FEDERAL REGISTER

Vol. 88 Thursday,

No. 177 September 14, 2023

Pages 62993–63512

OFFICE OF THE FEDERAL REGISTER

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Publishing Office, is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.federalregister.gov.*

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge at *www.govinfo.gov*, a service of the U.S. Government Publishing Office.

The online edition of the **Federal Register** is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6:00 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 1, 1 (March 14, 1936) forward. For more information, contact the GPO Customer Contact Center, U.S. Government Publishing Office. Phone 202-512-1800 or 866-512-1800 (toll free). E-mail, *gpocusthelp.com.*

The annual subscription price for the **Federal Register** paper edition is $860 plus postage, or $929, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $330, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Publishing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 88 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Publishing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC

Subscriptions:

Paper or fiche	**202–09512—1800**
Assistance with public subscriptions	**202–512–1806**
General online information	**202–512–1530; 1–888–293–6498**
Single copies/back copies:	
Paper or fiche	**202–512–1800**
Assistance with public single copies	**1–866–512–1800 (Toll-Free)**

FEDERAL AGENCIES

Subscriptions:

Assistance with Federal agency subscriptions:

Email	*FRSubscriptions@nara.gov*
Phone	**202–741–6000**

The Federal Register Printing Savings Act of 2017 (Pub. L. 115-120) placed restrictions on distribution of official printed copies of the daily **Federal Register** to members of Congress and Federal offices. Under this Act, the Director of the Government Publishing Office may not provide printed copies of the daily **Federal Register** unless a Member or other Federal office requests a specific issue or a subscription to the print edition. For more information on how to subscribe use the following website link: *https://www.gpo.gov/frsubs.*

Printed on recycled paper.

Contents

Federal Register

Vol. 88, No. 177

Thursday, September 14, 2023

Agriculture Department
See Animal and Plant Health Inspection Service
See Rural Business-Cooperative Service

Animal and Plant Health Inspection Service
RULES
Imports:
Horses, 62993–63004

Army Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 63086–63087

Children and Families Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Temporary Assistance for Needy Families Expenditure Report, 63109
Privacy Act; Systems of Records, 63109–63114

Civil Rights Commission
NOTICES
Meetings:
Minnesota Advisory Committee, 63061–63063

Coast Guard
RULES
Safety Zone:
San Diego Bay, San Diego, CA, 63018–63020
Special Local Regulation:
Marine Events within the Eleventh Coast Guard District—Swim for Special Operations Forces, 63018
PROPOSED RULES
Safety Zone:
Hurricanes, Tropical Storms, and other Storms with High Winds; Captain of the Port Zone Virginia, 63042–63045

Commerce Department
See International Trade Administration
See National Oceanic and Atmospheric Administration

Defense Department
See Army Department
See Navy Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 63087–63089
Meetings:
Defense Science Board, 63088
Wage Committee, 63089–63092

Drug Enforcement Administration
NOTICES
Decision and Order:
Green Wave Analytical, 63124–63126
Rachel Pittala, APRN, 63126–63130

Education Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Annual Performance Report for Titles III, V, and VII Grants, 63094
Evaluation of the REL Appalachia Teaching Math to Young Children Toolkit, 63093–63094
Reporting Additional Direct Assessment Programs, 63092–63093

Energy Department
See Energy Information Administration
See Federal Energy Regulatory Commission
See National Nuclear Security Administration
NOTICES
Meetings:
Appliance Standards and Rulemaking Federal Advisory Committee, 63095
Environmental Management Site–Specific Advisory Board Chairs, 63097–63098
President's Council of Advisors on Science and Technology, 63096–63097
Request for Information:
Launching a Responsible Carbon Management Initiative, 63097
Revision to the List of Covered Facilities:
Energy Employees Occupational Illness Compensation Program Act of 2000, 63095–63096

Energy Information Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 63098–63099

Environmental Protection Agency
RULES
Air Quality State Implementation Plans; Approvals and Promulgations:
California; El Dorado County Air Quality Management District; Stationary Source Permits, 63031–63033
Freedom of Information Act Regulations Update; Phase II, 63020–63031
PROPOSED RULES
Air Emissions Reporting Requirements, 63046–63047
National Emission Standards for Hazardous Air Pollutants:
Integrated Iron and Steel Manufacturing Facilities Technology Review; Extension of Comment Period, 63047–63048
NOTICES
Certain New Chemicals or Significant New Uses:
Statements of Findings for June and July 2023, 63103–63104

Federal Aviation Administration
RULES
Airworthiness Directives:
Airbus SAS Airplanes, 63011–63014
ATR—GIE Avions de Transport Regional Airplanes, 63007–63009
Bombardier, Inc., Airplanes, 63004–63006
General Electric Company Engines, 63014–63016

Saab AB, Support and Services (Formerly Known as Saab AB, Saab Aeronautics) Airplanes, 63009–63011
PROPOSED RULES
Airworthiness Directives:
Airbus Canada Limited Partnership (Type Certificate Previously Held by C Series Aircraft Limited Partnership (CSALP); Bombardier, Inc.) Airplanes, 63034–63036
Deutsche Aircraft GmbH (Type Certificate Previously Held by 328 Support Services GmbH; AvCraft Aerospace GmbH; Fairchild Dornier GmbH; Dornier Luftfahrt GmbH) Airplanes, 63036–63039
NOTICES
Funding Opportunity:
FY 2024 Discretionary Funds for the Airport Terminal Program, 63189–63194
Record of Decision:
LaGuardia Airport Access Improvement Project; Withdrawal, 63194–63195

Federal Communications Commission
PROPOSED RULES
Radio Broadcasting Services:
Lac du Flambeau, Wisconsin, 63048–63049
NOTICES
Privacy Act; Matching Program, 63104–63106

Federal Emergency Management Agency
NOTICES
Flood Hazard Determinations, 63116–63124

Federal Energy Regulatory Commission
NOTICES
Combined Filings, 63102–63103
Environmental Assessments; Availability, etc.:
Columbia Gas Transmission, LLC; Lucas and Pavonia Wells Abandonment Project, 63100–63101
New Freedom of Information Act and Critical Energy Infrastructure Information Email Addresses, 63101–63102

Federal Financial Institutions Examination Council
NOTICES
Meetings:
Appraisal Subcommittee, 63106

Federal Motor Carrier Safety Administration
NOTICES
Appeal Process:
Requests for Data Review, 63195–63199

Federal Reserve System
NOTICES
Formations of, Acquisitions by, and Mergers of Bank Holding Companies, 63108
Privacy Act; Systems of Records, 63106–63108

Foreign Assets Control Office
RULES
Publication of Belarus Sanctions Regulations Web General Licenses 8 and 9, 63017–63018

Health and Human Services Department
See Children and Families Administration
See National Institutes of Health
PROPOSED RULES
Discrimination on the Basis of Disability in Health and Human Service Programs or Activities, 63392–63512
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 63114–63115

Homeland Security Department
See Coast Guard
See Federal Emergency Management Agency

Internal Revenue Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 63199–63200

International Trade Administration
NOTICES
Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
Certain Metal Lockers and Parts Thereof from the People's Republic of China, 63064–63067
Determinations in the Less-Than-Fair-Value Investigations:
Boltless Steel Shelving Units Prepackaged for Sale from India, Malaysia, Taiwan, Thailand and the Socialist Republic of Vietnam, 63063–63064

International Trade Commission
NOTICES
Investigations; Determinations, Modifications, and Rulings, etc.:
Stainless Steel Flanges from China and India, 63124

Justice Department
See Drug Enforcement Administration
See Justice Programs Office

Justice Programs Office
NOTICES
Meetings:
Public Safety Officer Medal of Valor Review Board, 63130–63131

Labor Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Health Standards for Diesel Particulate Matter Exposure (Underground Coal Mines), 63131–63132
Periodic Medical Surveillance Examinations for Coal Miners, 63132–63133
Presence Sensing Device Initiation Standard, 63133
Safety Defects; Examination, Correction, and Records, 63131

National Institutes of Health
NOTICES
Meetings:
National Heart, Lung, and Blood Institute, 63115–63116

National Nuclear Security Administration
NOTICES
Record of Decision:
Production of Tritium in Commercial Light Water Reactors, 63099–63100

National Oceanic and Atmospheric Administration
NOTICES
Meetings:
Gulf of Mexico Fishery Management Council, 63084–63085

Permits; Applications, Issuances, etc.:
Marine Mammals and Endangered Species, 63085–63086
Takes of Marine Mammals Incidental to Specified Activities:
Ferry Berth Construction, Tongass Narrows in Ketchikan, AK, 63067–63084

Navy Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 63092

Nuclear Regulatory Commission
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Licenses for Radiography and Radiation Safety Requirements for Radiographic Operations, 63133–63134

Personnel Management Office
NOTICES
Privacy Act; System of Records, 63134–63137

Postal Regulatory Commission
PROPOSED RULES
Periodic Reporting, 63045–63046
NOTICES
New Postal Products, 63137–63138

Postal Service
NOTICES
Privacy Act; Systems of Records, 63139–63148
Product Change:
Priority Mail and USPS Ground Advantage Negotiated Service Agreement, 63138–63139, 63148
Priority Mail Express, Priority Mail, and USPS Ground Advantage Negotiated Service Agreement, 63149
Priority Mail Negotiated Service Agreement, 63138–63139

Rural Business-Cooperative Service
NOTICES
Request for Applications:
Intermediary Relending Program for Fiscal Year 2024, 63050–63053
Rural Economic Development Loan and Grant Programs for Fiscal Year 2024, 63057–63061
Rural Microentrepreneur Assistance Program for Fiscal Year 2024, 63054–63057
Rural Energy for America Program for Fiscal Year 2023:
Processing Timeline Change, 63053–63054

Securities and Exchange Commission
RULES
Private Fund Advisers:
Documentation of Registered Investment Adviser Compliance Reviews, 63206–63390
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 63173
Filing:
ICE Clear Europe Limited's Request to Withdraw from Registration as a Clearing Agency, 63173–63176
Self-Regulatory Organizations; Proposed Rule Changes:
Fixed Income Clearing Corp., 63157–63160
ICE Clear Europe Ltd., 63149–63157
MEMX LLC, 63160–63165, 63176–63180
National Securities Clearing Corp., 63180–63184
NYSE American, LLC, 63165–63169
The Depository Trust Co., 63169–63172
The Fixed Income Clearing Corp., 63185–63189

State Department
RULES
International Traffic in Arms Regulations:
Prohibited Exports, Imports, and Sales to or from Certain Countries—Cyprus, 63016–63017

Transportation Department
See Federal Aviation Administration
See Federal Motor Carrier Safety Administration

Treasury Department
See Foreign Assets Control Office
See Internal Revenue Service
PROPOSED RULES
Privacy Act; Systems of Records, 63039–63042
NOTICES
Privacy Act; Systems of Records, 63200–63203

Separate Parts In This Issue

Part II
Securities and Exchange Commission, 63206–63390

Part III
Health and Human Services Department, 63392–63512

Reader Aids

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

To subscribe to the Federal Register Table of Contents electronic mailing list, go to https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new, enter your e-mail address, then follow the instructions to join, leave, or manage your subscription.

CFR PARTS AFFECTED IN THIS ISSUE

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

9 CFR
93....................................62993

14 CFR
39 (5 documents) 63004, 63007, 63009, 63011, 63014

Proposed Rules:
39 (2 documents) 63034, 63036

17 CFR
275..................................63205

22 CFR
126..................................63016

31 CFR
548..................................63017

Proposed Rules:
1......................................63039

33 CFR
100..................................63018
165..................................63018

Proposed Rules:
165..................................63042

39 CFR

Proposed Rules:
3050................................63045

40 CFR
2......................................63020
52....................................63031

Proposed Rules:
2......................................63046
51....................................63046
63....................................63047

45 CFR

Proposed Rules:
84....................................63392

47 CFR

Proposed Rules:
73....................................63048

Rules and Regulations

Federal Register

Vol. 88, No. 177

Thursday, September 14, 2023

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

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

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 93

[Docket No. APHIS–2016–0033]

RIN 0579–AE62

Import Regulations for Horses

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the regulations for the importation of equines. These changes include increasing the number of days horses exported from regions free from contagious equine metritis (CEM) are allowed to spend in a CEM-affected region and enter the United States without testing from 60 days to 90 days; requiring an import permit for horses transiting through CEM-affected regions; adding requirements for health certifications to ensure health certifications properly attest to the health of the imported horse; requiring that horses transiting Central America or the West Indies comply with the same regulations that apply to horses directly imported from these regions; and adding requirements for shipping containers used in transporting horses. We are also adding a number of miscellaneous changes to the regulations such as clarifications of existing policy or intent, and corrections of inconsistencies or outdated information. Many of these changes will better align our regulations with international standards and allow us and the equine industry more flexibility. The changes will also add further safeguards that protect against introducing or disseminating pests or diseases of livestock into the United States.

DATES: Effective October 16, 2023.

FOR FURTHER INFORMATION CONTACT: Dr. Iwona Tumelty, VS Strategy and Policy, Live Animal Imports, VS, APHIS, 4700 River Road Unit 39, Riverdale, MD 20737–1231; 301–851–3300; *Iwona.Tumelty@usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

Under the Animal Health Protection Act (AHPA, 7 U.S.C. 8301 *et seq.*), the Secretary of Agriculture may prohibit or restrict the importation or entry of any animal, article, or means of conveyance if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into or dissemination within the United States of any pest or disease of livestock. The AHPA also authorizes the Secretary to prohibit or restrict the use of any means of conveyance in connection with the importation or entry of livestock if the Secretary determines that the prohibition or restriction is necessary because the means of conveyance has not been maintained in a clean and sanitary condition or does not have accommodations for the safe and proper movement of livestock.

The regulations in 9 CFR part 93 (referred to below as the regulations) prohibit or restrict the importation of certain animals, including horses, as well as their means of conveyance, pursuant to the AHPA.

On November 29, 2021, we published in the **Federal Register** (86 FR 67661–67669, Docket No. APHIS–2016–0033) a proposed rule [1] to amend the horse import regulations to better align them with international standards and improve flexibility for both the equine industry and the Animal and Plant Health Inspection Service (APHIS). The proposed changes included increasing the number of days horses exported from regions free from contagious equine metritis (CEM) are allowed to spend in a CEM-affected region and re-enter the United States without testing from 60 days to 90 days; requiring an import permit for horses transiting through CEM-affected regions; adding requirements for health certifications to ensure health certifications properly attest to the health of the imported horse; removing the requirement that horses permanently imported from Canada undergo inspection at the port of entry; requiring that horses transiting Central America or the West Indies comply with the same regulations that apply to horses directly imported from these regions; adding requirements for shipping containers used in transporting horses; and a number of minor miscellaneous changes.

We solicited comments concerning our proposal for 60 days ending January 28, 2022. We received 28 comments by that date. They were from a veterinary association, a business, governing bodies for equestrian sports, breed associations, State departments of agriculture, a university, equine associations, trade organizations, and members of the public.

Of the 28 submissions, 11 supported the rule, 1 did not support the rule, and 16 posed questions or additional suggestions without expressly supporting or disagreeing with the rule. In response to the comments, we made a number of changes to the proposed rule that we are implementing in this final rule. These changes include the following:

- Not proceeding with our proposal to remove, and instead maintaining, the requirement in § 93.317 that horses presented for permanent importation to the United States from Canada receive an inspection prior to entry;
- Not proceeding with our proposal to require a certificate of castration including date of castration and removal of both testicles from all gelded horses in § 93.314;
- Not proceeding with our proposed amendments to § 93.301(d), which would have required additional details in documentation for imported Spanish pure breed horses from Spain and racing thoroughbred horses from France, Germany, Great Britain, the Republic of Ireland, and Northern Ireland;
- Removing Los Angeles, California, and Miami, Florida from the list of air and ocean ports that APHIS has designated for the importation of horses in § 93.303(a);
- Removing the lists of border ports and limited ports in § 93.303(b) through (d) and adding instead a link to the APHIS website which contains the most up-to-date information regarding ports;
- Amending § 93.301(g)(1)(iii) to clarify that breeding of the horse must never have been attempted, either live or artificial;

[1] To view the proposed rule, supporting document, and the comments we received, go to *www.regulations.gov* and enter APHIS–2016–0033 in the Search box.

• Amending § 93.301(f)(5)(v) to state that seals may also be broken by a State animal health official;

• Adding new § 93.301(e)(2)(ii) to state that stallions and mares must be transported to the approved State in a sealed vehicle, and that the seal may be broken only by an APHIS representative, State animal health official, or accredited veterinarian under certain circumstances, at the horse's destination;

• Amending § 93.302(a)(4) to add the World Organization for Animal Health's (WOAH's) [2] Terrestrial Animal Health Code as another example of guidance that may be used to meet a shipping container performance standard;

• Correcting the section heading of § 93.304;

• Amending § 93.306 to clarify that APHIS will refuse entry to horses arriving in the same shipment as horses dead upon arrival;

• Amending § 93.308 to clarify that horses imported from regions where African horse sickness exists must obtain an import permit; and

• Amending § 93.314 to clarify that all horses described in § 93.301 that are allowed to enter the United States from a CEM-affected region under special provisions are not required to state on their health certificate that they have not been in a CEM-affected region prior to export.

The comments that we received, as well as details of the changes we made in response to the comments, are discussed below by topic.

Temporary Export to CEM-Affected Countries

We proposed to amend § 93.301(g) by increasing the number of days horses from the United States or other regions not known to be CEM-affected are allowed to spend in a CEM-affected region and re-enter the United States without testing from 60 days to 90 days.

One commenter believed APHIS was decreasing the amount of time a horse from a CEM-affected region was held in quarantine from 90 days to 60 days, and stated that horses should be made to stay the full 90 days to decrease risk of exposure. Another commenter disagreed with this interpretation and stated that the proposed rule referred to the amount of time a horse from the United States or a region not affected with CEM can spend in CEM-affected regions without needing to undergo CEM testing prior to entry into the United States, rather than time in quarantine upon reentry.

The latter commenter's interpretation is correct. APHIS is not decreasing the amount of time an animal is required to spend in quarantine after returning from the CEM-affected region. Rather, APHIS is making changes to special provisions applicable to horses from CEM-free countries temporarily exported to CEM-affected countries that do not have to undergo CEM testing or CEM quarantine upon arrival, provided they meet certain conditions. These conditions include extensive documentation ensuring that the horse was not exposed to CEM during its temporary exportation. APHIS proposed to extend the days of temporary exportation to a CEM-affected region from the current 60 days to 90 days with regard to these special provisions. As the extensive documentation of the horse's health status and movement during its exportation provides assurance that the horse was not exposed to CEM, this change will not increase the risk of introducing animal disease into the United States.

One commenter disagreed with extending the period of temporary export from 60 to 90 days, calling it careless.

APHIS had proposed this change to better align our regulations with the typical competition cycle—the competition cycle is often more than 60, but no more than 90, days. As stated in the proposed rule, APHIS found that the risk of horses introducing CEM to the United States would continue to be minimal if the temporary export period was increased to 90 days. The most significant safeguards against these horses introducing CEM into the United States are the attestations required by the health certificate in the current regulations, rather than the amount of time the horses may spend in a CEM-affected region. As these attestations ensure that horses have not had the opportunity to breed nor have any genital contact, and CEM is spread through these means, we consider these attestations to be effective mitigations against the introduction of CEM. Limiting the period of temporary export is an additional risk mitigation that supplements the mitigation of the health certificate.

CEM Testing

We proposed a number of miscellaneous changes to the regulations regarding test breeding required for horses entering the United States from CEM-affected countries. These included correcting an inconsistency between the requirements in § 93.301(e)(3) and (5) for mares and stallions by specifying that samples from stallions must also be collected by an accredited veterinarian.

One commenter supported adding to the regulations that samples collected from a stallion must be from a qualified trained individual such as an accredited veterinarian, but suggested adding flexibility to the regulations to allow States to approve qualified individuals to take samples as required in § 93.301(e)(3)(i).

We appreciate the suggestion. However, the purpose of this change was only to align the requirements for mares and stallions. We may look into addressing the issue of increased flexibility for States with regards to collecting samples in a future action.

One commenter requested clarification as to who is an accredited veterinarian.

The proposed addition of the term ''accredited veterinarian'' to § 93.301(e)(3) refers to the individual collecting samples from stallions during test breeding in a State following the horse's export to the United States. As stated in the definition of the term in § 93.300, an accredited veterinarian is a veterinarian approved by the Administrator in accordance with the provisions of 9 CFR part 161 to perform specific outlined functions.

One commenter suggested adding polymerase chain reaction (PCR) testing for CEM to the approved disease screening protocols.

APHIS is constantly monitoring test methods for possible approval. At this time, PCR tests for CEM are not validated by the National Veterinary Services Laboratories (NVSL), the reviewing party within APHIS for tests of diseases of concern for livestock.

One commenter suggested that retired racing stallions repatriated to the United States to accredited sanctuaries should not have to undergo test breeding for CEM.

We understand that racing stallions may come to the United States to retire and find test breeding onerous. However, our CEM testing requirements are critical to ensuring that the United States is protected against the introduction of foreign animal disease. We also note that, under certain circumstances, retiring racehorses may not have to undergo test breeding. For example, if the retiring racehorse is a racing thoroughbred that meets the requirements of § 93.301(d), which pertains to Spanish Pure Breed horses from Spain and thoroughbred horses from France, Germany, Great Britain, the Republic of Ireland, and Northern Ireland imported for permanent entry from CEM-affected regions, the horse does not have to undergo CEM test breeding upon arrival to the United States.

[2] World Organization for Animal Health (WOAH) (formerly referenced as OIE).

One commenter stated that test breeding for CEM in general should be reconsidered, calling the practice ''inhumane'' and stating that advancements in science have resulted in more humane methods to test for CEM.

We are constantly monitoring the development of new testing methods and look to adopt new methods when they are validated. At this time, test breeding has been determined to be the most reliable method to ascertain whether horses are affected with CEM and therefore to protect the United States against the introduction of foreign animal disease.

Horses From CEM-Affected Countries

We proposed a number of miscellaneous changes to the regulations regarding horses entering the United States from CEM-affected countries.

These included changes to paragraph (d) of § 93.301, which governs the importation of Spanish pure breed horses from Spain and racing thoroughbred horses from France, Germany, Great Britain (England, Scotland, and Wales), the Republic of Ireland, and Northern Ireland,[3] stipulating verification and documentation requirements that these horses must meet to qualify for exemption from the prohibition on importation of horses from CEM-affected regions. We proposed to amend § 93.301(d) to increase the level of detail in the verification and documentation requirements for these horses. Our proposal included requiring that, for Spanish pure breed horses, the health certificate state that the horses have been in Spain for a minimum of 60 days immediately prior to export; and for racing thoroughbreds from France, Germany, Ireland, and the United Kingdom, that the health certificate state that the horses have been in one or more of these countries for a minimum of 60 days immediately prior to export. Our proposal also included adding to the regulations the words ''and identification'' after the word ''activities'' in the description of the information the veterinarian issuing the health certificate is required to examine; adding to the regulations the words ''including the competition or event records'' after the words ''the records kept by the trainer'' in the description of the records the veterinarian is required to examine; and clarifying that the prohibition on attempted breeding that the veterinarian is required to ensure has not occurred applies to both live and artificial breeding. We also proposed to make an editorial change to paragraph (d) by adding the word ''racing'' in front of the words ''thoroughbred horses from France, Germany, Ireland, and the United Kingdom.''

One commenter asked about the significance of adding the word ''racing'' before ''thoroughbreds.'' Another commenter stated that the requirements that racing thoroughbreds from a CEM-affected country must meet to compete temporarily in the United States are excessive and a financial burden.

We have decided not to proceed with our proposed changes to § 93.301(d). Since the close of the comment period, APHIS has discovered a high degree of noncompliance with the current verification and documentation requirements in § 93.301(d). While we have strengthened our guidance to importers and remediated the non-compliance on a case-by-case basis thus far, and while we are still evaluating the full basis for this non-compliance, the fact that the horses to which these regulations apply move so rapidly between countries is a contributing factor, since this alacrity and frequency of movement makes it challenging for importers to provide the required verification and documentation. We believe that the proposed amendments could exacerbate that problem by adding to the current verification and documentation requirements. We do not want to proceed with the proposed amendments without first evaluating how to increase compliance.

To address this issue, we intend to undertake a holistic evaluation of the requirements in this section. We will propose any revisions to § 93.301(d) resulting from this evaluation at a future date.

Until such rulemaking is promulgated, the provisions of current § 93.301(d) will remain in effect.

Two commenters stated that the approved breed association for France should be updated to France Galop.

A final rule published in the **Federal Register** on August 16, 2021 (See footnote 3) updated the regulations to list France Galop as the approved breed association for France.

A commenter stated that some States want to seal doors and barns shut as part of their protocol for keeping a competition horse separated from other horses, and that this is a liability in the case of situations such as fires.

Event organizers routinely discuss emergency protocols in the case of unforeseen circumstances such as fires prior to competition events to ensure the wellbeing of competition horses. Because this contingency planning is a routine business practice, we do not believe that our requirements to keep competition horses separate from other horses place horses at an increased risk of harm in the case of emergencies.

Two commenters asked for the United States and other CEM-free countries to be added to the temporary import exemption provisions for racing thoroughbreds residing in France, Germany, Ireland, and/or the United Kingdom.

As the provisions that the commenter refers to in § 93.301(d) pertain to the importation of a horse from outside the United States into the United States, adding provisions governing reentry of domestic horses to the paragraph would not be warranted or appropriate. Additionally, at this time, we cannot consider adding other countries because a comprehensive evaluation of adequate and reliable recordkeeping on the health history of horses in the country would need to be completed. If a country requests to be added to this list, and APHIS confirms their maintenance of accurate and reliable recordkeeping, APHIS will consider additional changes to the regulations. Currently, APHIS evaluates requests for exemptions for horses from other countries on a case-by-case basis.

We also note that meeting the requirements of § 93.301(d) for racing thoroughbred horses from France, Germany, Great Britain (England, Scotland, and Wales), the Republic of Ireland, and Northern Ireland is not the only way horses can receive an exemption from CEM provisions. U.S.-origin horses may travel to a CEM-affected country for a specified period of time for competition and return without having to complete CEM testing or quarantine if the horse meets the requirements outlined in § 93.301(g).

One commenter asked whether a competition horse that spends 90 days in the European Union and qualifies for the CEM testing exemption in § 93.301(g) can return multiple times within 12 months to the European Union and continue to qualify for the CEM testing exemption.

Section 93.301(g) allows U.S.-origin horses to travel to CEM-affected regions for a maximum of 90 days at a time. The number of 90-day trips that a U.S.-origin

[3] At the time of the proposed rule's publication, these regions were characterized as ''France, Germany, Ireland, and the United Kingdom,'' and were referred to as such in our proposed rule and by commenters. A final rule published in the **Federal Register** on August 16, 2021 (86 FR 45621–45629, Docket No. APHIS–2021–0003) updated the regulations to treat Great Britain (England, Scotland, and Wales) and Northern Ireland as separate entities following the exit of the United Kingdom (UK) from the European Union.

horse can take within this 12-month period is not restricted by the regulations.

One commenter requested that, in addition to breeding and sexual contact, we add semen collection as a prohibited practice for horses temporarily exported to CEM-affected countries who can re-enter the United States without testing. The commenter noted that CEM can be transmitted through artificial insemination (which involves semen collection).

Because CEM can be spread through semen regardless of the method of insemination, we agree with the commenter and consider artificial breeding a form of breeding. We have revised the prohibition on breeding in § 93.301(g)(1)(iii) to specify that breeding of the horse must never have been attempted, whether live or artificial.

One commenter asked that we modify § 93.301(f)(5)(v), which governs transit within the United States for horses temporarily imported for competition or entertainment purposes, to allow State animal health officials to break seals on sealed vehicles due to the varying availability of APHIS representatives in different States.

We agree with the commenter and will add to the regulations that seals may also be broken by a State animal health official. As these individuals are also trained in preventing the introduction or dissemination of animal disease, this will not increase the risk of introducing CEM into the United States.

The commenter also asked that we add a requirement that trailers transporting horses from Federal to State CEM quarantine be sealed, as this is a routine practice and the explicit addition to the regulations would help with enforceability.

As we stated in the proposed rule, one of the aims of the rule was to clarify existing policy or intent with regard to our regulations governing the importation of equines. We agree with the commenter that the requirement requested does reflect current operational practice for transport of horses from Federal CEM quarantine to State CEM quarantine, and thus fits within this articulated rubric. Accordingly, we will add a new § 93.301(e)(2)(ii) to state that stallions and mares must be transported to the approved State in a sealed vehicle, and that the seal may be broken only by an APHIS representative or a State animal health official at the horse's destination. If an APHIS representative or State animal health official is unavailable to break the seal due to extenuating circumstances, the State animal health official may designate the authority to unseal to an accredited veterinarian and the State animal health official will assume the responsibility for oversight and recordkeeping.

Two commenters asked us to require that a horse's final destination in the United States following CEM quarantine release be listed on the horse's import permit.

This requirement is already captured in the eFile application system. We are currently in the process of phasing out the ePermits system and replacing it with eFile.

Shipping Containers

We proposed to add additional requirements for shipping containers to § 93.302 by adding disinfection requirements and measures to ensure that horses are transported safely. We proposed to present these requirements as performance standards, and referred individuals to the Live Animals Regulations (LAR), as amended, published by the International Air Transport Association (IATA) for optional guidance on how to meet these requirements. We also proposed that, if an importer wished to use alternative means of meeting the requirements other than those in the LAR, they would be able to contact APHIS Live Animal Imports to ask for approval. Five commenters suggested that APHIS develop its own standards for shipping containers or add more details to regulations, rather than using a performance standard and referring individuals to the LAR published by the IATA for guidance. These commenters cited ambiguity inherent to performance standards, and the high cost of purchasing the LAR as concerns.

Performance standards allow for the possibility of a variety of means in order to meet them. As one of the commenters noted, the various breeds, sizes, and ages of horses shipped make one-size-fits-all requirements for shipping containers difficult. If importers are unsure whether they have met the performance standard, they can contact APHIS Live Animal Imports to ask for approval by phone at (301) 851–3300, option 2, or by email at *LAIE@usda.gov.* If, in the future, we believe that additional clarification would be helpful, we may look into the development of further policy.

Regarding costs, importers are not required to use the LAR published by the IATA to meet the performance standard. Individuals may contact APHIS Live Animal Imports to ask for approval of a particular shipping container by the methods outlined above, without recourse to the examples of guidance that we provide in the regulatory text.

That being said, we acknowledge commenters' concerns about the accessibility of the LAR and recognize that the regulations as written in our proposal may have incorrectly given importers the impression that using the LAR is preferred over other means of meeting the performance standard. In response to these concerns, we are amending the regulatory text to add that the WOAH's Terrestrial Animal Health Code may also be used to meet the performance standard. The Terrestrial Animal Health Code can currently be accessed online [4] at no cost, and also meets the standards for shipping containers that we have laid out in the regulations.

One commenter asked us to add a provision giving APHIS the authority to test shipping containers for disease.

The existing regulation, redesignated as § 93.302(b) in this rule, allows inspectors to inspect whether a means of conveyance, including shipping containers, are contaminated with material that could introduce or disseminate any communicable animal disease. This gives APHIS the authority to test shipping containers for disease, if necessary. Our addition of specific cleaning and disinfection requirements in § 93.302(a) further ensures that biosecurity is upheld.

Horses From Canada

We proposed to remove the requirement in § 93.317 that horses presented for permanent importation to the United States from Canada receive an inspection prior to entry.

Four commenters expressed concern about our proposed removal of the inspection requirement for horses permanently imported from Canada. These commenters raised the possibility that horses that enter Canada from a different country would then be able to circumvent the health requirements for horses permanently entering the United States from that country. One additional commenter disagreed with our proposal without citing a reason.

We acknowledge the possibility of the commenters' concerns, as our proposed change would have allowed the importation of horses from Canada without inspection, which could present a risk of disease introduction in the event the horse originates from a higher risk region of the world. In light of the commenters' response, we will not proceed with this proposed change.

[4] The Terrestrial Animal Code is available at *https://www.woah.org/en/what-we-do/standards/codes-and-manuals/terrestrial-code-online-access/.*

Horses permanently imported into the United States from Canada will continue to undergo the currently required inspection at the port of entry. We will, however, proceed with making nonsubstantive editorial changes to paragraph (a) of § 93.317 to reflect a paragraph redesignation and to improve readability.

Transiting Horses

We proposed to amend § 93.304(a)(1)(i) by adding horses transiting CEM-affected regions to the list of horses requiring an import permit. We also proposed to amend § 93.319 by adding horses transiting Central America and the West Indies as horses requiring an import permit.

One commenter stated that they agreed that horses imported from Central America and the West Indies should comply with the regulations.

We would like to clarify that we proposed a change to horses transiting these regions. The requirements already apply to horses directly imported from these regions.

Five commenters asked us to define the term ''transiting,'' as its meaning in the regulations may vary depending on the type of horse.

The regulations pertaining to different types of transiting horses are contained in the specific sections for each type of transiting horse, and the meaning of the term ''transiting'' is contextually clear within each section. If individuals have specific questions regarding these requirements, they can contact APHIS Live Animal at *LAIE@usda.gov.*

Certificate of Castration

We proposed to add to § 93.314 that health certificates must confirm that the horse has not been castrated during the 14 days preceding exportation. We also proposed to require that all castrated horses be accompanied by a certificate of castration that includes the date of castration and confirmation that both testicles have been removed.

Five commenters expressed concern that a certificate of castration including a date of castration could be difficult or impossible to obtain, especially for horses castrated years in the past or that have had multiple owners.

We agree with the commenters' concerns regarding the collection of this information. Written confirmation that the horse has not been castrated [5] within the past 14 days will be sufficient to mitigate the risks associated with transporting recently castrated horses.

[5] The terms ''castrated'' and ''gelded'' are equivalent and are used interchangeably in this document.

We will not proceed with our proposal to require a certificate of castration including date of castration and removal of both testicles from all gelded horses.

One commenter asked for additional clarification on the certificate of castration requirement, asking about the required level of detail and whether an updated passport indicating the horse was castrated would suffice.

As noted above, we will only require confirmation that the horse has not been castrated within the 14 days preceding export. An updated passport would not fulfill this requirement. The attestation must be completed by a salaried veterinary officer of the national government of the region of origin, or as otherwise specified in § 93.314, and may come in the form of an attestation on the health certificate, or as an addendum to the health certificate that accompanies the horse upon arrival.

Pre-Export Exam

We proposed to require documentation stating that the pre-export examination required by § 93.314 occurred within 48 hours of the horse's export.

Three commenters expressed concern about the proposed requirement to complete the pre-export examination within 48 hours of the horse's export if the horse's travel time from point of origin to port of embarkation exceeds 48 hours, particularly in the case of long layovers or flight delays. One of these commenters also asked for clarification on whether the 48-hour window referred to the expected or actual departure time.

APHIS is requiring that horses complete a pre-export exam within 48 hours of export because an increasing number of horses are being imported into the United States that are sick or injured and noncompliant with the regulations. Not only does this pose a risk of introducing into or disseminating within the United States pests or diseases of livestock, but it also increases quarantine time and user fees for stakeholders. We believe that requiring horses to receive a pre-export exam within this timeframe will help mitigate these problems.

Because horses are required by § 93.314(b) to obtain a health certificate from each region in which they have been present during the 60 days prior to their shipment to the United States, horses that have an extended layover are currently required to obtain a health certificate from the country in which they had a layover. Therefore, the addition of a requirement of a pre-export exam completed within 48 hours does not impose an additional requirement in this situation.

Horses must be inspected within 48 hours of their actual departure time. To clarify what we meant by ''within 48 hours of export'' in the proposed rule, we will update § 93.314(a)(5) to replace the phrase ''of export'' with the phrase ''of departure from the port of embarkation.'' Extenuating circumstances, such as flight delays, are handled by APHIS on a case-by-case basis, as provided for by the current regulations in § 93.301(a).

Identification

We proposed to add the phrase ''or other permanent identification approved by APHIS'' to the requirement in § 93.301(e)(4) that mares used to test stallions for CEM be marked with the letter ''T''.

Five commenters asked that we add International Standards Organization-compliant microchips to the list of approved permanent means of identification for test mares in § 93.301(e)(4)(i).

As stated in the proposed rule, individuals will be able to contact APHIS Live Animal Imports by email at *VS.CEM.DATA@usda.gov* to seek approval of alternative permanent means of identification, including microchips. APHIS will work with stakeholders to ensure that this process is as efficient and expeditious as possible. As of now, APHIS has not evaluated whether microchips would be a viable method of identification in all instances.

Three of these commenters also asked that we clarify how individuals can request U.S. Department of Agriculture (USDA) approval of alternative forms of permanent identification for test mares.

As stated in the proposed rule, individuals may request approval of alternative permanent means of identification by contacting APHIS Live Animal Imports by email at *VS.CEM.DATA@usda.gov.*

Two commenters suggested that APHIS create a process through which States could seek permanent approval for an alternative type of permanent identification device to be used in that State.

At this time, limited agency resources do not make the creation of such a process practicable. However, we will continue to work with our State partners to ensure that the process for considering the approval of an alternative means of identification is as efficient and expeditious as possible.

One commenter sought clarification on why importers would be interested in using other means of permanent

identification for test mares, and added that microchips are an acceptable form of identification.

Currently, the regulations only allow test mares to be identified by being marked with the letter ''T''. Microchips are not listed as an acceptable form of permanent identification. Our change allows for the possibility of using permanent identification methods other than branding, such as microchips.

One commenter stated that photos of detailed markings of test mares should be collected to correlate with microchip identification information.

Approval of microchipping as a form of identification, including the specifics of recordkeeping involved in microchipping, will be considered on a case-by-case basis.

One commenter requested that we remove all references to eartags as a means of identification in part 93, as a horse is unlikely to have one, and they are insufficient for traceability.

The only reference to eartags in part 93 occurs in § 93.304, where they are listed as an example of identifying information about a horse to include on an import permit. We acknowledge that eartags are not a frequently used method of identification. However, in order to account for rare circumstances, to ensure that import permits include all possible relevant identifying information, and to retain consistency with the domestic animal traceability regulations in 9 CFR part 86, we will continue to list eartags as an accepted method of identification.

Quarantine

We proposed miscellaneous minor changes to regulations related to horses entering quarantine, including clarifying that horses originating from regions in which Venezuelan equine encephalomyelitis or screwworm is declared to exist may not complete quarantine in temporary, privately-owned quarantine facilities.

Two commenters asked that we remove the requirement for importers to use a trust fund agreement or escrow account agreement for quarantined horses and instead require these individuals to incur and pay user fees.

This is outside of the scope of this rulemaking.

One commenter asked us to consider specific measures to better ensure that horses completing quarantine following importation into the United States meet a destination State's import criteria prior to being moved into the State, as required by § 86.5.

This is also outside of the scope of this rulemaking.

Five commenters asked us to allow horses that receive non-negative tests for quarantine diseases to move to other facilities that better serve their health and wellness needs while waiting for a re-test.

Horses must remain in quarantine facilities for the full length of time prescribed by APHIS to ensure that no communicable animal diseases enter the United States. APHIS determines these quarantine requirements using the best available science regarding the diseases of concern. At the same time, APHIS works to address the health and wellbeing needs of horses in the quarantine facilities it operates. Privately owned quarantine facilities must meet the standards outlined in § 93.308(c) to also address these needs before being approved by APHIS.

Additionally, APHIS representatives work with importers to make sure the needs of horses are met while they are in quarantine.

One commenter stated that provisions need to be made for horses that arrive ill or injured, or become sick or are injured while in import quarantine, and require veterinary care beyond what can be provided at the quarantine facility.

This is standard practice in quarantine facilities. When horses exhibit signs of illness or injury upon arrival or during import quarantine, importers are responsible for bringing in an accredited veterinarian to examine and treat the animal. If the accredited veterinarian determines that the horse needs advanced care at a veterinary hospital, the horse is transported to a veterinary hospital approved by APHIS to treat horses under import quarantine.

Two commenters stated that horses that test negative for regulated diseases during quarantine but that exhibit signs of other illness and require treatment at an approved veterinary hospital should have less stringent quarantine requirements than untested horses.

Our quarantine requirements are based on the best available scientific understanding of communicable diseases of horses. Testing is just one part of the quarantine process. Observation under isolation for the requisite period of time is also essential, as horses that test negative for regulated diseases may still be sick with other infectious or emerging diseases and pose a risk to domestic livestock. Therefore, this suggestion is not practicable at this time. However, we may look further into this suggestion in the future.

Three commenters stated that USDA should dedicate resources to pursue advancing diagnostic testing capabilities for equine import testing, particularly for dourine and glanders diagnostic tests.

We are continuously working with NVSL to build capacity and develop diagnostic testing capabilities for equine import testing.

Two commenters requested that USDA maintain a system of recording and reporting abnormal health events that would be used to notify animal health officials in the state of the horse's destination, as recommended by the U.S. Animal Health Association's (USAHA) Committee on Equine.

We appreciate the suggestion and are working closely with stakeholders and other relevant parties to discuss USAHA's requests. We also note that APHIS currently has a protocol in place for recording and notifying State animal health officials of adverse health events in imported equines.

Three commenters asked that we define the terms ''Federal quarantine,'' ''private quarantine,'' and ''temporary private quarantine.''

The terms ''permanent, privately owned quarantine facility'' and ''temporary, privately owned quarantine facility'' are defined in § 93.300. These definitions distinguish these facilities from Federal quarantine facilities, which are facilities directly operated by APHIS.

Three commenters requested the removal of a reference to allowing exercise equipment in horses' stalls in permanent, privately owned quarantine facilities, as this may compromise the safety of the horse. One of these commenters also asked APHIS to allow horses other opportunities for exercise in both privately owned and Federal quarantine facilities.

Section 93.308(c)(3)(ii)(G) allows exercise equipment to be kept in the stall with the horse in permanent, privately owned quarantine facilities only if there will still be sufficient space within the stalls for the horse to move freely once the equipment is installed. Port officials work with owners to ensure the safety of the horse in these situations. When there are reasonable requests to allow a horse other forms of exercise during quarantine, such as exercise within the lot-holding area, APHIS evaluates the request for feasibility and compliance with the regulations, and works collaboratively with the horse's owner, importer, or other responsible party to address the request.

One commenter asked us to consider allowing horses from VEE-affected and screwworm-affected countries to quarantine in temporary, privately owned quarantine facilities.

As stated in the preamble to the proposed rule, horses from VEE- or screwworm-affected countries cannot complete quarantine in temporary, privately owned quarantine facilities because the performance requirements for these facilities are not sufficient to safeguard against vector-borne foreign animal diseases (which include screwworm, VEE, and African horse sickness).

Screwworm

We proposed to move the screwworm regulations from § 93.301 to § 93.308 and make a minor correction and clarification.

One commenter stated they supported the creation of a screwworm section.

We would like to clarify for the commenter that, as stated in the preamble to the proposed rule, we are not creating a new section regarding screwworm, but rather moving the existing regulations regarding screwworm to a different section and adding minor corrections and clarifications.

One commenter stated that, if USDA allows for exemptions from the 7-day screwworm import quarantine requirements, then a screwworm examination by the accredited veterinarian must be required prior to quarantine release.

We did not propose to add an exemption to the 7-day screwworm quarantine requirement in the regulations. The regulations continue to require that horses from screwworm-affected countries complete a minimum of 7 days in quarantine.

The commenter also requested that we allow a 3-day quarantine instead of 7-day quarantine for horses that stop in a screwworm-affected country for a plane to refuel. Another commenter asked why horses from Australia or New Zealand are required to complete a 7-day quarantine if they transit a screwworm-affected country, while horses from certain screwworm-affected regions are allowed a shorter quarantine period.

As stated above, we did not propose substantive changes to the screwworm regulations. Therefore, the length of time a horse from a screwworm-affected country spends in quarantine is outside the scope of this rulemaking.

Other Comments

Two commenters noted that the lists of ports of entry for horses in § 93.303 were not accurate or did not match those listed on the APHIS website.

The commenters are correct that this information is not up to date in the regulations. Because ports have historically opened or closed more frequently than could be updated via rulemaking, resulting in inaccurate information in the regulations, and because the proposed rule in several instances discussed activities that must take place at an approved port of entry in order for a horse to be validly imported, it is important for clear and unambiguous implementation of this final rule that the lists of such ports of entry be up to date. Accordingly, we will remove the lists of Canadian border ports in paragraph (b), Mexican border ports in paragraph (c), and limited ports in paragraph (d) in § 93.303 and add instead a link to the APHIS website (*https://www.aphis.usda.gov/aphis/ourfocus/importexport/animal-import-and-export/equine*), which contains the most up-to-date information regarding ports. In each of these three paragraphs from which we are removing the lists of ports, we will note that changes to the list of approved ports will be announced through notices published in the **Federal Register**.

Additionally, we will add this link to paragraph (e), which contains information about ports for horses to be quarantined at privately owned quarantine facilities, but does not currently include a list of these ports or information about where such a list may be found. We will also update the list of air and ocean ports in paragraph (a) to remove Los Angeles, California and Miami, Florida, as these ports no longer have APHIS-operated inspection and quarantine facilities for horses.

One commenter stated they had concerns about the validity of the list of VEE-affected countries when some countries fail to report disease outbreaks to the WOAH. Four other commenters expressed concern about the reliability of all the lists of countries affected by regulated equine diseases that APHIS maintains.

The WOAH is not the only source APHIS relies on to determine a country's disease status. As stated in § 93.308(a)(1)(ii), APHIS will add a region to the list of VEE-affected regions based on reports we receive of outbreaks of the disease from veterinary officials of the exporting country, from WOAH, or from other sources the Administrator determines to be reliable. The same is true for lists of regions where screwworm, African horse sickness, and CEM are considered to exist.

One commenter asked for further clarification on how APHIS deals with horses dead upon arrival, and asked us to add to the regulations that APHIS has the authority to require diagnostic testing for horses arriving in the same shipment as a dead horse to ensure that these horses were not exposed to an infectious, contagious condition.

As clarified in the proposed rule, APHIS will refuse entry to horses that are found to be dead upon presentation at the port of entry. The commenter's concern about horses arriving in the same shipment as a dead horse is warranted, as these horses pose an increased risk of introducing animal disease into the United States. Diagnostic testing for these horses would not be feasible, as determining what additional testing and quarantine would be necessary to mitigate disease risk would require a necropsy of the dead horse, and dead horses are refused entry. To address the disease risk that the commenter raises, we will add the phrase ''and horses arriving in the same shipment as such horses'' after the phrase ''horses dead upon presentation'' in § 93.306 to clarify that APHIS will refuse entry to such horses as well.

Three commenters recommended that APHIS adopt the USAHA Committee on Equine's request to amend the quarantine requirements for horses from VEE-affected countries by requiring that all horses be isolated 3 weeks prior to shipment, that horses vaccinated against VEE be vaccinated no less than 60 days prior to arrival at the import center, and that unvaccinated horses have negative results for VEE no less than 14 days after the commencement of quarantine.

We appreciate the suggestion and are working closely with stakeholders to discuss USAHA's requests.

Four commenters asked that the written plan outlined in § 93.304(a)(1)(iii)(I) to handle sick and injured horses required of horses temporarily imported into the United States solely for noncompetitive public exhibition and entertainment purposes include biosecurity measures.

The written plan referred to by the commenters is a part of the import permit application required of this class of horses. As such, APHIS evaluates the written plan before granting a permit, keeping biosecurity measures in mind while assessing the information provided regarding the accredited veterinarian and medical facility that will treat the horses should they become sick or injured while in the United States.

Miscellaneous

In paragraph (a)(1) of § 93.308, we proposed to clarify the regulations by adding that horses imported from regions where VEE exists must obtain an import permit in accordance with § 93.304. In reviewing the proposed rule, we noticed that we had neglected to clarify regulations regarding horses

imported from regions where African horse sickness exists in the same manner. We are adding the sentence "Each horse must be accompanied at the time of importation by an import permit in accordance with § 93.304." to paragraph (a)(2) of § 93.308.

In reviewing the proposed rule, we also noticed an outdated address. We are updating the address listed in § 93.301(h)(7) to reflect that the name of the relevant Veterinary Services division has changed from "Regionalization Evaluation Services" to "Live Animal Imports."

We are also making a minor nonsubstantive change by adding a correction to the section heading of § 93.304. The section heading currently reads "Import permits for horses from regions affected with CEM and for horse specimens for diagnostic purposes; reservation fees for space at quarantine facilities maintained by APHIS." As this section refers to import permits for all horses that require them, rather than only for horses from regions affected with CEM, we are removing the phrase "from regions affected with CEM" so that the heading more accurately reflects the information contained within the section.

Finally, in our proposal, we proposed to amend § 93.314(a)(7)(i) to clarify that the requirement contained within it, that health certificates must state that horses have not been in any region affected with CEM during the 12 months immediately prior to export, does not apply to horses described in § 93.301(f), which are horses from regions affected with CEM that are temporarily imported to the United States for competition or entertainment purposes. In reviewing the proposed rule, we noticed that we had neglected to clarify that this provision also does not apply to horses described in paragraph (d) of § 93.301, which are Spanish Pure Breed horses from Spain and racing thoroughbred horses from France, Germany, the Republic of Ireland, Great Britain, and Northern Ireland and paragraph (e), which are stallions and mares over 731 days of age from CEM-affected regions. Like horses described in § 93.301(f), these horses have special provisions outlined in the aforementioned paragraphs. To avoid confusion and align § 93.314 with these provisions, we are amending the regulatory text to clarify that horses described in § 93.301(d) and (e) are also excluded from the requirement in § 93.314(a)(7)(i).

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, with the changes discussed in this document.

Executive Order 12866 and Regulatory Flexibility Act

This final rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities. The analysis is summarized below. Copies of the full analysis are available on the *Regulations.gov* website (see footnote 1 in this document for a link to *Regulations.gov*) or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT.**

APHIS is amending elements of its equine import regulations.

First, APHIS will amend its regulations for temporary export of horses to CEM-affected regions. The changes will allow horses to spend up to 90 days in a CEM-affected region.

The amendments will also allow APHIS to correct and clarify information in 9 CFR 93.308, 93.314, and 93.319. This includes updating the regulations to reflect current policies and affected regions. It also includes amending the description of health certification and permit requirements.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the reporting and recordkeeping requirements included in this final rule, which were filed under 0579–0485, have been submitted for approval to the Office of Management and Budget (OMB). When OMB notifies us of its decision, if approval is denied, we will publish a document in the **Federal Register** providing notice of what action we plan to take.

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the EGovernment Act to promote the use of the internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this rule, please contact Mr. Joseph Moxey, APHIS' Paperwork Reduction Act Coordinator, at (301) 851–2483.

List of Subjects in 9 CFR Part 93

Animal diseases, Imports, Livestock, Poultry and poultry products, Reporting and recordkeeping requirements.

Accordingly, we are amending 9 CFR part 93 as follows:

PART 93—IMPORTATION OF CERTAIN ANIMALS, BIRDS, FISH, AND POULTRY, AND CERTAIN ANIMAL, BIRD, AND POULTRY PRODUCTS; REQUIREMENTS FOR MEANS OF CONVEYANCE AND SHIPPING CONTAINERS

■ 1. The authority citation for part 93 continues to read as follows:

Authority: 7 U.S.C. 1622 and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

■ 2. Amend § 93.300, in the definition of *Recognized Slaughtering Establishment* by revising footnote 2 to read as follows:

§ 93.300 Definitions.

* * * * *

[2] See footnote 1 of this section.

■ 3. Amend § 93.301 by:

■ a. Adding a heading to paragraphs (a) and (b);

■ b. In paragraph (a), redesignating footnote 3 as footnote 1;

■ c. In paragraph (b) introductory text, redesignating footnote 4 as footnote 2;

■ d. In paragraph (b)(1)(ii), redesignating footnote 5 as footnote 3, and revising newly redesignated footnote 3;

■ e. In paragraph (d)(1)(ii)(B) introductory text, redesignating footnote 6 as footnote 4;

■ f. In paragraph (d)(3), removing the words "paragraph (h)(6) or (h)(7)" and adding the words "paragraph (h)(7) or (8)" in their place;

■ g. In paragraph (e)(2)(i), removing "(h)(6)" and adding "(h)(7)" in its place, and removing "(h)(7)" and adding "(h)(8)" in its place;

■ h. Redesignating paragraphs (e)(2)(ii) through (iv) as paragraphs (e)(2)(iii) through (v), respectively, and adding a new paragraph (e)(2)(ii);

■ i. In paragraph (e)(3)(i) introductory text, in the first sentence, adding the words ''by an accredited veterinarian'' after the words ''of the stallion'';
■ j. In paragraph (e)(3)(i)(A), by redesignating footnote 7 as footnote 5;
■ k. In paragraph (e)(3)(i)(B), in the first sentence, adding the words ''(for the purposes of this section, the day after the date of breeding is considered the first day after breeding)'' after the words ''fourteenth day after breeding'';
■ l. Revising paragraph (e)(4)(i);
■ m. In paragraphs (e)(5)(ii) and (iii), redesignating footnotes 8 and 9 as footnotes 6 and 7 respectively;
■ n. Revising paragraph (f)(5)(v);
■ o. In paragraph (f)(10)(i), removing the words ''paragraph (h)(6) or (h)(7)'' and adding the words ''paragraph (h)(7) or (8)'' in their place;
■ p. Revising paragraphs (g) introductory text and (g)(1)(iii);
■ q. In paragraph (g)(4), removing the words ''(a) through (c)'' and adding the words ''(g)(1) through (3)'' in their place;
■ r. Redesignating paragraphs (h)(4) through (7) as paragraphs (h)(5) through (8), respectively, and adding a new paragraph (h)(4);
■ s. Revising newly redesignated paragraphs (h)(7) and (8);
■ t. Removing paragraph (j); and
■ u. Revising the OMB citation at the end of the section.

The revisions and additions read as follows:

§ 93.301 General prohibitions; exceptions.

(a) *General prohibitions.* * * *

(b) *General exceptions.* * * *

* * * * *

(e) * * *

(2) * * *

(ii) Stallions and mares must be transported to the approved State in a sealed vehicle. The seal may be broken only by an APHIS representative or a State animal health official at the horse's destination. If an APHIS representative or State animal health official is unavailable to break the seal due to extenuating circumstances, the State animal health official may designate the authority to unseal to an accredited veterinarian and will assume the responsibility for oversight and recordkeeping.

* * * * *

(4) * * *

(i) Mares to be used to test stallions for CEM shall be permanently identified before the mares are used for such testing with the letter ''T'' or other permanent identification approved by APHIS on a case-by-case basis. The marking shall be permanently applied by an inspector, a State inspector, or an accredited veterinarian who shall use a hot iron, freezemarking, a lip tattoo, or other APHIS-approved method. If a hot iron or freezemarking is used, the marking shall not be less than 2 inches (5.08 cm) high and shall be applied to the left shoulder or left side of the neck of the mare. If a lip tattoo is used, the marking shall not be less than 1 inch (2.54 cm) high and 0.75 inch (1.9 cm) wide and shall be applied to the inside surface of the upper lip of the test mare.

* * * * *

(f) * * *

(5) * * *

(v) While in transit, the horse must be moved in either an aircraft or a sealed van or trailer. If the horse is moved in a sealed van or trailer, the seal may be broken only by an APHIS representative or State animal health official at the horse's destination, except in situations where the horse's life is in danger.

* * * * *

(g) *Special provisions for the importation of horses that have been temporarily exported to a CEM-affected region.* If a horse originating from the United States has been temporarily exported for not more than 90 days to a CEM-affected region listed under paragraph (c)(1) of this section and returns to the United States during that time, or if a horse originating from a non-CEM affected region has been temporarily exported for not more than 90 days to a CEM-affected region during the 12 months preceding its proposed importation to the United States, the horse may be eligible for return, or for importation into the United States, without meeting the requirements of paragraphs (d) through (f) of this section, under the following conditions:

(1) * * *

(iii) That breeding of the horse, either live or artificial, has never been attempted, nor has the horse had any other sexual contact or genital examination while in such region; and

* * * * *

(h) * * *

(4) The State must agree to provide oversight during the test breeding of quarantined stallions.

* * * * *

(7) A list of States approved by APHIS to receive stallions over 731 days of age imported under paragraph (e) of this section is maintained on the APHIS website at *www.aphis.usda.gov/aphis/ourfocus/importexport/animal-import-and-export/equine.* Copies of the list will also be available via postal mail, fax, or email upon request to Live Animal Imports, Veterinary Services, Animal and Plant Health Inspection Service, 4700 River Road Unit 38, Riverdale, MD 20737.

(8) A list of States approved by APHIS to receive mares over 731 days of age imported under paragraph (e) of this section is maintained on the APHIS website at *www.aphis.usda.gov/aphis/ourfocus/importexport/animal-import-and-export/equine.* Copies of the list will also be available via postal mail, fax, or email upon request to Live Animal Imports, Veterinary Services, Animal and Plant Health Inspection Service, 4700 River Road Unit 38, Riverdale, MD 20737.

* * * * *

[3] See footnote 2 of this section.

(Approved by the Office of Management and Budget under control numbers 0579–0040, 0579–0165, 0579–0324, and 0579–0485)

■ 4. Amend § 93.302 by:
■ a. Redesignating paragraphs (a) through (d) as paragraphs (b) through (e), respectively, and adding a new paragraph (a); and
■ b. Adding a heading to newly redesignated paragraph (e).

The additions read as follows:

§ 93.302 Inspection of certain aircraft and other means of conveyance and shipping containers thereon; unloading, cleaning, and disinfection requirements.

(a) *Shipping container requirements.* Shipping containers used to transport live equine(s) to the United States must meet the following requirements:

(1) Containers must be new or cleaned and disinfected in a manner that sufficiently reduces the risk of introduction or dissemination of any pests or diseases of livestock into the United States.

(2) Containers must be of sufficient size and construction to reasonably assure that live equine(s) are transported safely.

(3) Stocking density of live equine(s) must not be to an extent that impinges on the animals' safety during transportation.

(4) Guidance on how to meet these requirements may be found in the Live Animals Regulations (LAR), as amended, published by the International Air Transport Association (IATA) or the Terrestrial Animal Health Code published by the World Organization for Animal Health (WOAH). The Administrator may also approve alternative guidance than that described in the LAR or the Terrestrial Animal Health Code.

* * * * *

(e) *Shipping container.* * * *

■ 5. Amend § 93.303 by:
■ a. In paragraph (a), removing the words ''these stations'' and adding in

their place the words ''the following station(s)'', and removing the words ''Los Angeles, California; Miami, Florida; and'';

■ b. Revising paragraphs (b), (c), and (d); and

■ c. In paragraph (e), adding a sentence after the last sentence and redesignating footnote 10 as footnote 1.

The revisions and addition read as follows:

§ 93.303 Ports designated for the importation of horses.

* * * * *

(b) *Canadian border ports.* Land border ports designated for the entry of horses from Canada may be found on the APHIS website at *www.aphis.usda.gov/aphis/ourfocus/importexport/animal-import-and-export/equine.* Changes to the list of approved ports will be announced through notices published in the **Federal Register**.

(c) *Mexican border ports.* Land border ports designated for the entry of horses from Mexico may be found on the APHIS website at *www.aphis.usda.gov/aphis/ourfocus/importexport/animal-import-and-export/equine.* Changes to the list of approved ports will be announced through notices published in the **Federal Register**.

(d) *Limited ports.* Certain ports are designated as having inspection facilities for the entry of horses and horse products such as horse test specimens which do not appear to require restraint and holding inspection facilities. These ports may be found on the APHIS website at *www.aphis.usda.gov/aphis/ourfocus/importexport/animal-import-and-export/equine.* Changes to the list of approved ports will be announced through notices published in the **Federal Register**.

(e) * * * These ports may be found on the APHIS website at *www.aphis.usda.gov/aphis/ourfocus/importexport/animal-import-and-export/equine.*

* * * * *

■ 6. Amend § 93.304 by:

■ a. Revising the section heading;

■ b. In paragraph (a)(1)(i), in the first sentence, adding the words ''or transiting'' after the words ''For horses from'', adding the words ''Federal quarantine or'' after the words ''quarantine at a'', and removing the text ''except as otherwise provided for in §§ 93.315, 93.319, and 93.321,'', and in the next to last sentence, adding the words '', or other attestation regarding the health of the animals'' after the word ''subjected''; and

■ c. Revising the OMB citation at the end of the section.

The revisions read as follows:

§ 93.304 Import permits for horses and for horse specimens for diagnostic purposes; reservation fees for space at quarantine facilities maintained by APHIS.

* * * * *

(Approved by the Office of Management and Budget under control numbers 0579–0040, 0579–0324, and 0579–0485)

§ 93.306 [Amended]

■ 7. Amend § 93.306 by adding the words '', to include horses dead upon presentation and horses arriving in the same shipment as such horses,'' after the words ''all other horses'' in the second sentence.

■ 8. Revise § 93.307 to read as follows:

§ 93.307 Articles accompanying horses.

No litter or manure, fodder or other aliment, nor any equipment such as boxes, buckets, ropes, chains, blankets, or other things used for or about horses governed under any law or regulation administered by the Secretary of Agriculture for prevention of the introduction or dissemination of any pests or diseases of livestock, shall be landed from any conveyance except under such restrictions as the inspector in charge at the port of entry shall direct.

■ 9. Amend § 93.308 by:

■ a. Revising paragraphs (a)(1) and (a)(2) introductory text;

■ b. Redesignating paragraphs (a)(3) and (4) as paragraphs (a)(4) and (5), respectively, and adding a new paragraph (a)(3);

■ c. In newly redesignated paragraph (a)(4), redesignating footnote 11 as footnote 1 and revising newly redesignated footnote 1;

■ d. In paragraph (b) introductory text, adding the words '', except horses originating from regions in which Venezuelan equine encephalomyelitis or screwworm is declared to exist,'' after the citation ''§ 93.303(e)'';

■ e. In paragraph (b)(2)(i), redesignating footnote 12 as footnote 2;

■ f. In paragraph (c)(1)(iv)(B), redesignating footnote 13 as footnote 3;

■ g. In paragraph (c)(4)(v)(B), removing ''(a)(4)'' and adding ''(a)(5)'' in its place; and

■ h. Revising the OMB citation at the end of the section.

The revisions and addition read as follows:

§ 93.308 Quarantine requirements.

(a) * * *

(1) Except as provided in §§ 93.317 (horses from Canada) and 93.324 (horses from Mexico), horses intended for importation from regions that APHIS considers to be affected with Venezuelan equine encephalomyelitis shall be quarantined at a port designated in § 93.303 to be evaluated for signs of Venezuelan equine encephalomyelitis. Each horse must be accompanied at the time of importation by an import permit in accordance with § 93.304.

(i) A list of regions that APHIS considers affected with Venezuelan equine encephalomyelitis is maintained on the APHIS website at *www.aphis.usda.gov/aphis/ourfocus/animalhealth/animal-and-animal-product-import-information/animal-health-status-of-regions.* Copies of the list can be obtained via postal mail or email upon request to Regionalization Evaluation Services, Strategy and Policy, Veterinary Services, Animal and Plant Health Inspection Service, 4700 River Road Unit 38, Riverdale, Maryland 20737; *AskRegionalization@usda.gov.*

(ii) APHIS will add a region to the list upon determining that the disease exists in the region based on reports APHIS receives of outbreaks of the disease from veterinary officials of the exporting country, from the World Organization for Animal Health (WOAH), or from other sources the Administrator determines to be reliable. APHIS will remove a region from the list after conducting an evaluation of the region in accordance with § 92.2 of this subchapter and finding that the disease is not present in the region. In the case of a region formerly not on this list that is added due to an outbreak, the region may be removed from the list in accordance with the procedures for reestablishment of a region's disease-free status in § 92.4 of this subchapter.

(2) Horses intended for importation from regions APHIS considers to be affected with African horse sickness may enter the United States only at the port of New York, and must be quarantined at the New York Animal Import Center in Newburgh, New York, for at least 60 days. This restriction also applies to horses that have stopped in or transited a region considered affected with African horse sickness. Each horse must be accompanied at the time of importation by an import permit in accordance with § 93.304.

* * * * *

(3) Horses from regions where APHIS considers screwworm to exist may be imported into the United States only if they meet the requirements in paragraphs (a)(3)(i) through (vii) of this section, obtain an import permit in accordance with § 93.304, and meet all

other applicable requirements of this part. A list of regions where screwworm is considered to exist is maintained on the APHIS website at *www.aphis.usda.gov/animalhealth/disease-status-of-regions.* Copies of the list will also be available via postal mail, fax, or email upon request to the Regionalization Evaluation Services, Strategy and Policy, Veterinary Services, Animal and Plant Health Inspection Service, 4700 River Road Unit 38, Riverdale, MD 20737; *AskRegionalization@usda.gov.* APHIS will add a region to the list upon determining that screwworm exists in the region based on reports APHIS receives of detections of the pest from veterinary officials of the exporting country, from WOAH, or from other sources the Administrator determines to be reliable. APHIS will remove a region from the list after conducting an evaluation of the region in accordance with § 92.2 of this subchapter and finding that screwworm is not present in the region. In the case of a region formerly not on this list that is added due to a detection, the region may be removed from the list in accordance with the procedures for reestablishment of a region's disease-free status in § 92.4 of this subchapter.

(i) A veterinarian must treat horses with ivermectin 3 to 5 days prior to the date of export to the United States according to the recommended dose prescribed on the product's label.

(ii) Horses must be examined for screwworm by a full-time salaried veterinary official of the exporting country within 24 hours prior to shipment to the United States. The official must fully examine the horses, including their external genitalia. If horses are found to be infested with screwworm, they must be treated until free from infestation.

(iii) At the time horses are loaded onto a means of conveyance for export, a veterinarian must treat any visible wounds on the animals with a solution of coumaphos dust at a concentration of 5 percent active ingredient.

(iv) Horses must be accompanied to the United States by a certificate signed by a full-time salaried veterinary official of the exporting country. The certificate must state that the horses, including their external genitalia, have been thoroughly examined and found free of screwworm and that the horses have been treated in accordance with paragraphs (a)(3)(i) and (iii) of this section.

(v) Horses must be quarantined upon arrival in the United States at a port designated in § 93.303 for at least 7 days.

(vi) Horses must be examined for screwworm by a veterinarian within 24 hours after arrival at a port designated in § 93.303. The examining veterinarian must examine horses, including their external genitalia, to determine whether the horse is infested with screwworm.

(vii) Horses must be held at the animal import center for a minimum of 7 days. On day 7, prior to the horses' release, the horses must be examined by a veterinarian at the expense of the owner or broker. For this examination, male horses must be tranquilized or sedated so that the external genitalia of the horses can be thoroughly examined. If screwworm is found during this examination, the horses must be held in quarantine and treated until free of infestation.

* * * * *

[1] Protocols for testing equines in import quarantine are available on the APHIS website at *www.aphis.usda.gov/aphis/ourfocus/importexport/animal-import-and-export/equine/guidelines-docs-related-to-importing-equine.*

(Approved by the Office of Management and Budget under control numbers 0579–0313 and 0579–0485)

■ 10. Amend § 93.314 by:

■ a. Revising paragraphs (a) introductory text and (a)(1);

■ b. Redesignating paragraphs (a)(4) and (5) as paragraphs (a)(6) and (7), respectively, and adding new paragraphs (a)(4) and (5);

■ c. Revising newly redesignated paragraph (a)(7)(i);

■ d. Adding paragraph (d); and

■ e. Adding an OMB citation at the end of the section.

The revisions and additions read as follows:

§ 93.314 Horses, certification, and accompanying equipment.

(a) Horses offered for importation from any part of the world shall be accompanied by an original certificate endorsed by a salaried veterinary officer of the national government of the region of origin, or if exported from Mexico, shall be accompanied either by such a certificate or by a certificate issued by a veterinarian accredited by the National Government of Mexico and endorsed by a full-time salaried veterinary officer of the National Government of Mexico, thereby representing that the veterinarian issuing the certificate was authorized to do so. The certificate shall specify the name and address of the importer; the species, breed, number or quantity of horses or horse test specimens to be imported; the purpose of the importation; individual horse identification which requires a description of the horse, name, age, markings and, when present, registration number, tattoo, microchip, eartag, brand, if any; the region and premises of origin; the name and address of the exporter; and the destination address for release into the United States; and shows that:

(1) The horses described in the certificate have been in said region during the 60 days preceding exportation, or, for horses described in § 93.301(g), for the duration of their temporary exportation to each CEM-affected region;

* * * * *

(4) The horse, if applicable, has not been gelded during the 14 days preceding exportation;

(5) The horse will be accompanied by documentation of pre-export examination occurring within 48 hours of departure from the port of embarkation endorsed by a salaried veterinary medical officer;

* * * * *

(7) * * *

(i) The horses, except horses described in § 93.301(d), (e), and (f), have not been in any region listed in accordance with § 93.301(c)(1) on the APHIS website as affected with CEM during the 12 months immediately prior to their importation into the United States;

* * * * *

(d) For purposes of this section, the term ''original'' means documentation is prepared and issued directly from the national government of the region of origin or annotated by the national government of the region of origin to indicate how the documentation may be verified. Any declaration, permit, or other required document for horses may be issued and presented using a United States Government electronic information exchange system or other method authorized by APHIS.

(Approved by the Office of Management and Budget under control number 0579–0485)

Subpart C—[Amended]

■ 11. In each undesignated center heading in subpart C listed in the first column, redesignate the footnote number in the second column as the footnote number in the third column:

Undesignated center heading in subpart C	Old footnote	New footnote
Canada	16	1
Central America and West Indies	17	1
Mexico	18	1

■ 12. Amend § 93.317 by:
■ a. Revising paragraph (a); and
■ b. Redesignating paragraph (c) as paragraph (d) and adding a new paragraph (c).

The revision and addition read as follows:

§ 93.317 Horses from Canada.

(a) Except as provided in paragraph (d) of this section, horses from Canada shall be inspected as provided in § 93.306 and accompanied by a certificate as required by § 93.314, which shall include evidence of a negative test for equine infectious anemia for which blood samples were drawn during the 180 days preceding exportation to the United States and which test was conducted in a laboratory approved by the Canada Department of Agriculture or the United States Department of Agriculture. Horses accompanying their dams, which were foaled after their dam was so tested negative, need not be so tested and shall otherwise be handled as provided in § 93.314. Certificates required for horses from Canada must be issued and endorsed by a salaried veterinarian of the Canadian Government. USDA veterinary port inspection is not required for horses imported from Canada under temporary Customs authorization for a period of 30 days from the date of issue of the certificate and the certificate issued is valid for an unlimited number of importations into the United States during the 30-day period.

* * * * *

(c) Any horse imported into the United States from Canada through air or ocean ports of entry must obtain an import permit under § 93.304 and shall otherwise be handled as provided in §§ 93.305 and 93.314.

* * * * *

■ 13. Revise § 93.319 to read as follows:

§ 93.319 Import permit and declaration for horses.

For all horses offered for importation from or transiting through regions of Central America or of the West Indies, the importer or his or her agent shall have obtained an import permit under § 93.304 and shall present two copies of a declaration as provided in § 93.305.

(Approved by the Office of Management and Budget under control number 0579–0485)

§ 93.320 [Amended]

■ 14. Amend § 93.320 by adding the words "or transiting through" after the word "from" in the section heading and the first sentence.

■ 15. Amend § 93.321 by adding a sentence after the last sentence and an OMB citation at the end of the section to read as follows:

§ 93.321 Import permits and applications for inspection for horses.

* * * Horses quarantined at a U.S. facility designated in § 93.303 must obtain an import permit under § 93.304.

(Approved by the Office of Management and Budget under control number 0579–0485)

■ 16. Amend § 93.324 by redesignating footnote 19 as footnote 1 and revising it to read as follows:

§ 93.324 Detention for quarantine.

* * * * *

[1] Protocols for testing equines in import quarantine are available on the APHIS website at *www.aphis.usda.gov/aphis/ourfocus/importexport/animal-import-and-export/equine/guidelines-docs-related-to-importing-equine.*

Done in Washington, DC, this 8th day of September 2023.

Michael Watson,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2023–19864 Filed 9–13–23; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1052; Project Identifier MCAI–2023–00260–T; Amendment 39–22532; AD 2023–17–06]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc., Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting 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 AD was prompted by an uncommanded flap extension accompanied by a flaps fail caution message during climb. This AD requires initial and repetitive operational tests of the flap control system. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective October 19, 2023.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of October 19, 2023.

ADDRESSES:

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 final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For service information identified in this final rule, 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. It is also available at *regulations.gov* under Docket No. FAA–2023–1052.

FOR FURTHER INFORMATION CONTACT: Chirayu Gupta, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; email *9-avs-nyaco-cos@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 Bombardier, Inc., Model CL–600–1A11 (600), CL–600–2A12 (601), and CL–600–2B16 (601–3A, 601–3R, and 604 Variants) airplanes. The NPRM published in the **Federal Register** on May 31, 2023 (88 FR 34794). The NPRM was prompted by AD CF–2023–07, dated February 10, 2023, issued by Transport Canada, which is the aviation authority for Canada (referred to after this as the MCAI).

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 of this event by Transport Canada and the airplane manufacturer found that the flap control system failed to arrest the uncommanded movement of the flap, due to a failed retract relay. The failed retract relay also caused the flap control system to operate at half speed, which had occurred, but was undetected, during previous flights. The root cause of the uncommanded flap extension remains under investigation. Transport Canada considers the MCAI to be an interim action, and further AD action may follow.

In the NPRM, the FAA proposed to require initial and repetitive operational tests of the of the inboard and outboard flaps of the flap control system to verify the functionality of the retract relays. 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.

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

Discussion of Final Airworthiness Directive

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

Conclusion

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

Related Service Information Under 1 CFR Part 51

The FAA reviewed 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 (repair) 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.

Interim Action

The FAA considers this AD 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 affects 1,124 airplanes of U.S. registry. The FAA estimates the following costs to comply with this 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

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:

2023–17–06 Bombardier, Inc.: Amendment 39–22532; Docket No. FAA–2023–1052; Project Identifier MCAI–2023–00260–T.

(a) Effective Date

This airworthiness directive (AD) is effective October 19, 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 inclusive.

(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 inclusive.

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

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

(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, International Validation 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 International Validation Branch, mail it to the address identified in paragraph (k)(2) of this AD or email to: *9-avs-nyaco-cos@faa.gov.* 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, International Validation 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, Aviation Safety Engineer, FAA, 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 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 August 22, 2023.

Victor Wicklund,

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

[FR Doc. 2023–19901 Filed 9–13–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1206; Project Identifier MCAI–2023–00068–T; Amendment 39–22527; AD 2023–17–01]

RIN 2120–AA64

Airworthiness Directives; ATR—GIE Avions de Transport Régional Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all ATR—GIE Avions de Transport Régional Model ATR42 and ATR72 airplanes. This AD was prompted by a determination that some batches of nose landing gear (NLG) drag brace panels (DBP) having certain part numbers were affected by a quality deficiency that was not detected in production. This AD requires a measurement of the affected part and, depending on findings, accomplishment of applicable corrective actions, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. This AD also prohibits the installation of affected parts. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective October 19, 2023.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of October 19, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1206; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For EASA material incorporated by reference in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this material on the EASA website at *ad.easa.europa.eu.*
- For Safran Landing Systems SAS service information incorporated by reference in this AD, contact Safran Landing Systems SAS, Inovel Parc Sud—7, rue Général Valérie André, 78140 VELIZY–VILLACOUBLAY—FRANCE; telephone +33 (0) 1 46 29 81 00, website *safran-landing-systems.com.*
- You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket at *regulations.gov* under Docket No. FAA–2023–1206.

FOR FURTHER INFORMATION CONTACT: Shahram Daneshmandi, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: 206–231–3220; email: *shahram.daneshmandi@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 all ATR—GIE Avions de Transport Régional Model ATR 42–200, ATR 42–300, ATR 42–320, ATR 42–400, ATR 42–500, ATR 72–101, ATR 72–102, ATR 72–201, ATR 72–202, ATR 72–211, ATR 72–212, and ATR 72–212A airplanes. Model ATR 42–400 airplanes are not certificated by the FAA and are not included on the U.S. type certificate data sheet; this AD therefore does not include those airplanes in the applicability. The NPRM published in the **Federal Register** on June 8, 2023 (88 FR 37481). The NPRM was prompted by AD 2023–0010, dated January 17, 2023, issued by EASA, which is the Technical Agent for the Member States of the European Union (EASA AD 2023–0010) (also referred to as the MCAI). The MCAI states that it has been determined that some batches of NLG DBP having part number (P/N) D63757 and P/N D69085 were affected by a quality deficiency that was not detected in production. Consequently, this issue could lead to NLG DBP dissymmetry at the lower area, which might affect the structural strength of the NLG DBP. This condition, if not addressed, could lead to NLG DBP structural fatigue failure and subsequent collapse of the NLG, possibly resulting in damage to the airplane and injury to occupants.

In the NPRM, the FAA proposed to require a measurement of the affected part and, depending on findings, accomplishment of applicable corrective actions, as specified in EASA AD 2023–0010. The NPRM also proposed to prohibit the installation of affected parts. 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–2023–1206.

Discussion of Final Airworthiness Directive

Comments

The FAA received a comment from Air Line Pilots Association, International, who supported the NPRM without change.

Conclusion

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

Related Service Information Under 1 CFR Part 51

EASA AD 2023–0010 specifies procedures for measuring the affected part and, depending on findings, accomplishing applicable corrective actions. Corrective actions could include obtaining and carrying out repair instructions, or replacing the affected part with a serviceable part. EASA AD 2033–0010 also specifies procedures for reporting measurement findings to ATR—GIE and prohibits the installation of affected parts.

Safran Landing Systems SAS Service Bulletin 631–32–286, dated October 28, 2022, provides the list of affected parts and specifies measurement procedures.

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

Costs of Compliance

The FAA estimates that this AD affects 73 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
2 work-hours × $85 per hour = $170	$0	$170	$12,410

The FAA has received no definitive data on which to base the cost estimates for the on-condition actions specified in this AD.

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to take approximately 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

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:

2023–17–01 ATR—GIE Avions de Transport Régional: Amendment 39–22527; Docket No. FAA–2023–1206; Project Identifier MCAI–2023–00068–T.

(a) Effective Date

This airworthiness directive (AD) is effective October 19, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all ATR—GIE Avions de Transport Régional Model ATR42–200, –300, –320, and –500 airplanes; and Model ATR72–101, –102, –201, –202, –211, –212, and –212A airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 32, Landing gear.

(e) Unsafe Condition

This AD was prompted by a determination that some batches of nose landing gear (NLG) drag brace panels (DBP) having part number (P/N) D63757 and P/N D69085 were affected by a quality deficiency that was not detected in production. The FAA is issuing this AD to address the possibility of a resulting NLG DBP dissymmetry at the lower area, which might affect the structural strength of the NLG DBP. This condition, if not addressed, could lead to NLG DBP structural fatigue failure and subsequent collapse of the NLG, possibly resulting in damage to the airplane and injury to occupants.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2023–0010, dated January 17, 2023 (EASA AD 2023–0010).

(h) Exceptions to EASA AD 2023–0010

(1) Where EASA AD 2023–0010 refers to its effective date, this AD requires using the effective date of this AD.

(2) This AD does not adopt the ''Remarks'' section of EASA AD 2023–0010.

(3) Where EASA AD 2023–0010 defines ''the SB,'' for this AD, operators must use Safran Landing Systems SAS Service Bulletin 631–32–286, dated October 28, 2022.

(4) Paragraph (2) of EASA AD 2023–0010 specifies to report measurement results to Safran Landing Systems SAS within a certain compliance time. For this AD, report inspection results at the applicable time specified in paragraph (h)(4)(i) or (ii) of this AD, but do not exceed the compliance time specified in Table 1 of EASA AD 2023–0010.

(i) If the inspection was done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(ii) If the inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

(i) Additional AD Provisions

The following provisions also apply to this AD:

(1) *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 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 International Validation Branch, send it to the attention of the person identified in paragraph (j) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov*. 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, International Validation Branch, FAA; or EASA; or ATR—GIE Avions de Transport Régional's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(j) Additional Information

For more information about this AD, contact Shahram Daneshmandi, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: 206–231–3220; email: *shahram.daneshmandi@faa.gov*.

(k) 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 this AD specifies otherwise.

(i) European Union Aviation Safety Agency (EASA) AD 2023–0010, dated January 17, 2023.

(ii) Safran Landing Systems SAS Service Bulletin 631–32–286, dated October 28, 2022.

(3) For EASA AD 2023–0010, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu*; website *easa.europa.eu*. You may find this EASA AD on the EASA website at *ad.easa.europa.eu*.

(4) For Safran Landing Systems SAS service information, contact Safran Landing Systems SAS, Inovel Parc Sud—7, rue Général Valérie André, 78140 VELIZY–VILLACOUBLAY—FRANCE; telephone +33 (0) 1 46 29 81 00, website *safran-landing-systems.com*.

(5) You may view this material 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.

(6) You may view this material 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 September 7, 2023.

Ross Landes,

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

[FR Doc. 2023–19900 Filed 9–13–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1215; Project Identifier MCAI–2023–00196–T; Amendment 39–22528; AD 2023–17–02]

RIN 2120–AA64

Airworthiness Directives; Saab AB, Support and Services (Formerly Known as Saab AB, Saab Aeronautics) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Saab AB, Support and Services Model 340A (SAAB/SF340A) and SAAB 340B airplanes. This AD was prompted by reports of a high number of events related to stall warnings upon landing, following introduction of the ice speed function within the stall warning system. This AD requires modification of the stall warning/identification system, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective October 19, 2023.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of October 19, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1215; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For EASA material incorporated by reference in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this material on the EASA website at *ad.easa.europa.eu.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket at *regulations.gov* under Docket No. FAA–2023–1215.

FOR FURTHER INFORMATION CONTACT: Shahram Daneshmandi, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3220; email *Shahram.Daneshmandi@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 SAAB/SF340A and SAAB 340B airplanes. The NPRM published in the **Federal Register** on June 20, 2023 (88 FR 39794). The NPRM was prompted by AD 2022–0216R1, dated February 1, 2023; corrected February 2, 2023, issued by EASA, which is the Technical Agent for the Member States of the European Union (EASA AD 2022–0216R1) (also referred to as the MCAI). The MCAI states that following the introduction of the ice speed function within the SAAB 340 stall warning system, a high number of events have been reported related to stall warnings upon landing. Subsequent investigation determined that the margin to stall warning is lower when ice speed is ON than with ice speed OFF. This condition, if not corrected, could lead to inappropriate stall warnings during the landing phase and result in increased pilot workload during a critical phase of flight.

In the NPRM, the FAA proposed to require accomplishing the actions specified in EASA AD 2022–0216R1, except for any differences identified as exceptions in the regulatory text of this AD. 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–2023–1215.

Discussion of Final Airworthiness Directive

Comments

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

Conclusion

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

Related Service Information Under 1 CFR Part 51

EASA AD 2022–0216R1 specifies procedures for modifying the stall warning/identification system to introduce an ice speed cancel logic. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

Costs of Compliance

The FAA estimates that this AD affects 79 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Up to 30 work-hours × $85 per hour = $2,550	$7,900	Up to $10,450	Up to $825,550.

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:

2023–17–02 Saab AB, Support and Services (Formerly Known as Saab AB, Saab Aeronautics): Amendment 39–22528; Docket No. FAA–2023–1215; Project Identifier MCAI–2023–00196–T.

(a) Effective Date

This airworthiness directive (AD) is effective October 19, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Saab AB, Support and Services (formerly known as Saab AB, Saab Aeronautics) Model 340A (SAAB/SF340A) and SAAB 340B airplanes, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2022–0216R1, dated February 1, 2023; corrected February 2, 2023 (EASA AD 2022–0216R1).

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by reports of a high number of events related to stall warnings upon landing, following introduction of the ice speed function within the stall warning system. The FAA is issuing this AD to address a margin to stall warning that is lower when ice speed is ON than with ice speed OFF. The unsafe condition, if not addressed, could lead to inappropriate stall warnings during the landing phase and result in increased pilot workload during a critical phase of flight.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2022–0216R1.

(h) Exceptions to EASA AD 2022–0216R1

(1) Where EASA AD 2022–0216R1 refers to November 16, 2022 (the effective date of EASA AD 2022–0216), this AD requires using the effective date of this AD.

(2) The "Remarks" section of EASA AD 2022–0216R1 does not apply to this AD.

(i) Additional AD Provisions

The following provisions also apply to this AD:

(1) *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 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 International Validation Branch, send

it to the attention of the person identified in paragraph (j) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.* 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, International Validation Branch, FAA; or EASA; or Saab AB, Support and Services' EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(j) Additional Information

For more information about this AD, contact Shahram Daneshmandi, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3220; email *Shahram.Daneshmandi@faa.gov.*

(k) 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 this AD specifies otherwise.

(i) European Union Aviation Safety Agency (EASA) AD 2022–0216R1, dated February 1, 2023; corrected February 2, 2023.

(ii) [Reserved]

(3) For EASA AD 2022–0216R1, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this EASA AD on the EASA website at *ad.easa.europa.eu.*

(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 material 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 August 17, 2023.

Victor Wicklund,

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

[FR Doc. 2023–19899 Filed 9–13–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1051; Project Identifier MCAI–2022–01565–T; Amendment 39–22529; AD 2023–17–03]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Airbus SAS Model A330–200 series airplanes, Model A330–200 Freighter series airplanes, Model A330–300 series airplanes, Model A340–200 series airplanes, and Model A340–300 series airplanes. This AD was prompted by a report that certain overheat detection system (OHDS) sensing elements, produced before January 31, 2021, may not properly detect thermal bleed leak events due to a quality escape during the manufacturing process. This AD requires a one-time special detailed inspection (SDI) for discrepancies of each affected part installed at an affected position, and replacement of discrepant parts, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. This AD would also prohibit the installation of affected parts. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective October 19, 2023.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of October 19, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1051; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For EASA material incorporated by reference in this AD, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this material on the EASA website at *ad.easa.europa.eu.*
- For Kidde Aerospace & Defense service information incorporated by reference in this AD, contact Kidde Aerospace & Defense, 4200 Airport Drive NW, Building B, Wilson, NC 27896; telephone 319–295–5000; website *kiddetechnologies.com/aviation.com.*
- You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket at *regulations.gov* under Docket No. FAA–2023–1051.

FOR FURTHER INFORMATION CONTACT: Timothy Dowling, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3667; email *Timothy.P.Dowling@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 all Airbus SAS Model A330–200 [1] series airplanes, Model A330–200 Freighter series airplanes, Model A330–300 series airplanes, Model A340–200 series airplanes, and Model A340–300 series airplanes. The NPRM published in the **Federal Register** on May 26, 2023 (88 FR 34097). The NPRM was prompted by AD 2022–0243, dated December 8, 2022, issued by EASA, which is the Technical Agent for the Member States of the European Union (EASA AD 2022–0243) (also referred to as the MCAI). The MCAI states that the affected part manufacturer, Kidde Aerospace & Defense, reported that certain OHDS sensing elements, produced before January 31, 2021, may not properly detect thermal bleed leak events due to a quality escape during the manufacturing process.

In the NPRM, the FAA proposed to require a one-time SDI for discrepancies of each affected part installed at an affected position, and replacement of discrepant parts, as specified in EASA AD 2022–0243. The NPRM also proposed to prohibit the installation of

[1] In the preamble of the NPRM, the FAA inadvertently referred to model ''A320–200'' series airplanes. The affected airplane models, however, were correctly described in the Applicability paragraph. The preamble of this final rule has been corrected to reference the correct model, ''A330–200'' series airplanes.

affected parts. The FAA is issuing this AD to address an air leak remaining undetected by the OHDS sensing element and not being isolated during flight. The unsafe condition, if not addressed, could possibly result in localized areas of the airplane being exposed to high temperatures, with consequent reduced structural integrity of the airplane.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–1051.

Discussion of Final Airworthiness Directive

Comments

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

The FAA received additional comments from Airbus SAS. The following presents the comment received on the NPRM and the FAA's response.

Request To Correct the Referenced EASA AD Number

Airbus SAS requested to correct the EASA AD number referenced in paragraph (h)(5) of the proposed AD. The reference to EASA AD 2022–0234 is a mistake as it should refer to EASA AD 2022–0243.

The FAA agrees that EASA AD 2022–0243 is correct for paragraph (h)(5) of this AD. The FAA has changed this AD accordingly.

Conclusion

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

Related Service Information Under 1 CFR Part 51

EASA 2022–0243 specifies procedures for a one-time SDI for discrepancies of each affected part installed at an affected position, and replacement of discrepant parts where the displayed electronic centralized aircraft monitoring (ECAM) warning is not related to results of a heat gun test at certain locations. EASA AD 2022–0243 also prohibits the installation of affected parts.

The FAA reviewed Kidde Aerospace & Defense Service Bulletin CFD–26–3, dated January 13, 2022; and Revision 1, dated March 29, 2022, which identify affected OHDS sensing elements (those having certain part numbers and corresponding date codes). These documents are distinct because Revision 1 corrects typographical errors and clarifies wording.

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

Costs of Compliance

The FAA estimates that this AD affects 119 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Up to 64 work-hours × $85 per hour = $5,440	$0	$5,440	$647,360

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

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
13 work-hours × $85 per hour = $1,105	* $	$1,105

* The FAA has received no definitive data on which to base the parts cost.

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

Authority for This Rulemaking

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

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

Regulatory Findings

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:

2023–17–03 Airbus SAS: Amendment 39–22529; Docket No. FAA–2023–1051; Project Identifier MCAI–2022–01565–T.

(a) Effective Date

This airworthiness directive (AD) is effective October 19, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Airbus SAS airplanes specified in paragraphs (c)(1) through (5) of this AD, certificated in any category.

(1) Model A330–201, –202, –203, –223, and –243 airplanes.

(2) Model A330–223F and –243F airplanes.

(3) Model A330–301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes.

(4) Model A340–211, –212, and –213 airplanes.

(5) Model A340–311, –312, and –313 airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 36, Pneumatic.

(e) Unsafe Condition

This AD was prompted by a report that certain overheat detection system (OHDS) sensing elements, produced before January 31, 2021, may not properly detect the thermal bleed leak events due to a quality escape during the manufacturing process. The FAA is issuing this AD to address an air leak remaining undetected by the OHDS sensing element and not being isolated during flight. The unsafe condition, if not addressed, could possibly result in localized areas of the airplane being exposed to high temperatures, with consequent reduced structural integrity of the airplane.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2022–0243, dated December 8, 2022 (EASA AD 2022–0243).

(h) Exceptions to EASA AD 2022–0243

(1) Where EASA AD 2022–0243 refers to its effective date, this AD requires using the effective date of this AD.

(2) This AD does not adopt the "Remarks" section of EASA AD 2022–0243.

(3) Where EASA AD 2022–0243 defines "affected part" and refers to "the VSB" for the part numbers and date codes, for this AD, use Kidde Aerospace & Defense Service Bulletin CFD–26–3, dated January 13, 2022; or Revision 1, dated March 29, 2022, as "the VSB" for the part numbers and date codes.

(4) Where EASA AD 2022–0243 defines Groups, replace the text "the SB" with "Airbus Service Bulletin A330–36–3052, dated June 27, 2022; or Airbus SB A340–36–4036, dated June 27, 2022; as applicable."

(5) Where paragraph (2) of EASA AD 2022–0243 specifies action if "any discrepancy as defined in the SB is detected," for this AD a discrepancy is when the displayed electronic centralized aircraft monitoring (ECAM) warning is not related to results of a heat gun test at certain location.

(i) No Reporting Requirement and No Return of Parts

(1) Although the service information referenced in EASA AD 2022–0243 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

(2) Although the service information referenced in EASA AD 2022–0243 specifies to return certain parts to the manufacturer, this AD does not include that requirement.

(j) Additional AD Provisions

The following provisions also apply to this AD:

(1) *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 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 International Validation Branch, send it to the attention of the person identified in paragraph (k) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.* 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, International Validation Branch, FAA; or EASA; Airbus SAS's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC):* Except as required by paragraph (j)(2) of this AD, if any service information contains procedures or tests that are identified as RC, those procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(k) Additional Information

For more information about this AD, contact Timothy Dowling, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3667; email *Timothy.P.Dowling@faa.gov.*

(l) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2022–0243, dated December 8, 2022.

(ii) Kidde Aerospace & Defense Service Bulletin CFD–26–3, dated January 13, 2022.

(iii) Kidde Aerospace & Defense Service Bulletin CFD–26–3, Revision 1, dated March 29, 2022.

Note 1 to paragraph (l)(2)(iii): The revision level of this document is identified on only the transmittal page; no other page of the document contains this information.

(3) For EASA AD 2022–0243, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this EASA AD on the EASA website at *ad.easa.europa.eu.*

(4) For Kidde Aerospace & Defense service information, contact Kidde Aerospace & Defense, 4200 Airport Drive NW, Building B, Wilson, NC 27896; telephone 319–295–5000; website *kiddetechnologies.com/aviation.com.*

(5) You may view this material 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.

(6) You may view this material 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 September 7, 2023.

Ross Landes,

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

[FR Doc. 2023–19898 Filed 9–13–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1208; Project Identifier AD–2023–00325–E; Amendment 39–22545; AD 2023–18–04]

RIN 2120–AA64

Airworthiness Directives; General Electric Company Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain General Electric Company (GE) Model CF6–80E1A2, CF6–80E1A3, CF6–80E1A4, and CF6–80E1A4/B engines. This AD was prompted by a manufacturer investigation that revealed that a certain forward outer seal and certain high-pressure turbine rotor (HPTR) stage 1 disks and rotating seals were manufactured from material suspected to contain iron inclusion, which may cause reduced material properties and a lower fatigue life capability. This AD requires the replacement of the affected forward outer seal, HPTR stage 1 disks, and rotating seals. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective October 19, 2023.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1208; 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, 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.

FOR FURTHER INFORMATION CONTACT:
Alexei Marqueen, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7178; email: *alexei.t.marqueen@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 GE Model CF6–80E1A2, CF6–80E1A3, CF6–80E1A4, and CF6–80E1A4/B engines. The NPRM published in the **Federal Register** on June 9, 2023 (88 FR 37812). The NPRM was prompted by a report from the manufacturer that a certain forward outer seal and certain HPTR stage 1 disks and rotating seals were made from billets manufactured from material that is suspected to contain iron inclusion. Such iron inclusion may cause premature fracture and subsequent uncontained failure. The FAA has determined that the operators with affected HPTR stage 1 disks have proactively removed these parts from service. As a result, the compliance time for removal and replacement of the affected HPTR stage 1 disks is before further flight. This condition, if not addressed, could result in uncontained debris release, damage to the engine, and damage to the aircraft. In the NPRM, the FAA proposed to require the removal of a certain forward outer seal and certain HPTR stage 1 disks and rotating seals from service and replacement with parts eligible for installation. The FAA is issuing this AD to address the unsafe condition on these products.

Discussion of Final Airworthiness Directive

Comments

The FAA received comments from two commenters. The commenters were Delta Air Lines, Inc. (DAL) and EVA Air. The following presents the comments received on the NPRM and the FAA's response to each comment.

No Affected Parts

EVA Air commented that its fleet does not have any affected parts. The FAA acknowledges this comment.

Request To Expand Applicability and Add Parts Prohibition Requirement

DAL commented that according to the engine illustrated parts catalog, the R88DT rotor on the CF6–80E1 fleet of engines could be installed on the CF6–80C2 fleet of engines, specifically on the –B2F, –B4F, –B6F, –B7F, and –B8F variants. The commenter reasoned that without a part installation prohibition in the proposed AD, the affected parts would be eligible for installation on the non-CF6–80E1 engines after the required removal action in the AD. DAL requested that the FAA revise the proposed AD to add certain engine variants to paragraph (c), Applicability, and to add a parts installation prohibition to paragraph (g), Required Actions, to prevent installation of the removed parts on non-CF6–80E1 engines.

The FAA disagrees. This AD applies to engine models known to have affected parts installed. Paragraph (g) of this AD requires the removal of the affected parts from service. Since the FAA and the manufacturer know where these parts are, and parts removed from service by AD action are not serviceable and not eligible for re-installation on any engine, it is not necessary to revise paragraph (c) of this AD to add engine variants and revise paragraph (g) of this AD to prohibit installation of the removed parts. Additionally, adding new engine variants to this AD would delay final issuance of this AD, as such a change would increase the scope of this AD, requiring new notice and comment. We may consider separate rulemaking, however. The FAA did not change this AD as a result of these comments.

Conclusion

The FAA reviewed the relevant data, considered any comments 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, and any other changes described previously, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

Interim Action

The FAA considers this AD to be an interim action. This unsafe condition is still under investigation by the manufacturer and, depending on the results of that investigation, the FAA may consider further rulemaking action.

Costs of Compliance

The FAA estimates that this AD affects 1 engine installed on airplanes of U.S. registry. This engine requires replacement of the rotating seal. The FAA estimates that there are no engines installed on airplanes of U.S. registry that requires replacement of the forward outer seal or HPTR stage 1 disk.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Replace HPTR stage 1 disk	8 work-hours × $85 per hour = $680	$1,479,623 (prorated)	$1,480,303	$0
Replace rotating seal	8 work-hours × $85 per hour = $680	$732,517 (prorated)	733,197	733,197
Replace forward outer seal	8 work-hours × $85 per hour = $680	$1,290,000 (prorated)	1,290,680	0

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:

2023–18–04 General Electric Company: Amendment 39–22545; Docket No. FAA–2023–1208; Project Identifier AD–2023–00325–E.

(a) Effective Date

This airworthiness directive (AD) is effective October 19, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to General Electric Company Model CF6–80E1A2, CF6–80E1A3, CF6–80E1A4, and CF6–80E1A4/B engines with an installed forward outer seal, high-pressure turbine rotor (HPTR) stage 1 disk, or rotating seal having a part number (P/N) and serial number (S/N) identified in Table 1 to paragraph (c) of this AD.

TABLE 1 TO PARAGRAPH (c)—AFFECTED FORWARD OUTER SEAL, HPTR STAGE 1 DISKS, AND ROTATING SEALS

Part name	P/N	Part S/N
Forward outer seal	1778M70P03	NCU65340
HPTR stage 1 disk	1863M36G06	TMT5TD23
		TMT5TD26
		TMT5TD27
Rotating seal	1778M69P06	BTB20610
		BTB20611
		BTB20612
		BTB26650

(d) Subject

Joint Aircraft System Component (JASC) Code 7250, Turbine Section.

(e) Unsafe Condition

This AD was prompted by a manufacturer investigation that revealed that a certain forward outer seal and certain HPTR stage 1 disks and rotating seals were manufactured from material suspected to contain iron inclusion, which may cause reduced material properties and a lower fatigue life capability. The FAA is issuing this AD to prevent fracture and subsequent uncontained failure of a certain forward outer seal and certain HPTR stage 1 disks and rotating seals. The unsafe condition, if not addressed, could result in uncontained debris release, damage to the engine, and damage to the aircraft.

(f) Compliance

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

(g) Required Actions

(1) At the next piece-part exposure of the affected forward outer seal or before the affected forward outer seal exceeds 5,400 cycles since new (CSN), whichever occurs first after the effective date of this AD, remove the affected forward outer seal from service and replace with a part eligible for installation.

(2) At the next piece-part exposure of the affected rotating seal or before the affected rotating seal exceeds 5,200 CSN, whichever occurs first after the effective date of this AD, remove the affected rotating seal from service and replace with a part eligible for installation.

(3) Before further flight after the effective date of this AD, remove the affected HPTR stage 1 disk from service and replace with a part eligible for installation.

(h) Definitions

(1) For the purpose of this AD, a ''part eligible for installation'' is any forward outer seal, HPTR stage 1 disk, or rotating seal that does not have a P/N and S/N identified in Table 1 to paragraph (c) of this AD.

(2) For the purpose of this AD, ''piece-part exposure'' is when the affected part is removed from the engine and completely disassembled.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, AIR–520, Continued Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the branch, send it to the attention of the person identified in paragraph (j) of this AD and email to: *ANE-AD-AMOC@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(j) Related Information

For more information about this AD, contact Alexei Marqueen, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7178; email: *alexei.t.marqueen@faa.gov.*

(k) Material Incorporated by Reference

None.

Issued on September 7, 2023.

Ross Landes,

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

[FR Doc. 2023–19793 Filed 9–13–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF STATE

22 CFR Part 126

[Public Notice: 12155]

RIN 1400–AF69

International Traffic in Arms Regulations: Prohibited Exports, Imports, and Sales to or From Certain Countries—Cyprus

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: The Department of State is amending the International Traffic in Arms Regulations to reflect current defense trade policy toward Cyprus.

DATES: This rule is effective on October 1, 2023.

FOR FURTHER INFORMATION CONTACT: Ms. Maria Tatarska, Foreign Affairs Officer, Office of Defense Trade Controls Policy, U.S. Department of State, telephone (771) 205–7671; email *DDTCCustomerService@state.gov.* ATTN: Regulatory Change, ITAR Section 126.1 Cyprus Country Policy Update.

SUPPLEMENTARY INFORMATION: Section 1250A(d) of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92) (2020 NDAA) and section 205(d) of the Eastern Mediterranean Security and Energy Partnership Act of 2019 (Pub. L. 116–94, Div. J.) (EMSEPA) provide that the policy of denial for exports, reexports, and transfers of defense articles on the United States Munitions List to the Republic of Cyprus shall remain in place unless the President determines and certifies to the appropriate congressional committees, not less than annually, that: (A) the Government of the Republic of Cyprus is continuing to cooperate with the United States Government in efforts to implement reforms on anti-money laundering regulations and financial regulatory oversight; and (B) the Government of the Republic of Cyprus has made and is continuing to take the steps necessary to deny Russian military vessels access to ports for refueling and servicing.

On April 14, 2020, the President delegated to the Secretary of State the functions and authorities vested by the 2020 NDAA and the EMSEPA (85 FR 35797, June 12, 2020). On August 14, 2023, utilizing these authorities, the Secretary of State certified to the appropriate congressional committees that the Republic of Cyprus meets the statutory requirements to remove the policy of denial for exports, reexports, and transfers of defense articles to the Republic of Cyprus for fiscal year 2024. The Secretary of State further approved the suspension of the policy of denial for exports, reexports, and transfers of defense articles and defense services to the Republic of Cyprus for fiscal year 2024. In conjunction with this action, the Secretary of State also suspended the policy of denial for retransfers and temporary imports destined for or originating in the Republic of Cyprus and brokering activities involving the Republic of Cyprus for fiscal year 2024. Accordingly, the Department now amends section 126.1 of the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120 through 130) to specify that the Republic of Cyprus' status as a proscribed destination is suspended from October 1, 2023, through September 30, 2024. This action continues the Department's current policy, which suspended the status of the Republic of Cyprus as a proscribed destination under § 126.1 of the ITAR on October 1, 2022.

As a result of this change, certain exemptions to licensing requirements continue to be available for exports, reexports, retransfers, and temporary imports destined for or originating in the Republic of Cyprus and brokering activities involving the Republic of Cyprus, provided the conditions for use of those exemptions are met. Applications for licenses and other authorizations submitted to the Directorate of Defense Trade Controls involving the Republic of Cyprus and nationals of the Republic of Cyprus are subject to case-by-case review.

Regulatory Analysis and Notices

Administrative Procedure Act

This rulemaking is exempt from section 553 of the Administrative Procedure Act (APA) pursuant to section 553(a)(1) as a military or foreign affairs function of the United States. As the provisions of section 553 do not apply to this rulemaking, the Department is publishing this rule without a delay in its effective date or a request for public comment.

Regulatory Flexibility Act

Since this rule is exempt from the notice-and-comment rulemaking provisions of 5 U.S.C. 553, it does not require analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This rulemaking does not involve a mandate that will 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 year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

It is the view of the Office of Information and Regulatory Affairs that this rulemaking is not a major rule under the criteria of 5 U.S.C. 804. This rule will not increase costs or prices and should have no adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets. The Department does not expect this rule to have an annual effect on the economy of $100 million or more.

Executive Orders 12372 and 13132

This rulemaking does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this rulemaking.

Executive Orders 12866, 14094, and 13563

Executive Orders 12866 (as amended by Executive Order 14094) and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributed impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Because the scope of this rule implements a governmental policy expanding defense trade with a country, and does not impose additional regulatory requirements or obligations, the Department believes costs associated with this rule will be minimal. This rule has been designated as a significant regulatory action by the Office of Information and Regulatory Affairs under Executive Order 12866, as amended.

Executive Order 12988

The Department of State has reviewed this rulemaking in light of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175

The Department of State has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rulemaking.

Paperwork Reduction Act

This rulemaking does not impose or revise any information collections subject to 44 U.S.C. Chapter 35.

List of Subjects in 22 CFR Part 126

Arms and munitions, Exports.

Accordingly, for the reasons set forth above, title 22, chapter I, subchapter M, part 126 is amended as follows:

PART 126—GENERAL POLICIES AND PROVISIONS

■ 1. The authority citation for part 126 is revised to read as follows:

Authority: 22 U.S.C. 287c, 2651a, 2752, 2753, 2776, 2778, 2779, 2779a, 2780, 2791, 2797; Sec. 1225, Pub. L. 108–375, 118 Stat. 2091; Sec. 7045, Pub. L. 112–74, 125 Stat. 1232; Sec. 1250A, Pub. L 116–92, 133 Stat. 1665; Sec. 205, Pub. L. 116–94, 133 Stat. 3052; E.O. 13637, 78 FR 16129, 3 CFR, 2013 Comp., p. 223.

■ 2. Amend § 126.1 by revising paragraph (r) to read as follows:

§ 126.1 Prohibited exports, imports, and sales to or from certain countries.

* * * * *

(r) *Cyprus.* It is the policy of the United States to deny licenses or other approvals for exports or imports of defense articles and defense services destined for or originating in Cyprus, except that:

(1) A license or other approval may be issued, on a case-by-case basis, for the United Nations Forces in Cyprus (UNFICYP) or for civilian end-users; and

(2) From October 1, 2023, through September 30, 2024, the policy of denial and the status of Cyprus as a proscribed destination is suspended.

* * * * *

Bonnie Jenkins,

Under Secretary, Arms Control and International Security, Department of State.

[FR Doc. 2023–19851 Filed 9–13–23; 8:45 am]

BILLING CODE 4710–25–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 548

Publication of Belarus Sanctions Regulations Web General Licenses 8 and 9

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Publication of web general licenses.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing two general licenses (GLs) issued pursuant to the Belarus Sanctions Regulations: GLs 8 and 9, each of which was previously made available on OFAC's website.

DATES: GLs 8 and 9 were issued on August 9, 2023. See **SUPPLEMENTARY INFORMATION** for additional relevant dates.

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

SUPPLEMENTARY INFORMATION:

Electronic Availability

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

Background

On August 9, 2023, OFAC issued GLs 8 and 9 to authorize certain transactions otherwise prohibited by the Belarus Sanctions Regulations, 31 CFR part 548. GL 8 has an expiration date of October 9, 2023. GL 9 has an expiration date of September 8, 2023. Each GL was made available on OFAC's website (*https://ofac.treasury.gov*) at the time of publication. The text of these GLs is provided below.

OFFICE OF FOREIGN ASSETS CONTROL

Belarus Sanctions Regulations

31 CFR Part 548

GENERAL LICENSE NO. 8

Authorizing the Wind Down of Transactions Involving Joint Stock Company Byelorussian Steel Works Management Company of Holding Byelorussian Metallurgical Company

(a) Except as provided in paragraph (b) of this general license, all transactions prohibited by the Belarus Sanctions Regulations, 31 CFR part 548 (BSR), that are ordinarily incident and necessary to the wind down of any transaction involving Joint Stock Company Byelorussian Steel Works Management Company of Holding Byelorussian Metallurgical Company (BSW) or any entity in which BSW owns, directly or indirectly, a 50 percent or greater interest, including Bel-Kap-Steel LLC (collectively, ''BSW Entities''), are authorized through 12:01 a.m. eastern daylight time, October 9, 2023, provided that any payment to a BSW Entity must be made into a blocked account in accordance with the BSR.

Note to paragraph (a). The authorization in paragraph (a) of this general license includes authorization for U.S. persons to process and pay salaries, severance, and expenses, and to pay vendors and landlords, to the extent such transactions are ordinarily incident and necessary to the wind down of Bel-Kap-Steel LLC and do not involve a debit to a blocked account.

(b) This general license does not authorize any transactions otherwise prohibited by the BSR, including transactions involving any person blocked pursuant to the BSR other than the BSW Entities, unless separately authorized.

Andrea M. Gacki,
Director, Office of Foreign Assets Control.
Dated: August 9, 2023.

OFFICE OF FOREIGN ASSETS CONTROL

Belarus Sanctions Regulations

31 CFR Part 548

GENERAL LICENSE NO. 9

Authorizing Transactions Related to Civil Aviation Safety or the Wind Down of Transactions Involving Open Joint Stock Company Belavia Belarusian Airlines

(a) Except as provided in paragraph (c), all transactions prohibited by the Belarus Sanctions Regulations, 31 CFR part 548 (BSR), that are ordinarily incident and necessary to the provision, exportation, or reexportation of goods, technology, or services to ensure the safety of civil aviation involving Open Joint Stock Company Belavia Belarusian Airlines, or any entity in which Open Joint Stock Company Belavia Belarusian Airlines owns, directly or indirectly, a 50 percent or greater interest (collectively, the ''Belavia Entities''), are authorized through 12:01 a.m. eastern daylight time, September 8, 2023, provided that the goods, technology, or services that are provided, exported, or reexported are for use on aircraft operated solely for civil aviation purposes.

(b) Except as provided in paragraph (c), all transactions prohibited by the BSR that are ordinarily incident and necessary to the wind down of any transaction involving the Belavia Entities, are authorized through 12:01 a.m. eastern daylight time, September 8, 2023, provided that any payment to a Belavia Entity must be made into a blocked account in accordance with the BSR.

(c) This general license does not authorize any transactions otherwise prohibited by the BSR, including transactions involving any person blocked pursuant to the BSR other than the Belavia Entities, unless separately authorized.

Note to General License 9. Nothing in this general license relieves any person from compliance with any other Federal laws or requirements of other Federal agencies, including export, reexport, and transfer (in-country) licensing requirements maintained by the Department of Commerce's Bureau of Industry and Security under the Export Administration Regulations, 15 CFR parts 730–774.

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

Dated: August 9, 2023.

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

[FR Doc. 2023–19887 Filed 9–13–23; 8:45 am]
BILLING CODE 4810–AL–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2023–0487]

Special Local Regulation; Marine Events Within the Eleventh Coast Guard District—Swim for Special Operations Forces

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the special local regulation on the waters of San Diego Bay, CA, during the Swim for Special Operations Forces on September 16, 2023. This special local regulation is necessary to provide for the safety of the participants, crew, sponsor vessels of the event, and general users of the waterway. During the enforcement period, persons and vessels are prohibited from entering into, transiting through, or anchoring within this regulated area unless authorized by the Captain of the Port, or his designated representative.

DATES: The regulations in 33 CFR 100.1101 for the location described in Item 16 in table 1 to § 100.1101, will be enforced from 7:30 a.m. until Noon on September 16, 2023.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notification of enforcement, call or email Lieutenant Junior Grade Shelley Turner, Waterways Management, U.S. Coast Guard Sector San Diego, CA; telephone (619) 278–7656, email *MarineEventsSD@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the special local regulations in 33 CFR 100.1101 for the location identified in Item No. 16 in table 1 to § 100.1101, from 7:30 a.m. until Noon on September 16, 2023, for the Swim for Special Operations Forces in San Diego Bay, CA. This action is being taken to provide for the safety of life on the navigable waterways during the event. Our regulation for recurring marine events in the San Diego Captain of the Port Zone, § 100.1101, Item No. 16 in table 1 to § 100.1101, specifies the location of the regulated area for the Swim for Special Operations Forces, which encompasses portions of San Diego Bay. Under the provisions of § 100.1101, persons and vessels are prohibited from entering into, transiting through, or anchoring within this regulated area unless authorized by the Captain of the Port, or his designated representative. The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

In addition to this document in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of this enforcement period via the Local Notice to Mariners and marine information broadcasts.

Dated: September 8, 2023.

J.W. Spitler,
Captain, U.S. Coast Guard, Captain of the Port San Diego.

[FR Doc. 2023–19869 Filed 9–13–23; 8:45 am]
BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0703]

RIN 1625–AA00

Safety Zone; San Diego Bay, San Diego, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is proposing to establish a temporary safety zone for certain waters of the San Diego Bay. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards during a U.S. Army parachute demonstration. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Sector San Diego.

DATES: This rule is effective from 10 a.m. to noon on September 18th, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2023–0703 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed

rulemaking, call or email LTJG Shelley Turner, Waterways Management, U.S. Coast guard Sector San Diego, Coast Guard; telephone 619–278–7656, email *MarineEventsSD@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it would be impracticable as the Coast Guard did not receive final details until August 3rd, 2023, and must establish this safety zone by September 18th, 2023.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because the Coast Guard must establish this safety zone by September 18th, 2023.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port Sector San Diego (COTP) has determined that potential hazards associated with the U.S. Army's parachute demonstration on September 18th, 2023, will be a safety concern for anyone within a 100-yard radius of USS MIDWAY. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone during the demonstration.

IV. Discussion of the Rule

This rule establishes a safety zone from 10 a.m. until noon on September 18, 2023. The safety zone will cover all navigable waters within 100 yards of the USS MIDWAY. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters while the parachute demonstration is being conducted. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a ''significant regulatory action,'' under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, location, duration, and time-of-day of the regulated area. The affected portion of the San Diego Bay will be of very limited duration and is necessary for safety of life to participants in the event. Moreover, the Coast Guard would make a post in the Local Notice to Mariners with details on the regulated area, as well as issue a Safety Marine Information Broadcast over Channel 22A.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In

particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a 100 yard radius safety zone around the USS MIDWAY lasting 2 hours during the U.S. ARMY's parachute demonstration. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 46 U.S.C. 70034, 70051, 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 § 165.T11–130 to read as follows:

§ 165.T11–130 Safety Zone; San Diego Bay, San Diego, California.

(a) *Location.* The following area is a safety zone: all water surface to the bottom encompassing a 100-yard radius around USS MIDWAY.

(b) *Definitions.* As used in this section, *designated representative* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Sector San Diego (COTP) in the enforcement of the safety zone.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative by VHF–FM Channel 21A or by telephone at 619–278–7033. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement period.* This section will be enforced from 10 a.m. to noon on September 18, 2023.

Dated: September 8, 2023.

J.W. Spitler,

Captain, U.S. Coast Guard, Captain of the Port San Diego.

[FR Doc. 2023–19870 Filed 9–13–23; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 2

[OGC–2022–0885; FRL 5630–01–OGC]

RIN 2025–AA38

Freedom of Information Act Regulations Update; Phase II

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA or Agency) finalizes revisions to the Agency's regulations under the Freedom of Information Act (FOIA or Act). This action supports the Agency's mission by updating the process by which the public may access information about EPA actions and activities.

DATES: This rule is effective on November 13, 2023.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. OGC–2022–0885. All documents in the docket are listed on the *http://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Christopher T. Creech, Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, (2310A), Washington, DC 20460; telephone, 202–564–4286; email, *creech.christopher@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. General Information
II. Background
III. Summary of Provisions Finalized as Proposed
IV. Summary of Changes From Proposal
V. Statutory and Executive Orders Reviews

I. General Information

A. Does this action apply to me?

This discussion is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This discussion includes the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not included could also be regulated. To determine whether your entity is regulated by this action, you should carefully examine the applicability criteria found in 40 CFR part 2. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

B. What action is the Agency taking?

This action finalizes changes to EPA's FOIA regulations at 40 CFR part 2. The changes alter the process by which individuals and entities request records from EPA under the Act. EPA makes changes to clarify certain provisions and align with the FOIA and with EPA and government-wide policy.

In the 2019 ''Freedom of Information Act Regulations Update,'' 84 FR 30028, July 26, 2019 (Phase I Rule), EPA stated its intention to conduct a second rulemaking phase to make discretionary and modernizing changes. Consistent with that statement, EPA is finalizing the proposal published on November 17. 2022 with certain changes. *See*

Freedom of Information Act Regulations Update; Phase II, 87 FR 68946.

II. Background

This action is the second phase in a two-phase process to update the Agency's FOIA regulations. On June 26, 2019, effective July 26, 2019, EPA issued the Phase I Rule to ''bring EPA's regulations into compliance with nondiscretionary provisions of the amended statute and reflect changes in the Agency's organization, procedure, or practice.'' 84 FR 30028.

III. Summary of Provisions Finalized as Proposed

Below is a summary of the provisions that EPA finalizes in the same form that they were proposed.

A. Time for Response to Modification Request

EPA adds a statement that requires a requester to modify a request within 20 calendar days after an EPA notice that the request is not reasonably described. 40 CFR 2.102(c) requires that requesters reasonably describe the records that they are seeking. EPA did, and continues to, provide requesters with an opportunity to discuss and modify a request that does not reasonably describe the records sought. Previously, however, there was no clear timeline for requesters to modify a request. If a requester sufficiently modifies the request to meet the requirements of 40 CFR 2.102(c) within 20 calendar days, EPA will not close the request.

B. Readability and Useful Information

EPA reorganizes, but makes no substantive changes to, 40 CFR 2.100(a) by moving to separate paragraphs the sentences describing other regulations relevant to the release of information.

EPA creates a new paragraph (f) in section 2.100 to direct the public to the Agency's website (*epa.gov/foia*) for records made publicly available in compliance with 5 U.S.C. 522(a)(2)(D)(ii)(II).

EPA consolidates the provisions in EPA's FOIA regulations that discuss the timing of EPA's response to FOIA requests to simplify and accurately represent EPA's obligations under the FOIA. This change combines into section 2.104(a) previous sections 2.101(a)(4) and 2.102(a), and directly incorporates into section 2.104(a) the FOIA's language on timing of response from 5 U.S.C. 552(a)(6)(A)(i). EPA also explains at section 2.104(f) that EPA will work with requesters to come to an agreement regarding alternative timeframes for processing the request when EPA provides notice pursuant to 5 U.S.C. 552(a)(6)(B)(i) and (ii).

EPA adds to section 2.104(a)(2) providing that a request submitted after 5:00 p.m. Eastern Time is considered received on the next business day. This change states the corollary of the already existing and unchanged language stating that requests submitted before 5:00 p.m. are considered received on that business day. EPA modifies section 2.108(b) to state that appeals submitted after 5:00 p.m. Eastern Time are considered received on the next business day.

C. Consistency With Government-Wide Policy

EPA makes three changes, found at sections 2.106, 2.108(d)(3), and 2.108(e)(1), which discuss the preservation of records, handling of appeals after FOIA litigation, and the contents of adverse administrative appeals decisions.

EPA updates 40 CFR 2.107(b) to state that payments by check or money order should be made out to the Treasury of the United States.

EPA revises all references to EPA's electronic submission website, FOIAonline (*www.FOIAonline.gov*), to a more general location, EPA's FOIA website (*www.epa.gov/foia*). EPA will identify for requesters the electronic submission platform's new link on EPA's FOIA website.

D. 2019 Phase I Regulations

EPA removes the clause in 40 CFR 2.103(b) that described the phrase ''determinations required by 5 U.S.C. 552(a)(6)(A).'' 40 CFR 2.103(b) previously stated ''[Listed positions within EPA] are authorized to make determinations required by 5 U.S.C. 522(a)(6)(A), including to issue final determinations whether to release or withhold a record or a portion of a record on the basis of responsiveness or under one or more of the exemptions under the FOIA, and to issue 'no records' responses.'' 40 CFR 2.103(b) now states that ''[Listed positions within EPA] are authorized to make determinations required by 5 U.S.C. 522(a)(6)(A).''

EPA does not reinstate any methods of submission that EPA removed through the issuance of the 2019 FOIA Regulations Update. *See* 2019 FOIA Regulations Update, 84 FR 30028 at 30030, July 26, 2019. EPA continues to accept FOIA requests through its FOIA submission website, an electronic submission website established pursuant to 5 U.S.C. 552(m), and U.S. Mail and overnight delivery sent to the National FOIA Office.

E. General Processing Changes

EPA changes the ''ordinary'' search cut-off date identified in section 2.103(a) from the date the request was received to the date the Agency begins its search for responsive records.

EPA adds a provision at 40 CFR 2.107(l) that states EPA may aggregate FOIA requests when EPA reasonably believes that multiple requests—submitted either by a requester or by a group of requesters acting in concert—constitute a single request that would otherwise give rise to unusual circumstances and the requests involve related matters.

EPA adds a provision at 40 CFR 2.104(f) that states EPA may assign multiple tracking numbers to a request with distinct parts that will be processed by separate regions or program offices. EPA will notify the requester of the separate tracking numbers for the distinct parts of the request, which thereafter would be processed and responded to separately and will be provided with separate appeal rights on completion.

EPA modifies the methods of submission of FOIA appeals, located at section 2.108(a), to match the methods of submission of FOIA requests.

F. Fee Rates Update

EPA establishes new fee rates, located at 40 CFR 2.107(f)(2)(ii) tied to the U.S. Office of Personnel and Management's General Schedule (GS) scale. EPA now has two fee rates for Agency personnel time spent processing FOIA requests, one rate for grades GS–12 and below and a second rate for those with grades GS–13 and above. Both rates are adjusted for the value of benefits, expressed in quarter-hour rates, and rounded to the nearest $1 increment. As of the date of signature, the proposed rates would be calculated as explained below.

Employees GS–12 and Below

Average Quarter-Hour Rate of GS–9 Step 1, GS–10 Step 1, GS–11 Step 1, and GS–12 Step 1 ($8.83) + Benefits (16% or $1.41) = $10.25 = (rounded to the nearest $1 increment) $10.00/quarter hour

Employees GS–13 and Above

Average Quarter-Hour Rate for GS–13 Step 1, GS–14 Step 1, and GS–15 Step 1 ($15.24) + Benefits (16% or $2.43) = $17.67 = (rounded to the nearest $1 increment) $18.00/quarter-hour

G. Minimum Fee Threshold

EPA increases the minimum fee threshold, located at 40 CFR 2.107(g)(1), to an amount calculated by formula,

which, as of the publication of this rule is $250. That formula would apply a fourteen (14) times multiplier to the rate set in 40 CFR 2.107(e)(2)(ii)(B), rounded to the nearest $5 increment. As of the date of signature, the minimum fee threshold would be calculated as explained below.

Fee rate listed in 40 CFR 2.107(f)(2)(ii)(B) ($18.00) × 14 = $252 = (rounded to the nearest $5 increment) $250

H. Automatic Agreement To Pay Fees

EPA removes the provision specifying that a requester automatically agrees to pay up to $25 in fees when they submit a FOIA request. Because EPA raises the minimum fee threshold, EPA believes that an automatic agreement to fees at any amount at or above $250 may dissuade some requesters from submitting FOIA requests.

I. Assurance of Payment Threshold

EPA raises the assurance of payment threshold, located at 40 CFR 2.107(h)(1), to an amount calculated by formula, which, as of the publication of this rule is $250. When EPA estimates fees or accumulates actual fees equaling or exceeding the assurance of payment threshold, EPA seeks from a requester an assurance that the requester will pay the fees associated with the FOIA request. The formula would tie the assurance of payment threshold to the minimum fee threshold (40 CFR 2.107(g)(1)).

J. Advanced Payment Threshold

EPA increases the advanced payment threshold, located at 40 CFR 2.107(h)(2), to an amount that would currently calculate to $450 and proposes a formula for calculating the advance payment threshold that will be self-escalating as EPA's costs increase in future years. When EPA estimates fees or accumulates actual fees equaling or exceeding the advanced payment threshold, EPA may seek advanced payment from a requester of the estimated or actual fees associated with the FOIA request.

Fee rate listed in proposed 40 CFR 2.107(f)(2)(ii)(B) ($18.00) × 25 = $450

K. Estimated or Actual Fee Assessment

EPA adds language at 2.107(h)(5) explaining that EPA's reassessment of actual or estimated fees may result in EPA re-seeking assurance of payment or advanced payment. This provision provides clarity and informs the public regarding EPA's practices by describing a scenario where EPA has previously informed the requester of the amount of actual or estimated fees and, after further processing, EPA has updated its actual or estimated fee assessment.

L. Failure To Pay Charged Fees

EPA revises the provisions applicable to delinquent requesters. Previous EPA regulations discussed the failure to pay fees in several separate locations (previous sections 2.107(h) and (j). EPA consolidates these provisions into 40 CFR 2.107(k). EPA also adds a sentence stating that the Agency may share information regarding delinquent requesters with other Federal agencies.

IV. Summary of Changes From Proposal

Below is a summary of the changes from what EPA proposed and what EPA finalizes today.

A. Environmental Justice Expedited Processing Criteria

EPA proposed, and here finalizes, a provision to allow requesters to seek expedited processing of their request if the records sought pertain to an environmental justice-related need and will be used to inform an affected community. 5 U.S.C. 552(a)(6)(E)(i) provides that EPA may issue regulations ''providing for expedited processing of requests for records (I) in cases in which the person requesting the records demonstrates a compelling need; *and* (II) in other cases determined by the agency.'' (emphasis added). The Act defines what constitutes a ''compelling need,'' *id.* at section 552(a)(6)(E)(v), and does not limit the ''other cases'' that the Agency may determine merit expedited processing.

EPA finalizes the proposed provision with two minor changes. EPA makes the first change to reflect a change in relevant descriptive language used in Executive Order 14096. EPA modifies the phrase ''disproportionately high and adverse human health or environmental effects'' to read ''disproportionate and adverse human health or environment effects.'' This change will ensure consistency with EPA policy but is not intended to have substantive impact on EPA's implementation on the environmental justice-need expedited processing provision.

EPA makes the second change to improve the readability of the environmental justice expedited processing criteria. EPA reorganizes but does not substantively change 40 CFR 2.107(g)(ii). As proposed, the provision specified considerations in both 2.107(g)(ii) and in the subsequent subparagraphs. The reorganization identifies in a list format the specific elements EPA will consider. EPA believes that this change is clearer than the proposal and will benefit requesters by providing a set of elements that flow in a logical and express manner.

The provision providing expedited processing for an environmental justice-related need is in addition to and does not modify the provision granting expedited processing for requests demonstrating a ''compelling need,'' which the FOIA provides at 5 U.S.C. 552(a)(6)(E)(i)(I). This new expedited processing category targets a recognized need for communities with environmental justice concerns to have timely access to information.

Executive Order 14096 defines environmental justice as ''the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision-making and other Federal activities that affect human health and the environment[.]'' EPA recognizes that timely access to information contained in EPA records improves the opportunity for meaningful involvement by communities with environmental justice concerns.

To determine whether an application for expedited processing qualifies under this provision, the Agency will consider: (1) whether the requested records relate to actual or alleged Federal government activity, including Agency records containing environmental information or data; (2) the extent to which there is a pressing need to inform the community about the Federal government activity; (3) the extent to which the community is potentially experiencing disproportionate and adverse human health or environmental effects; and (4) the requester's ability and intention to effectively convey the information to members of the community.

EPA will use EJScreen as a source of facts to determine whether the community cited by the requester is potentially experiencing environmental justice concerns. As EPA previously explained in the preamble to the proposed rule, EJScreen is an environmental justice mapping and screening tool that provides EPA with a nationally consistent dataset and approach for combining environmental and demographic indicators into Environmental Justice indexes. EJScreen's ''Supplemental Indexes'' are thirteen indexes calculated by combing a single environmental indicator and the supplemental demographic index. The Supplemental Indexes do not factor in racial status. EJScreen may also be a valuable tool for requesters to assess whether the community about which they are seeking records may be affected

by disproportionate and adverse human health or environmental effects. More information regarding EJScreen is available at this link: *https://www.epa.gov/ejscreen/environmental-justice-indexes-ejscreen.* EPA notes that it will consider additional information the requester provides if the additional information is not adequately reflected in the methods and tools available to the Agency, like EJScreen's Supplemental Indexes, and the Agency is not otherwise prohibited from considering the information.

One commenter suggested that EPA ''make[ ] clear that any criteria be applied flexibly and generously to accomplish the goals of this provision.'' EPA acknowledges the commenter's concern and will implement the provision consistent with the regulatory text. As such, EPA provides the following examples of types of requests that EPA would consider as evidencing a pressing need to inform a community potentially experiencing environmental justice-related concerns.

—Requests for EPA-held data or communications that are reasonably likely to contain information that is directly relevant to an environmental harm affecting a community potentially experiencing environmental justice-related concerns.
—Requests for information about or relevant to an action or policy, existing or in development, that is reasonably likely to have a direct, imminent, and cognizable connection to a threat to human health in a community experiencing environmental justice-related concerns.

On the other hand, EPA would *not* consider the following types of requests to show a pressing need to inform the community.

—Requests for information about a nation-wide action or policy, either existing or in development, that is largely only of general interest to the public.
—Requests for environmental data without a direct and cognizable connection to the community.
—Requests for information that is primarily in the commercial interest of the requester.
—Requests for communications which are not reasonably likely to contain information related to the community.
—Requests for wholly publicly available information.
—Requests for information about an environmental concern not affecting or not reasonably likely to affect the community.

One commenter suggested that EPA remove the evaluation criteria regarding the requester's intent and ability to effectively convey the information to members of the community that is potentially experiencing disproportionate and adverse human health or environmental effects. EPA declines to make this change. The purpose of considering the requesters intent and ability to effectively convey the information to members of the community is to ensure that those seeking the information can and are likely to meet the information needs of members of the community. EPA believes that this consideration is essential to both the purpose and effective implementation of the provision.

For clarity on how EPA intends to implement the ''ability and intention'' element, EPA provides the following examples that EPA would consider as evidencing an ability and intent to inform the community potentially experiencing environmental justice-related concerns:

—The requester is a membership or community-based organization with active members in the community and that disseminates environmental- or health-related information to those members.
—The requester is a news organization with active subscribers in the community and that disseminates environmental- or health-related information to those subscribers.
—The requester has demonstrated a particular technical expertise in the subject area and has previously directly disseminated information to the community or similar communities.

EPA would consider the following types of requests to *not* show an intent and ability to inform the community potentially experiencing environmental justice-related concerns:

—The requester's stated ability to disseminate the information to the community is limited to passive or indirect means (*e.g.,* dissemination through a website, newsletter, or other publication without indication of directly reaching members of the community).
—A requester without either a direct connection to the community or a demonstrated expertise in the subject matter.
—A requester without a direct connection to the community and without a mission and history of disseminating information to the community.
—The Agency may consider previous failures to disseminate to the community information a requester received from EPA through an expedited request for records.

B. Definition of Reasonably Described Requests

EPA proposed modifying previous section 2.102(c) to state that ''Requesters should reasonably describe the records sought in sufficient detail to enable agency personnel to locate them with a reasonable amount of effort.'' One commenter suggested to use alternative language from *Truitt* v. *Department of State. See* 897 F.2d 540 (D.C. Cir. 1990). EPA agrees with the comment and changes the sentence, which is now located at section 2.102(b)(1), to state that ''Requesters must reasonably describe the records sought in sufficient detail to enable a professional employee of the agency who is familiar with the subject area of the request to locate the records with reasonable amount of effort.'' *See Truitt* v. *Dep't of State,* 897 F.2d 540, 545 n.36 (D.C. Cir. 1990), quoting H.R. Rep. No. 93–876, 93d Cong., 2d Sess. 5–6 (1974).

C. Requests for Waiver and Reduction of Fees

EPA proposed to incorporate a requirement that a requester must submit a statement, certified to be true and correct to the best of the requester's knowledge and belief, explaining in detail the basis for the fee waiver request. EPA does not finalize that proposed provision at this time.

D. Language Referring to Appeal Letter

EPA received one comment about the use of the term ''appeal letter'' in the section of the regulations discussing administrative appeals, 40 CFR 2.108. The comment stated that the use of the word ''letter'' was misleading and implied that physical mail is suggested or preferred for purposes of appeal. Dropping the term ''letter'' would provide clarity to requesters. EPA reviewed the use of the word ''letter'' and related terms and updated 40 CFR 2.108(c). These changes have no substantive impact on EPA or the public and are meant solely for clarity.

E. Grammatical Edit

EPA received one comment noting that the hyphen is not needed in the phrase ''90-calendar days'' and should be removed. EPA agrees with the commentor will make the suggested change at 40 CFR 2.108(a).

V. Statutory and Executive Orders Reviews

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

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA.

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. 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 has no net burden on the small entities subject to the rule. This final rule does not impose any new requirements on small entities, and the EPA FOIA regulation's requirements apply equally to all FOIA requesters. This rule raises the FOIA fee rates, which EPA applies when EPA charges for the direct costs of EPA staff's time. This change does not represent a significant economic impact and any impact will be offset by increasing the minimum fee threshold. If EPA does not accumulate chargeable fees in an amount above the minimum fee threshold, then EPA does not charge fees. We have therefore concluded that this action will have no net regulatory burden for all directly regulated small entities.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandates as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

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

This action does not have tribal implications as specified in Executive Order 13175. It will not have substantial direct effects on Indian Tribal governments or on the relationship between the national government and the Indian Tribal governments. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the 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 subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

This rule does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority 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 low-income populations.

The 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, the EPA identifies and addresses environmental justice concerns by finalizing a provision to allow requesters to seek expedited processing of their request if the records sought pertain to an environmental justice-related need and will be used to inform an affected community. See section IV.A. of this preamble.

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 2

Environmental protection, Administrative practice and procedure, Confidential business information, Freedom of information, Government employees.

Michael S. Regan,

Administrator.

For the reasons set forth in the preamble, the EPA amends title 40 of the Code of Federal Regulations, part 2 as follows:

PART 2—PUBLIC INFORMATION

■ 1. The authority citation for part 2 continues to read as follows:

Authority: 5 U.S.C. 552, 552a, 553; 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717.

■ 2. Subpart A of Part 2 is revised to read as follows:

PART 2—PUBLIC INFORMATION

Subpart A—Procedures for Disclosure of Records Under the Freedom of Information Act

Sec.

2.100 General provisions.
2.101 Where to file requests for records.
2.102 Procedures for making requests.
2.103 Responsibility for responding to requests.
2.104 Responses to requests.
2.105 [Reserved]
2.106 Preservation of records.
2.107 Fees.
2.108 Administrative appeals.
2.109 Other rights and services.

Subpart A—Procedures for Disclosure of Records Under the Freedom of Information Act

§ 2.100 General provisions.

(a) *General.* This subpart contains the rules that the Environmental Protection

Agency (EPA or Agency) follows in processing requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. Information routinely provided to the public as part of a regular EPA activity may be provided to the public without following this subpart.

(b) *Other regulatory provisions.* (1) Subpart B of this part contains requirements pertaining to the confidentiality of business information.

(2) 40 CFR part 16 contains requirements pertaining to Privacy Act requests.

(c) *Statutory-based fee schedule programs.* EPA will inform the requester of the steps necessary to obtain records from agencies operating statutory-based fee schedule programs, such as, but not limited to, the Government Printing Office or the National Technical Information Service.

(d) *National FOIA Office.* The Chief FOIA Officer designates the office that performs the duties of the National FOIA Office. The National FOIA Office reports to the Chief FOIA Officer.

(e) *FOIA Public Liaison.* The Chief FOIA Officer designates the FOIA Public Liaisons. The FOIA Public Liaisons report to the Chief FOIA Officer. A FOIA Public Liaison is responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes. A FOIA Public Liaison is an official to whom a requester can raise concerns about the service the requester received from the FOIA Requester Service Center. The public can find more information about the FOIA Public Liaisons at EPA's website.

(f) *Other record availability.* Records required by FOIA to be made available for public inspection and copying are accessible through EPA's FOIA website, *http://www.epa.gov/foia.* EPA also proactively discloses records and information through the Agency's website, *www.epa.gov.*

§ 2.101 Where to file requests for records.

(a) Requesters must submit all requests for records from EPA under the FOIA in writing and by one of the following methods:

(1) EPA's FOIA submission website, linked to at *www.epa.gov/foia;*

(2) An electronic government submission website established pursuant to 5 U.S.C. 552(m), such as *FOIA.gov;*

(3) U.S. Mail sent to the following address: National FOIA Office, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW (2310A), Washington, DC 20460; or

(4) Overnight delivery service to National FOIA Office, U.S. Environmental Protection Agency, 1200 Pennsylvania NW, Room 7309C, Washington, DC 20460.

(b) EPA will not treat a request submitted by any method other than those listed in § 2.101(a) as a FOIA request, and the Agency will not re-route such a request.

(c) The requester or requester organization must include the full name of their point of contact and their mailing address for EPA to process the request. For all requests, requesters should provide an email address and daytime telephone number whenever possible. For requests submitted through EPA's FOIA submission website or as provided by an electronic government submission website established pursuant to 5 U.S.C. 552(m), requesters must include an email address. For requests submitted through U.S. Mail, the requester must mark both the request letter and envelope ''Freedom of Information Act Request.''

(d) EPA provides access to all records that the FOIA requires an agency to make regularly available for public inspection and copying. Each office is responsible for determining which of the records it generates are required to be made publicly available and for providing access by the public to them. The Agency will also maintain and make available for public inspection and copying a current subject matter index of such records and provide a copy or a link to the respective website for Headquarters or the Regions. Each index will be updated regularly, at least quarterly, with respect to newly-included records.

(e) All records created by EPA on or after November 1, 1996, which the FOIA requires an agency to make regularly available for public inspection and copying, will be made available electronically through EPA's website, located at *http://www.epa.gov,* or, upon request, through other electronic means. EPA will also include on its website the current subject matter index of all such records.

§ 2.102 Procedures for making requests.

(a) EPA employees may attempt in good faith to comply with oral requests for inspection or disclosure of EPA records that are publicly available under § 2.201(a) and (b), but such requests are not subject to the FOIA or this Part.

(b)(1) Requesters must reasonably describe the records sought in sufficient detail to enable a professional employee of the Agency who is familiar with the subject area of the request to locate the records with a reasonable amount of effort.

(2) If EPA determines that a request does not reasonably describe the requested records as provided in § 2.102(b)(1), EPA will tell the requester either what additional information the requester needs to provide or why the request is otherwise insufficient. EPA will also give the requester an opportunity to discuss and modify the request to meet the requirements of § 2.102(b)(1). If the requester fails to modify the request to meet the requirements of § 2.102(b)(1) within 20 calendar days, EPA will not process the submission and close the request. If the requester does modify the request to meet the requirements of § 2.102(b)(1), EPA will consider the request received as of the date the modification is received by EPA.

(3) Whenever possible, a request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter. If known, the requester should include any file designations or descriptions for the records that the requester wants. The more specific the requester is about the records or type of records that the requester wants, the more likely EPA will be able to identify and locate records responsive to the request.

§ 2.103 Responsibility for responding to requests.

(a) *In general.* Upon receipt of a FOIA request under § 2.101(a), the National FOIA Office will assign the request to an appropriate office within the Agency for processing. To determine which records are within the scope of a request, an office will ordinarily include only those records in the Agency's possession as of the date that the Agency begins its search. The Agency will inform the requester if any other date is used.

(b) *Authority to issue final determinations.* The Administrator, Deputy Administrators, Assistant Administrators, Deputy Assistant Administrators, Regional Administrators, Deputy Regional Administrators, General Counsel, Deputy General Counsels, Regional Counsels, Deputy Regional Counsels, and Inspector General or those individuals' delegates, are authorized to make determinations required by 5 U.S.C. 552(a)(6)(A).

(c) *Authority to grant or deny fee waivers or requests for expedited processing.* EPA's Chief FOIA Officer or EPA's Chief FOIA Officer's delegates are authorized to grant or deny requests for fee waivers or requests for expedited processing.

(d) *Consultations and referrals.* When a request to EPA seeks records in EPA's possession that originated with another Federal agency, the EPA office assigned to process the request shall either:

(1) In coordination with the National FOIA Office, consult with the Federal agency where the record or portion thereof originated and then respond to the request, or

(2) With the concurrence of the National FOIA Office, refer any record to the Federal agency where the record or portion thereof originated. The National FOIA Office will notify the requester whenever all or any part of the responsibility for responding to a request has been referred to another agency.

(e) *Law enforcement information.* Whenever a requester makes a request for a record containing information that relates to an investigation of a possible violation of law and the investigation originated with another agency, the assigned office, with the concurrence of the National FOIA Office, will refer the record to that other agency or consult with that other agency prior to making any release determination.

(f) *Assigning tracking numbers.* EPA may assign multiple tracking numbers to a FOIA request that contains unrelated parts that will be processed separately by multiple regions or headquarters program offices.

§ 2.104 Responses to requests.

(a) *Timing of response.* (1) Consistent with 5 U.S.C. 552(a)(6)(A) and upon any request for records made pursuant to this subpart, EPA shall determine within 20 working days after receipt of any such request whether to comply with such request and shall immediately notify the person according to this section.

(2) A requester submitting a request electronically must do so before 5:00 p.m. Eastern Time for the Agency to consider the request as received on that date, and a request submitted electronically at or after 5 p.m. Eastern Time will be considered received by the National FOIA Office on the next business day.

(3) The timeframe for response may be extended if unusual circumstances exist per paragraph (f) of this section, including when EPA asserts unusual circumstances and arranges an alternative timeframe with the requester, or exceptional circumstances exist per paragraph (g) of this section. The timeframe for response may be tolled per paragraph (e) of this section.

(b) *Agency failure to respond.* If EPA fails to respond to the request within the statutory time-period, or any authorized extension of time, the requester may seek judicial review to obtain the records without first making an administrative appeal.

(c) *Acknowledgment of request.* On receipt of a request, the National FOIA Office ordinarily will send a written acknowledgment advising the requester of the date the Agency received the request and of the processing number assigned to the request for future reference.

(d) *Multitrack processing.* The Agency uses three or more processing tracks by distinguishing between simple and complex requests based on the amount of work, time needed to process the request, or both, including limits based on the number of pages involved. The Agency will advise the requester of the processing track in which the Agency placed the request and the limits of the different processing tracks. The Agency may place the request in a slower track while providing the requester with the opportunity to limit the scope of the request to qualify for faster processing within the specified limits of a faster track. If the Agency places the request in a slower track, the Agency will contact the requester.

(e) *Tolling the request.* EPA shall not toll the processing time-period except:

(1) The Agency may toll the processing time-period one time while seeking clarification from the requester; or

(2) The Agency may toll the processing time-period as many times as necessary to resolve fee issues.

(f) *Unusual circumstances.* (1) When the Agency cannot meet statutory time limits for processing a request because of "unusual circumstances," as defined in the FOIA, and the time limits are extended on that basis, the Agency will notify the requester in writing, as soon as practicable, of the unusual circumstances and of the date by which processing of the request should be completed.

(2) If the 20 working-day period is extended, EPA will give the requester an opportunity to limit the scope of the request, modify the request, or agree to an alternative time-period for processing, as described by the FOIA.

(3) EPA will provide contact information for its FOIA Public Liaison to assist in the resolution of any disputes between the requester and the Agency, and the Agency will notify the requester of their right to seek dispute resolution services from the Office of Government Information Services within the National Archives and Records Administration.

(g) *Expedited processing.* (1) EPA will take requests or appeals out of order and give expedited treatment whenever EPA determines that such requests or appeals involve a compelling need, an environmental justice-related need, or both.

(i) A compelling need is defined as either:

(A) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(B) An urgency to inform the public about an actual or alleged Federal government activity, if the information is requested by a person primarily engaged in disseminating information to the public.

(ii) For purposes of this provision, an environmental justice-related need means a pressing need to inform a community that is potentially experiencing disproportionate and adverse human health or environmental effects. The Agency will consider:

(A) Whether the requested records relate to actual or alleged Federal government activity, including Agency records containing environmental information or data.

(B) The extent to which there is a pressing need to inform the community about the Federal government activity. A pressing need to inform does not include requests where the disclosure is primarily in the commercial interest of the requester.

(C) The extent to which the community is potentially experiencing disproportionate and adverse human health or environmental effects.

(D) The requester's ability and intention to effectively convey the information to members of the community.

(iii) If the Agency grants a request for expedited processing under paragraph (g)(1)(ii) of this section, the Agency will also waive fees established under § 2.107(f) for the request.

(2) Requesters must make a written request for expedited processing at the time of the initial request for records or at the time of appeal.

(3) If the requester seeks expedited processing, the requester must submit a statement, certified to be true and correct to the best of the requester's knowledge and belief, explaining in detail the basis for the request.

(i) For example, if the requester fits within the category described in paragraph (g)(1)(i)(B) of this section and is not a full-time member of the news media, the requester must establish that they are a person whose primary professional activity or occupation is information dissemination, although it

need not be the requester's sole occupation.

(ii) If the requester fits within the category described in paragraph (g)(1)(i)(B) of this section, the requester must also establish a particular urgency to inform the public about the government activity involved in the request, beyond the public's right to know about government activity generally.

(4) Within 10 calendar days from the date of the request for expedited processing, the Chief FOIA Officer, or the Chief FOIA Officer's delegates, will decide whether to grant the request and will notify the requester of the decision. If the Agency grants the request for expedited processing, the Agency will give the request priority and will process the request as soon as practicable. If the Agency denies the request for expedited processing, the Agency will act on any appeal of that decision expeditiously.

(h) *Grants of requests.* Once the Agency determines to grant a request in whole or in part, it will release the records or parts of records to the requester and notify the requester of any applicable fee charged under § 2.107. The office will annotate records released in part, whenever technically feasible, with the applicable FOIA exemption or exemptions at that part of the record from which the exempt information was deleted.

(i) *Adverse determinations of requests.* When the Agency makes an adverse determination, the Agency will notify the requester of that determination in writing. Adverse determinations include:

(1) A decision that the requested record is exempt from disclosure, in whole or in part;

(2) A decision that the information requested is not a record subject to the FOIA;

(3) A decision that the requested record does not exist or cannot be located;

(4) A decision that the requested record is not readily reproducible in the form or format sought by the requester;

(5) A determination on any disputed fee matter, including a denial of a request for a fee waiver; or

(6) A denial of a request for expedited processing.

(j) *Content of final determination letter.* The appropriate official will issue the final determination letter in accordance with § 2.103(b) and will include:

(1) The name and title or position of the person responsible for the determination;

(2) A brief statement of the reason or reasons for the denial, including an identification of records being withheld (either individually or, if a large number of similar records are being denied, described by category) and any FOIA exemption applied by the office in denying the request;

(3) An estimate of the volume of records or information withheld, in number of pages or in some other reasonable form of estimation. This estimate does not need to be provided if the volume is otherwise indicated through annotated deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption;

(4) A statement that an adverse determination may be appealed under § 2.108 and description of the requirements for submitting an administrative appeal; and

(5) A statement that the requester has the right to seek dispute resolution services from an EPA FOIA Public Liaison or the Office of Government Information Service.

§ 2.105 [Reserved]

§ 2.106 Preservation of records.

The Agency will preserve all correspondence pertaining to the FOIA requests that it receives, as well as copies of all requested records, until disposition or destruction is authorized pursuant to title 44 of the United States Code or the National Archives and Records Administration's General Records Schedule 4.2. Records shall not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

§ 2.107 Fees.

(a) *In general.* The Agency will charge for processing requests under the FOIA in accordance with this section, except where fees are limited under paragraph (g) of this section or where a waiver or reduction of fees is granted under paragraph (n) of this section.

(b) *How to pay fees.* Requesters must pay fees by check, money order, electronically at *https://www.pay.gov/,* to the Treasury of the United States.

(c) *Contractor rates.* When any search, review, or duplication task is performed by a contractor, EPA will charge for staff time at the contractor's actual pay rate, but not exceeding the rates set under paragraph (f)(2)(ii) of this section.

(d) *Rounding staff time.* Billable staff time is calculated by rounding to the nearest quarter-hour.

(e) *Types of requests for fee purposes.* For purposes of this section, the five types of request categories are defined in paragraphs (e)(1) through (5) of this section. These request categories will be charged for the types of fees as noted, subject to the restrictions in paragraph (g) of this section and unless a fee waiver has been granted under paragraph (n) of this section. Paragraph (f) of this section defines and explains how the Agency calculates each type of fee.

(1) *Commercial-use Request.* (i) Commercial use request means a request from or on behalf of a person who seeks information for a use or purpose that furthers the requester's commercial, trade, or profit interests, which can include furthering those interests through litigation. The Agency will determine, whenever reasonably possible, the use to which a requester will put the requested records. When it appears that the requester will put the records to a commercial use, either because of the nature of the request itself or because the Agency has reasonable cause to doubt a requester's stated use, the Agency will provide the requester a reasonable opportunity to submit further clarification.

(ii) For a commercial-use request, the Agency will charge the requester for search, review, and duplication.

(2) *Educational institution request.* (i) Educational institution means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program of scholarly research. To be eligible for inclusion in this category, requesters must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly research.

(ii) For an educational institution request, the Agency will charge the requester for duplication, except that the Agency will furnish the first 100 pages of duplication at no charge.

(3) *Noncommercial scientific institution request.* (i) Noncommercial scientific institution means an institution not operated on a ''commercial'' basis, as defined in paragraph (e)(1) of this section, and that is operated solely for conducting scientific research that is not intended to promote any particular product or industry. To be eligible for inclusion in this category, requesters must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial

use, but are sought in furtherance of scientific research.

(ii) For a noncommercial scientific institution request, the Agency will charge the requester for duplication, except that the Agency will furnish the first 100 pages of duplication at no charge.

(4) *Representative of the news media requests.* (i) Representative of the news media has the meaning provided at 5 U.S.C. 552(a)(4)(A)(ii).

(ii) For representative of the news media requests, the Agency will charge a requester for duplication, except that the Agency will furnish the first 100 pages of duplication at no charge.

(5) *Other requests.* (i) Other requesters are requesters that are not commercial-use requesters, educational institutions, noncommercial scientific institutions, or representatives of the news media.

(ii) The Agency will charge other requesters for search and duplication, except that the Agency will furnish without charge the first two hours of search time and the first 100 pages of duplication.

(f) *Types of fees.* Paragraphs (f)(1) through (4) of this section are definitions of the types of fees and explanations of how the Agency calculates each type of fee.

(1) *Direct costs.* Direct costs means those expenses that the Agency actually incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work and the cost of operating duplication equipment. Not included in direct costs are overhead expenses such as the costs of space and heating or lighting of the facility in which the records are kept.

(2) *Search.* (i) Search means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. Offices will ensure that searches are done in the most efficient and least expensive manner reasonably possible. For example, offices will not search line-by-line where duplicating an entire document would be quicker and less expensive. The Agency will charge for time spent searching even if no responsive records are found or if the records are located but are determined to be exempt from disclosure.

(ii) Search fees will equal the direct costs of search. Personnel will bill their time at the following rates using the current Office of Personnel Management General Schedule (GS) pay table for Washington–Baltimore–Arlington, DC–MD–VA–WV–PA. The current calculations of these rates may be found at *www.epa.gov/foia.*

(A) GS–12 level or below (or equivalent pay scale): The average of GS–9 to GS–12 (Step 5), plus 16 percent, rounded to the nearest $1 increment per quarter hour.

(B) GS–13 level or above (or equivalent pay scale): The average of GS–13 to GS–15 (Step 5), plus 16 percent, rounded to the nearest $1 increment per quarter hour.

(iii) For requests that require the retrieval of records stored by an agency at a Federal Records Center operated by NARA, additional costs will be charged in accordance with the Transactional Billing Rate Schedule established by NARA.

(3) *Review.* (i) Review means the examination of a record located in response to a request to determine whether any portion of it is exempt from disclosure. It also includes processing any record for disclosure (for example, doing all that is necessary to redact it and prepare it for disclosure). Review costs are recoverable even if a record ultimately is not disclosed. Review time includes time spent considering any formal objection to disclosure made by a business submitter requesting confidential treatment but does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(ii) The Agency will charge review fees only for the initial record review (that is, the review done when an office is deciding whether an exemption applies to a particular record or portion of a record at the initial request level). The Agency will not charge for review at the administrative appeal level for an exemption already applied. However, the Agency may again review records or portions of records withheld under an exemption that the Agency subsequently determines not to apply to determine whether any other exemption not previously considered applies; the Agency will charge costs of that review when a change of circumstances makes it necessary. The Agency will charge review fees at the same rates as those charged for a search under paragraph (f)(2)(ii) of this section.

(4) *Duplication.* (i) Duplication means the making of a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, microform, audiovisual materials, or electronic records (for example, magnetic tape, disc, or compact disc), among others. The Agency will honor a requester's specified preference of form or format of disclosure if the record is readily reproducible with reasonable efforts in the requested form or format.

(ii) For either a photocopy or a computer-generated printout of a record (no more than one copy of which need be supplied), the fee will be fifteen (15) cents per page. For electronic forms of duplication, other than a computer-generated printout, offices will charge the direct costs of that duplication. Such direct costs will include the costs of the requested electronic medium on which the copy is to be made and the actual operator time and computer resource usage required to produce the copy, to the extent they can be determined. The Agency will charge operator time at the same rates as those charged for search under paragraph (f)(2)(ii) of this section.

(g) *Limitations on charging fees.* (1) The Agency will charge no fee when a total fee calculated under paragraph (c) of this section is less than fourteen times the rate in paragraph (f)(2)(ii)(B) of this section rounded to the nearest $5.00 increment for any request. The current calculation of this threshold may be found at *www.epa.gov/foia.*

(2) The restrictions in paragraphs (e)(1)(ii), (2)(ii), (3)(ii), (4)(ii), and (5)(ii) and minimum fee threshold in (g)(1) of this section work together. This means that for requesters other than those seeking records for a commercial use, the Agency will charge no fee unless the cost of search more than two hours plus the cost of duplication in excess of 100 pages totals more than fourteen times the rate in paragraph 2.107(f)(2)(ii)(B) of this section rounded to the nearest $5.00 increment. The current calculation of this threshold may be found at *www.epa.gov/foia.*

(3) If EPA fails to comply with the FOIA's time limits for responding to a request, EPA will not charge search fees, or, in the instance of requesters described in paragraphs (e)(2) through (4) of this section, duplication fees, except as follows:

(i) If EPA determined that unusual circumstances as defined by the FOIA apply and the Agency provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit shall be excused for an additional 10 working days;

(ii) If EPA determined that unusual circumstances as defined by the FOIA apply and more than 5,000 pages are necessary to respond to the request, EPA may charge search fees, or, in the case of requesters described in paragraphs (e)(2) through (4) of this section, may charge duplication fees, if the following steps are taken: EPA must have

provided timely written notice of unusual circumstances to the requester in accordance with the FOIA and the EPA must have discussed with the requester by written mail, email, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii), which includes notification to the requester of the availability of the FOIA Public Liaison and the right to seek dispute resolution services from the Office of Government Information Services. If this exception is satisfied, EPA may charge all applicable fees incurred in the processing of the request; or

(iii) If a court determines that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(h) *Assurance of payment and advanced payment of fees.* (1) If EPA determines that the actual or estimated fees exceed the amount in paragraph (g)(1) of this section, the Agency will notify the requester of the actual or estimated amount, toll the processing clock, and will do no further work on the request until the requester agrees in writing to pay the anticipated total fee.

(2) If EPA determines that the actual or estimated fees exceed twenty-five times the amount in paragraph (f)(2)(ii)(B) of this section, the Agency will notify the requester of the actual or estimated amount, and may toll the processing clock and do no further work on the request until the requester pays the estimated or actual fee. The current calculation of this amount may be found at *www.epa.gov/foia.*

(3) After providing the requester with estimated fee amounts, EPA will provide the requester with an opportunity to discuss with the Agency how to modify the request to meet the requester's needs at a lower cost.

(4) EPA calculates the estimated or actual fee cumulatively for multi-component requests. If only a part of the fee can be estimated readily, the Agency will advise the requester that the estimated fee may be only a portion of the total fee.

(5) If, after the requester provided an assurance of payment or paid an initially estimated or actual amount of fees, the Agency increases the estimated or actual amount of fees, the Agency will notify the requester, stop further processing of the request, and toll any deadline for responding to the request. Once the requester provides assurance of payment or pays the fees, the time to respond to the request will resume from where it was at the date of the tolling notification.

(i) *Charges for other services.* Although not required to provide special services, if EPA chooses to do so as a matter of administrative discretion, the direct costs of providing the service will be charged to the requester. Examples of such services include certifying that records are true copies, sending records by other than EPA's electronic FOIA management system or U.S. Mail, or providing multiple copies of the same document.

(j) *Charging interest.* EPA may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. The Agency will assess interest charges at the rate provided in 31 U.S.C. 3717 and will accrue from the date of the billing until the Agency receives payment. EPA will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97–365), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset. The Agency will assess no penalty against FOIA requesters for exercising their statutory right to ask the Agency to waive or reduce a fee or to dispute a billing. If a fee is in dispute, the Agency will suspend penalties upon notification.

(k) *Delinquent requesters.* (1) If a requester fails to pay all fees charged to the requester under the FOIA by EPA or any other Federal agency within 60 calendar days of the date the fees were billed, the Agency will treat the requester as delinquent. The Agency may share information regarding delinquent requesters with other Federal agencies.

(2) Before EPA continues processing a pending FOIA request or begins processing any new FOIA requests from a delinquent requester, the delinquent requester must pay the full amount due, plus any applicable interest, on that prior request and make an advance payment of the full amount of any anticipated fee.

(3) When the Agency requires payment under paragraph (h)(2) of this section, the request will not be considered received until the required payment is made. If the requester does not pay the outstanding balance and the advance payment within 30 calendar days after the date of EPA's fee determination, the request will be closed.

(l) *Aggregating requests.* If a requester or a group of requesters acting in concert submit two or more requests that involve related matters and paragraphs (l)(1), (2), or both of this section, apply then the Agency may aggregate those requests and charge fees accordingly. Multiple FOIA requests involving unrelated matters shall not be aggregated. An aggregated group of FOIA requests will be treated as a single FOIA request under this subpart, including evaluation of whether unusual circumstances exist.

(1) The Agency reasonably believes that if the requests constituted a single request, such a request would result in unusual circumstances pursuant to § 2.104(f); or

(2) The Agency reasonably believes that the requester or requesters acting together are attempting to divide a request into a series of requests for the purpose of avoiding fees. The Agency may presume that such requests have been submitted to avoid fees if submitted within a 30-day period. When requests are submitted by a period greater than 30 days, the Agency will aggregate them only if there exists a solid basis for determining that aggregation is warranted under all the circumstances involved.

(m) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any other statute that specifically requires an agency to set and collect fees for particular types of records. When records responsive to requests are maintained for distribution by agencies operating such statutorily based fee schedule programs, EPA will inform requesters of the steps for obtaining records from those sources so that they may do so most economically.

(n) *Waiver or reduction of fees.* (1) A request for a waiver or reduction of FOIA fees must be made at the time of the initial submission of a FOIA request. An untimely request for a waiver or reduction of fees will be denied.

(2) Requests for the waiver or reduction of fees must address the factors listed in paragraphs (n)(4) through (6) of this section, as far as they apply to each request. EPA components will exercise their discretion to consider the cost-effectiveness of their investment of administrative resources in deciding whether to grant waivers or reductions of fees and will consult the appropriate EPA components as needed. Requesters must submit requests for the waiver or reduction of fees along with the request.

(3) When only some of the requested records satisfy the requirements for a waiver of fees, the Agency will grant a waiver for only those records.

(4) Records responsive to a request will be furnished without charge or at a charge reduced below that established under paragraph (c) of this section when the Agency determines, based on all available information, that disclosure of the requested information is in the public interest because it is:

(i) Likely to contribute significantly to public understanding of the operations or activities of the government, and

(ii) Is not primarily in the commercial interest of the requester.

(5) To determine whether the request meets the first fee waiver requirement, the Agency will consider the following factors:

(i) The subject of the request. Whether the subject of the requested records concerns ''the operations or activities of the government.'' The subject of the requested records must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote.

(ii) The informative value of the information to be disclosed. Whether the disclosure is ''likely to contribute'' to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be ''likely to contribute'' to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding when nothing new would be added to the public's understanding.

(iii) The contribution to an understanding of the subject by the public is likely to result from the disclosure. Whether disclosure of the requested information will contribute to ''public understanding.'' The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. The Agency will consider a requester's expertise in the subject area and ability and intention to effectively convey information to the public. The Agency presumes that a representative of the news media will satisfy this consideration.

(iv) The significance of the contribution to public understanding. Whether the disclosure is likely to contribute ''significantly'' to public understanding of government operations or activities. The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. The Agency will not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is ''important'' enough to be made public.

(6) To determine whether the request meets the second fee waiver requirement, the Agency will consider the following factors:

(i) The existence and magnitude of a commercial interest. Whether the requester has a commercial interest that would be furthered by the requested disclosure. The Agency will consider any commercial interest of the requester (with reference to the definition of ''commercial use request'' in paragraph (e)(1) of this section), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. The Agency will give the requester an opportunity in the administrative process to provide explanatory information regarding this consideration.

(ii) The primary interest in disclosure. Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is ''primarily in the commercial interest of the requester.'' A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. The Agency ordinarily will presume that when a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. The Agency will not presume that disclosure to data brokers or others who merely compile and market government information for direct economic return is to primarily serve the public interest.

§ 2.108 Administrative appeals.

(a) *Appeals of adverse determinations.* To appeal an adverse determination, a requester must submit an appeal in writing within 90 calendar days from the date of the letter communicating the Agency's adverse determination, and by one of the following methods:

(1) EPA's FOIA submission website, linked to at *www.epa.gov/foia;*

(2) U.S. Mail sent to the following address: National FOIA Office, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW (2310A), Washington, DC 20460; or

(3) Overnight delivery service to National FOIA Office, U.S. Environmental Protection Agency, 1200 Pennsylvania NW, Room 7309C, Washington, DC 20460.

(b) *Timing for administrative appeals submitted electronically.* Requesters submitting appeals electronically must do so before 5 p.m. Eastern Time for the Agency to consider the appeal as received on that date, and appeals submitted electronically at or after 5 p.m. Eastern Time will be considered received by the National FOIA Office on the next business day.

(c) *Content of administrative appeal.* The appeal may include as much or as little related information as the requester wishes. The appeal must clearly identify the office's determination that is being appealed and the assigned request tracking number. For quickest handling of appeals sent via U.S. Mail or overnight delivery service, the requester must mark their appeal letter and its envelope with ''Freedom of Information Act Appeal.''

(d) *Authority to make decision on appeal.* Unless the Administrator directs otherwise, the General Counsel or the General Counsel's delegate will act on behalf of the Administrator on all appeals under this section, except that:

(1) The Counsel to the Inspector General will act on any appeal where the Inspector General or the Inspector General's delegate has made the final adverse determination; however, if the Counsel to the Inspector General has signed the final adverse determination, the General Counsel or the General Counsel's delegate will act on the appeal;

(2) An adverse determination by the Administrator on an initial request will serve as the final action of the Agency; and

(3) An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation.

(e) *Timing of decision on appeal.* EPA will make the decision on the appeal in writing, normally within 20 working days of its receipt by the National FOIA Office.

(1) A decision affirming an adverse determination in whole or in part will contain a statement of the reason or reasons for the decision, including any FOIA exemption or exemptions applied, inform the requester of dispute resolution services offered by the Office of Government Information Service of the National Archives and Records Administration, and inform the

requester of the FOIA provisions for judicial review of the decision.

(2) If the Agency reverses or modifies the adverse determination on appeal, the Agency will attach the requested information that the Agency determined on appeal to be releasable, or the Agency will return the request to the appropriate office so that the office may reprocess the request in accordance with the appeal decision.

(f) *When appeal is required.* If the requester wishes to seek judicial review of any adverse determination, the requester must first appeal that adverse determination under this section, except when EPA has not responded to the request within the applicable time-period. In such cases, the requester may seek judicial review without making an administrative appeal.

§ 2.109 Other rights and services.

Nothing in this subpart shall be construed to entitle any person, as a right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

[FR Doc. 2023–19699 Filed 9–13–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2022–0910; FRL–10564–03–R9]

Air Quality Implementation Plan; California; El Dorado County Air Quality Management District; Stationary Source Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing a revision to the El Dorado County Air Quality Management District's (EDCAQMD or ''District'') portion of the California State Implementation Plan (SIP). This revision governs the District's issuance of permits for stationary sources, and focuses on the preconstruction review and permitting of major sources and major modifications under part D of title I of the Clean Air Act (CAA or ''the Act'').

DATES: This rule is effective October 16, 2023.

ADDRESSES: The EPA has established a docket for this action under Docket No. EPA–R09–OAR 2022–0910. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *https://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Camille Cassar, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105; by phone: (415) 947–4164; or by email to *cassar.camille@epa.gov.*

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

Table of Contents

I. Proposed Action
II. Public Comments
III. EPA Action
IV. Incorporation by Reference
V. Statutory and Executive Order Reviews

I. Proposed Action

On March 31, 2023,[1] the EPA proposed to approve the rule listed in Table 1 into the California SIP.[2]

TABLE 1—SUBMITTED RULE

Rule No.	Rule title	Revised	Submitted
Rule 523–1	Federal Non-Attainment New Source Review	December 7, 2021	March 9, 2022.

For areas designated nonattainment for one or more National Ambient Air Quality Standards (NAAQS), the applicable SIP must include preconstruction review and permitting requirements for new or modified major stationary sources of such nonattainment pollutant(s) under part D of title I of the Act, commonly referred to as Nonattainment New Source Review (NNSR). The rule listed in Table 1 contains the District's NNSR permit program applicable to new and modified major sources located in the designated nonattainment areas in El Dorado County. Our proposed action contains more information on the rule and our evaluation.

II. Public Comments

The EPA's proposed action provided a 30-day public comment period. During this period, no comments were submitted on our proposal.

III. EPA Action

No comments were submitted on our proposal. We continue to find that Rule 523–1 satisfies the relevant requirements for a CAA NNSR program for ozone and $PM_{2.5}$ nonattainment areas,[3] as well as the associated visibility requirements for sources subject to review under such a program in accordance with 40 CFR 51.307. Therefore, as authorized in section 110(k)(3) of the Act, the EPA is approving the submitted rule.

Additionally, all sanctions and sanctions clocks triggered by our February 2, 2000 final limited approval and limited disapproval action (65 FR 4887) will be permanently terminated on the effective date of this final approval action. In our interim final determination to defer sanctions (88 FR 19225), issued concurrently with our proposed approval action, we explained

[1] 88 FR 19233.

[2] Concurrent with our proposed approval action, we issued an interim final determination that the District had satisfied the requirements of title I, part D of the CAA permitting program for nonattainment areas within the jurisdiction of the EDCAQMD. See 88 FR 19225 (March 31, 2023). The effect of our interim final determination was that the imposition of sanctions that had been triggered in a February 2, 2000 final limited approval and limited disapproval action (65 FR 4887) was deferred.

[3] As discussed in our proposed action, we determined that Rule 523–1 satisfies the NNSR program requirements applicable to nonattainment areas classified as Severe for ozone and Moderate for $PM_{2.5}$, and that the submittal addressed the NNSR requirements both the 2008 and 2015 ozone NAAQS, as well as the 2006 $PM_{2.5}$ NAAQS. 88 FR 19233, 19235.

our finding that Rule 523–1 would correct the deficiencies that triggered such sanctions. We received no comments on this finding or our interim final determination. Our interim final determination and our proposed action, as well as our Technical Support Document (TSD), which can be found in the docket for this action, contain more information regarding the basis for our finding in this regard.

This action incorporates the submitted rule into the California SIP. In conjunction with the EPA's SIP approval of the District's visibility program for sources subject to the NNSR program, this action also revises the scope of the visibility Federal Implementation Plan (FIP) at 40 CFR 52.28 in California so that this FIP no longer applies to sources located in El Dorado County that are subject to the District's visibility program.

IV. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is incorporating by reference El Dorado County Air Quality Management District Rule 523–1, Federal Non-Attainment New Source Review, revised on December 7, 2021, which regulates the issuance of permits for stationary sources. The EPA has made, and will continue to make, these materials available through *https://www.regulations.gov* and in hard copy at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 14094 (88 FR 21879, April 11, 2023);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it approves a state program;
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act.

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

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. The EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' The EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

The State did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. The EPA did not perform an EJ analysis and did not consider EJ in this action. Due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

This action is subject to the Congressional Review Act, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 13, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

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

Dated: August 28, 2023.

Martha Guzman Aceves,

Regional Administrator, Region IX.

For the reasons stated in the preamble, the Environmental Protection Agency amends part 52, chapter I, title 40 of the Code of Federal Regulations as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraph (c)(604)(i)(B) to read as follows:

§ 52.220 Identification of plan-in part.

* * * * *

(c) * * *

(604) * * *

(i) * * *

(B) El Dorado County Air Quality Management District.

(*1*) Rule 523–1, ''Federal Non-Attainment New Source Review,'' revised on December 7, 2021.

(*2*) [Reserved]

■ 3. Section 52.281 is amended by adding paragraph (d)(11) to read as follows:

§ 52.28 1 Visibility protection.

* * * * *

(d) * * *

(11) El Dorado County Air Quality Management District.

* * * * *

[FR Doc. 2023–19727 Filed 9–13–23; 8:45 am]

BILLING CODE 6560–50–P

Proposed Rules

Federal Register

Vol. 88, No. 177

Thursday, September 14, 2023

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1880; Project Identifier MCAI–2023–00587–T]

RIN 2120–AA64

Airworthiness Directives; Airbus Canada Limited Partnership (Type Certificate Previously Held by C Series Aircraft Limited Partnership (CSALP); 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 Airbus Canada Limited Partnership Model BD–500–1A10 and BD–500–1A11 airplanes. This proposed AD was prompted by damage found on two power-feeder harnesses due to chafing with wheel bins. An investigation found that the power-feeder harnesses were not adequately supported to protect from chafing due to vibration. This proposed AD would require modifying the variable frequency generator (VFG) power-feeder harness routing, as specified in a Transport Canada AD, which is proposed for incorporation by reference (IBR). 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 October 30, 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–2023–1880; 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 Transport Canada material that is proposed for IBR in this AD, contact Transport Canada, Transport Canada National Aircraft Certification, 159 Cleopatra Drive, Nepean, Ontario K1A 0N5, Canada; telephone 888–663–3639; email *TC.AirworthinessDirectives-Consignesdenavigabilite.TC@tc.gc.ca.* You may find this material on the Transport Canada website at *tc.canada.ca/en/aviation.* It is also available at *regulations.gov* under Docket No. FAA–2023–1880.
- For service information identified in this NPRM, contact Airbus Canada Limited Partnership, 13100 Henri-Fabre Boulevard, Mirabel, Québec, J7N 3C6, Canada; telephone 450–476–7676; email *a220_crc@abc.airbus*; website *a220world.airbus.com.*
- You may view this material 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: William Reisenauer, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: 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–2023–1880; Project Identifier MCAI–2023–00587–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to William Reisenauer, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: 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 Transport Canada AD CF–2023–24, dated April 6, 2023 (Transport Canada AD CF–2023–24) (also referred to as the MCAI), to correct an unsafe condition for certain Airbus Canada Limited Partnership Model BD–500–1A10 and BD–500–1A11 airplanes. The MCAI states that two VFG power-feeder harnesses were found damaged due to chafing with wheel bins during

maintenance in service on three airplanes. An investigation found that the power-feeder harnesses were not adequately supported to protect from chafing due to vibration.

The FAA is proposing this AD to prevent damage to VFG power-feeder harnesses from chafing due to vibration, which could lead to a loss of generated power from both VFGs, or to a fire in the case of flammable fluid contact with arcing wires.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–1880.

Related Service Information Under 1 CFR Part 51

Transport Canada AD CF–2023–24 specifies procedures for modifying the VFG power-feeder harness routing, including a general visual inspection for damage at the intersection of the VFG power-feeder harnesses and the surface of the wheel bins, and corrective actions including obtaining and following repair instructions. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

FAA's Determination

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in Transport Canada AD CF–2023–24 described previously, except for any differences identified as exceptions in the regulatory text of this proposed AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to incorporate Transport Canada AD CF–2023–24 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with Transport Canada AD CF–2023–24 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Service information required by Transport Canada AD CF–2023–24 for compliance will be available at *regulations.gov* under Docket No. FAA–2023–1880 after the FAA final rule is published.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 16 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
Up to 51 work-hours × $85 per hour = Up to $4,335	Up to $3,538	Up to $7,873	Up to $125,968.

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:

Airbus Canada Limited Partnership (Type Certificate Previously Held by C Series Aircraft Limited Partnership (CSALP); Bombardier, Inc.): Docket No. FAA–2023–1880; Project Identifier MCAI–2023–00587–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by October 30, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Canada Limited Partnership Model BD–500–1A10 and BD–500–1A11 airplanes, certificated in any category, as identified in Transport Canada

AD CF–2023–24, dated April 6, 2023 (Transport Canada AD CF–2023–24).

(d) Subject

Air Transport Association (ATA) of America Code 24, Electrical Power.

(e) Unsafe Condition

This AD was prompted by damage found on two variable frequency generator (VFG) power-feeder harnesses due to chafing with wheel bins. An investigation found that the power-feeder harnesses were not adequately supported to protect from chafing due to vibration. The FAA is issuing this AD to prevent damage to VFG power-feeder harnesses from chafing due to vibration. The unsafe condition, if not addressed, could lead to a loss of generated power from both VFGs, or to a fire in the case of flammable fluid contact with arcing wires.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, Transport Canada AD CF–2023–24.

(h) Exceptions to Transport Canada AD CF–2023–24

(1) Where Transport Canada AD CF–2023–24 refers to its effective date, this AD requires using the effective date of this AD.

(2) Where Transport Canada AD CF–2023–24 refers to ''hours air time,'' this AD requires using ''flight hours.''

(i) Additional AD Provisions

The following provisions also apply to this AD:

(1) *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 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 International Validation Branch, send it to the attention of the person identified in paragraph (j) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.* 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, International Validation Branch, FAA; or Transport Canada; or Airbus Canada Limited Partnership's Transport Canada Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(j) Additional Information

For more information about this AD, contact William Reisenauer, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: 516–228 7300; email: *9-avs-nyaco-cos@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) Transport Canada AD CF–2023–24, dated April 6, 2023.

(ii) [Reserved]

(3) For Transport Canada AD CF–2023–24, contact Transport Canada National Aircraft Certification, 159 Cleopatra Drive, Nepean, Ontario K1A 0N5, Canada; telephone 888–663–3639; email *TC.AirworthinessDirectives-Consignesdenavigabilite.TC@tc.gc.ca.* You may find this Transport Canada AD on the Transport Canada website at *tc.canada.ca/en/aviation.*

(4) You may view this material 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 material 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 September 8, 2023.

Ross Landes,

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

[FR Doc. 2023–19861 Filed 9–13–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1881; Project Identifier MCAI–2023–00495–T]

RIN 2120–AA64

Airworthiness Directives; Deutsche Aircraft GmbH (Type Certificate Previously Held by 328 Support Services GmbH; AvCraft Aerospace GmbH; Fairchild Dornier GmbH; Dornier Luftfahrt GmbH) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all Deutsche Aircraft GmbH Model 328–100 and 328–300 airplanes. This proposed AD was prompted by a manufacturer's design review, which identified a potential risk of the rudder control rod buckling during operation with one engine inoperative during take-off and landing phases. This proposed AD would require visually inspecting the rudder control rod, performing a one-time functional check of the rudder control rod, performing corrective actions if necessary, and reporting the inspection results, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference (IBR). This proposed AD would also limit the installation of affected parts under certain conditions. 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 October 30, 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–2023–1881; 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 material that is proposed for IBR in this NPRM, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email: *ADs@easa.europa.eu;* website: *easa.europa.eu.* You may find this material on the EASA website: *ad.easa.europa.eu.* It is also available at *regulations.gov* under Docket No. FAA–2023–1881.
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th Street, Des Moines, WA. For information on the

availability of this material at the FAA, call 206–231–3195.

FOR FURTHER INFORMATION CONTACT: Todd Thompson, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3228; email *todd.thompson@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–2023–1881; Project Identifier MCAI–2023–00495–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Todd Thompson, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3228; email *todd.thompson@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

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2023–0065, dated March 20, 2023 (EASA AD 2023–0065) (also referred to as the MCAI), to correct an unsafe condition for all Deutsche Aircraft GmbH (Type Certificate Previously Held by 328 Support Services GmbH; AvCraft Aerospace GmbH; Fairchild Dornier GmbH; Dornier Luftfahrt GmbH) Model 328–100 and 328–300 airplanes. The MCAI states that during a design review of the rudder control architecture, it was discovered that the rudder control rod could buckle during operation with one engine inoperative during take-off and landing phases. This condition, if not detected and corrected, could result in reduced control of the airplane.

The FAA is proposing 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–2023–1881.

Related Service Information Under 1 CFR Part 51

EASA AD 2023–0065 specifies procedures for a functional check and general visual inspection (GVI) of the rudder control rod (measuring the length of the rudder control rod, inspecting for signs of bending, ensuring both rudder control rod ends are symmetrically adjusted, and ensuring the threads of the rod end fully cover both inspection holes). Depending on the inspection results, EASA AD 2023–0065 also specifies corrective action, including obtaining and following instructions if any discrepancy is identified. EASA AD 2023–0065 also requires reporting the inspection results to Deutsche Aircraft GmbH and limits the installation of affected parts under certain conditions.

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

FAA's Determination

This product has been approved by the aviation authority of another country and is approved for operation in the United States. Pursuant to the FAA's bilateral agreement with this State of Design Authority, it has notified the FAA of the unsafe condition described in the MCAI referenced above. The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in EASA AD 2023–0065 described previously, except for any differences identified as exceptions in the regulatory text of this proposed AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to incorporate EASA AD 2023–0065 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2023–0065 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in EASA AD 2023–0065 does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in EASA AD 2023–0065. Service information required by EASA AD 2023–0065 for compliance will be available at *regulations.gov* under Docket No. FAA–2023–1881 after the FAA final rule is published.

Interim Action

The FAA considers that 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 54 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
2 work-hours × $85 per hour = $170	$0	$170	$9,180

The FAA has received no definitive data on which to base the cost estimates for the on-condition actions specified in this proposed AD.

Paperwork Reduction Act

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to take approximately 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

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:

Deutsche Aircraft GmbH (Type Certificate Previously Held by 328 Support Services GmbH; AvCraft Aerospace GmbH; Fairchild Dornier GmbH; Dornier Luftfahrt GmbH): Docket No. FAA–2023–1881; Project Identifier MCAI–2023–00495–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by October 30, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all Deutsche Aircraft GmbH (Type Certificate previously held by 328 Support Services GmbH; AvCraft Aerospace GmbH; Fairchild Dornier GmbH; Dornier Luftfahrt GmbH) Model 328–100 and 328–300 airplanes, certificated in any category.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by a manufacturer's design review, which identified a potential risk of the rudder control rod buckling during operation with one engine inoperative during take-off and landing phases. The FAA is issuing this AD to address the potential failure of a rudder control rod. The unsafe condition, if not addressed, could result in reduced control of the airplane.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2023–0065, dated March 20, 2023 (EASA AD 2023–0065).

(h) Exceptions to EASA AD 2023–0065

(1) Where EASA AD 2023–0065 refers to its effective date, this AD requires using the effective date of this AD.

(2) Replace the entire text of paragraph (2) of EASA AD 2023–0065 with the following text, ''If, during the functional check or GVI as required by paragraph (1) of this AD, as applicable, the length of the rudder control rod exceeds the maximum allowable length specified in the ASB, the rudder control rod is bent, both rudder control rod ends are not symmetrically adjusted, or both inspection holes are not fully covered with the threads of the rod end, repair before further flight using a method approved by the Manager, International Validation Branch, FAA; or EASA; or Deutsche Aircraft GmbH's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.''

(3) This AD does not adopt the ''Remarks'' section of EASA AD 2023–0065.

(i) Additional AD Provisions

The following provisions also apply to this AD:

(1) *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 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 International Validation Branch, send it to the attention of the person identified in paragraph (j) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.* 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, International Validation Branch, FAA; or EASA; or Deutsche Aircraft GmbH's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(j) Additional Information

For more information about this AD, contact Todd Thompson, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 206–231–3228; email *todd.thompson@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2023–0065, dated March 20, 2023.

(ii) [Reserved]

(3) For EASA AD 2023–0065, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email: *ADs@easa.europa.eu;* website: *easa.europa.eu.* You may find this EASA AD on the EASA website: *ad.easa.europa.eu.*

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

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

Issued on September 8, 2023.

Ross Landes,

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

[FR Doc. 2023–19862 Filed 9–13–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Office of the Secretary

31 CFR Part 1

RIN: 1506–AB63

Privacy Act of 1974; Proposed Rule Exempting a System of Records From Certain Provisions of the Privacy Act of 1974

AGENCY: Financial Crimes Enforcement Network (FinCEN), Treasury.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, as amended, FinCEN gives notice of a proposed amendment to exempt a new system of records, entitled ''FinCEN .004—Beneficial Ownership Information System,'' from certain provisions of the Privacy Act. The Beneficial Ownership Information (BOI) System is being established to implement the beneficial ownership information reporting and access requirements set out in the Corporate Transparency Act (CTA), which was enacted on January 1, 2021, as part of the Anti-Money Laundering Act of 2020. The exemptions are intended to increase the value of the system for law enforcement purposes and to comply with the CTA's prohibitions against unauthorized disclosure of certain information. Public comments are invited.

DATES: Comments on this document must be received by October 16, 2023.

ADDRESSES: Written comments on this document may be submitted electronically through the Federal Government eRulemaking portal at *https://www.regulations.gov.* Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt, and enables the Department of the Treasury (Treasury) to make the comments available to the public. Please note that comments submitted through *https://www.regulations.gov* will be public and can be viewed by members of the public.

In general, Treasury will post all comments to *https://www.regulations.gov* without change, including any business or personal information provided, such as names, addresses, email addresses, or telephone numbers. All comments received, including attachments and other supporting material, will be part of the public record and subject to public disclosure. You should submit only information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: For questions about this document and privacy issues, contact: Deputy Assistant Secretary for Privacy, Transparency, and Records at U.S. Department of the Treasury, 1500 Pennsylvania Avenue NW, Washington, DC 20220; telephone: (202) 622–5710.

SUPPLEMENTARY INFORMATION:

Background

In a separate notice published on September 14, 2023, FinCEN is proposing to establish a system of records for information that the bureau will collect pursuant to the CTA, which was enacted into law as part of the Anti-Money Laundering Act of 2020.[1] The CTA requires ''reporting companies''—certain corporations, limited liability companies, and other entities created in or registered to do business in the United States—to report to FinCEN identifying information associated with the entities themselves, their beneficial owners, and their company applicants (together, beneficial ownership information or BOI). The CTA establishes that beneficial ownership information (BOI) is ''sensitive information'' and imposes strict confidentiality and security restrictions on the storage, access, and use of that information.[2]

On September 30, 2022, FinCEN issued the final rule establishing BOI reporting requirements (the Reporting Rule).[3] The Reporting Rule requires reporting companies to report BOI to FinCEN. Reporting companies will provide this information to FinCEN by submitting a Beneficial Ownership Information Report (BOIR). An initial BOIR must include the following BOI about the reporting company's beneficial owners and company applicants (if the reporting company is required to report company applicant information): full legal name; date of birth; complete current address; and unique identifying number and issuing jurisdiction from an acceptable non-expired identification document (*i.e.,* a passport issued by the U.S. government, a document issued by a State,[4] local

[1] The CTA is Title LXIV of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283 (Jan. 1, 2021) (the NDAA). Division F of the NDAA is the Anti-Money Laundering Act of 2020 (AML Act), which includes the CTA.

[2] *See* CTA, section 6402(6), (7).

[3] FinCEN, *Beneficial Ownership Information Reporting Requirements,* 87 FR 59498 (Sept. 30, 2022), *available at https://www.federalregister.gov/documents/2022/09/30/2022-21020/beneficial-ownership-information-reporting-requirements.*

[4] The term ''State'' means any State of the United States, the District of Columbia, or any

Continued

government, or Indian tribe for the purposes of identifying the individual, a driver's license issued by a State, or a passport issued by a foreign government if the individual does not possess any of the other documents described). Additionally, an image of the identification document must be included in the BOIR. Reporting companies must file an updated BOIR to reflect any changes to required information previously submitted to FinCEN.

An individual or a reporting company may obtain a FinCEN identifier (FinCEN ID) by providing certain information to FinCEN. A FinCEN ID is unique to each such individual or reporting company. The FinCEN ID associated with an individual can be used in lieu of the information required to be reported about that individual. An individual may request and obtain a FinCEN ID by submitting an application containing the information described above in connection with a reporting company's beneficial owner or company applicant. Information provided to FinCEN to obtain a FinCEN ID will be disclosed to authorized recipients for authorized purposes—in the same way and to the same extent as BOI. The effective date of the Reporting Rule is January 1, 2024.

In addition to imposing reporting requirements, the CTA also authorizes FinCEN to disclose BOI to five categories of authorized recipients, subject to strict security, confidentiality, and use protocols. Those categories include foreign and domestic law enforcement agencies, but do *not* include disclosures to beneficial owners, company applicants, or individuals who have obtained FinCEN IDs.

To collect, maintain, and provide access to BOI, FinCEN is developing the Beneficial Ownership Information System (the BOI System). The CTA dictates that the BOI System should be ''highly useful'' to its authorized users, including law enforcement agencies.[5] Indeed, the information to be collected by FinCEN is intended to assist law enforcement in: anti-money laundering, tax, and other financial investigations; advance counterterrorism, counter-proliferation, and broader national security and intelligence interests; help prevent evasion of financial sanctions; and facilitate tax compliance.

Privacy Act

The Privacy Act contains certain requirements regarding the maintenance and disclosure of a system of records. Those requirements may differ from, or conflict with, the comprehensive requirements for maintaining and disclosing BOI specified in the CTA. For example, while the Privacy Act provides for access to records by certain individuals upon request, the CTA prohibits disclosure of BOI except as authorized in five enumerated categories, none of which include disclosure to such individuals under the Privacy Act.[6] The CTA, therefore, expressly prohibits certain disclosures that would otherwise be required under the more general provisions of the Privacy Act. In this and any other case where the CTA conflicts with the Privacy Act, FinCEN believes that the more detailed, specific provisions of the CTA supersede any contrary provisions in the Privacy Act. Nevertheless, to the extent certain provisions of the Privacy Act were to apply, and without conceding that they do, FinCEN is publishing this proposed rule pursuant to 5 U.S.C. 552(j) and (k), to exempt FinCEN .004—Beneficial Ownership Information System from those provisions.

Under 5 U.S.C. 552a(j)(2), the head of a Federal agency may promulgate rules to exempt a system of records from certain provisions of 5 U.S.C. 552a if the system of records is ''maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.''

Under 5 U.S.C. 552a(k)(2), the head of a Federal agency may promulgate rules to exempt a system of records from certain provisions of 5 U.S.C. 552a if the system of records is ''investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section.''

FinCEN is hereby giving notice of a proposed rule to exempt the BOI System from certain provisions of the Privacy Act pursuant to 5 U.S.C. 552a(j)(2) and (k)(2) and the authority vested in the Secretary of the Treasury by 31 CFR 1.23(c). The reasons for exempting the system of records from sections (c)(3), (c)(4), (d)(1), (d)(2), (d)(3), (d)(4), (e)(1), (e)(2), (e)(4)(G), (e)(4)(H), (e)(5), (e)(8), (f) and (g) of the Privacy Act are as follows:

(1) 5 U.S.C. 552a(d)(1), (e)(4)(H) and (f)(2), (f)(3) and (f)(5) grant individuals access to records containing information about them. An exemption from these provisions is appropriate because the CTA prohibits FinCEN from disclosing BOI except to five categories of authorized recipients;[7] these categories do not include beneficial owners, company applicants, or individuals who have obtained FinCEN IDs. Because individuals who are the subject of the records in the BOI System are not included in any of those categories, the application of 5 U.S.C. 552a(d)(1), (e)(4)(H) and (f)(2), (f)(3) and (f)(5) to the BOI System would contravene the CTA's disclosure restrictions.

(2) 5 U.S.C. 552a(e)(4)(G) and (f)(1) enable individuals to inquire whether a system of records contains records about them. An exemption from these provisions is appropriate because allowing individuals involved in illegal activity to learn that FinCEN has information concerning those individuals that could lead to them being identified for investigation could undercut the CTA mandate that the BOI System be ''highly useful'' to law enforcement agencies. For instance, such notice could prompt individuals engaged in illegal activity to: (a) take steps to avoid detection; (b) begin, continue, or resume illegal conduct upon learning that they are not identified in the system of records; or (c) destroy evidence needed to prove the violation.

(3) 5 U.S.C. 552a(d)(2), (d)(3) and (d)(4), (e)(4)(H) and (f)(4) permit individuals to request amendment of a record pertaining to them and require the agency either to amend the record or note the disputed portion of the record and, if the agency refuses to amend the record, to provide a copy of the individual's statement of disagreement with the agency's refusal, to persons or other agencies to whom the record is thereafter disclosed. Because these provisions depend on individuals

commonwealth, territory, or possession of the United States. *See* 31 U.S.C. 5336(a)(12).

[5] *See* CTA, section 6402(8)(C).

[6] *Compare* 5 U.S.C. 552a(d) *with* CTA, section 6402(c)(2).

[7] 31 U.S.C. 5337(c)(2).

having access to their records, and since this rule proposes to exempt the BOI System from the provisions of 5 U.S.C. 552a relating to access to records for the reasons set forth above, these provisions would not apply to the BOI System. Furthermore, an exemption from this requirement is appropriate because allowing individuals to amend certain records that pertain to them would conflict with the mechanism for reporting and updating beneficial ownership information provided for in the CTA.

(4) 5 U.S.C. 552a(c)(4) requires an agency to inform any person or other agency about any correction or notation of dispute that the agency made in accordance with 5 U.S.C. 552a(d) to any record that the agency disclosed to the person or agency, if an accounting of the disclosure was made. Because this provision depends on individuals having access to and an opportunity to request amendment of records pertaining to them, and because this rule proposes to exempt the BOI System from the provisions of 5 U.S.C. 552a relating to access to and amendment of records for the reasons set forth above, this provision would not apply to the BOI System.

(5) 5 U.S.C. 552a(c)(3) requires an agency to make any accounting of disclosures of records required by 5 U.S.C. 552a(c)(1) available to the individual named in the record upon his or her request. Any such accounting must state the date, nature, and purpose of each disclosure of the record and the name and address of the recipient. Applying this provision would impair the effective use of information collected in the BOI System. Making an accounting of disclosures available to the subject of an investigation would alert them that another agency is investigating their criminal activities and could reveal the geographic location of the other agency's investigation, the nature and purpose of that investigation, and the dates on which that investigation was active. Violators possessing such knowledge would be able to take measures to avoid detection or apprehension by: (a) altering their operations; (b) transferring their criminal activities to other geographical areas, legal entities, or ostensible beneficial owners; or (c) destroying or concealing evidence that would form the basis for arrest. Moreover, providing an accounting to the subjects of investigations would alert them to the fact that FinCEN has information relevant to their suspected criminal activities. Access to such information, together with other available information, could reveal the operation of the information-gathering and analysis systems of FinCEN and other BOI System users, and permit violators to take steps to avoid detection or apprehension.

(6) 5 U.S.C. 552a(e)(1) requires an agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or executive order. Maintenance of information, as defined in 5 U.S.C. 552a(a)(3), includes the collection and dissemination of information. An exemption from this provision is therefore appropriate because its application would require FinCEN to make determinations at the time of collection about the relevance and necessity of collected information. Speculative determinations about the relevance and necessity of collected information could negatively impact the quality of information available to law enforcement in future investigations, which would undermine the mandate in the CTA that the BOI System be ''highly useful'' to law enforcement.

(7) 5 U.S.C. 552a(e)(2) requires an agency to collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs. To the extent information in the BOI System might result in such an adverse determination, applying this provision would contravene the requirement in the CTA that FinCEN collect BOI from reporting companies.

(8) 5 U.S.C. 552a(e)(5) requires an agency to maintain all records it uses in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination. Because 5 U.S.C. 552a(a)(3) defines ''maintain'' as including ''collect'' and ''disseminate,'' applying this provision to the BOI System would hinder timely dissemination of BOI, and by extension hinder law enforcement efforts dependent upon such information. Information in the BOI System is filed by reporting companies and individual FinCEN ID applicants, and it is not possible at the time of collection to determine whether the information in such records is accurate, relevant, timely, and complete.

(9) 5 U.S.C. 552a(e)(8) requires an agency to make reasonable efforts to serve notice on an individual when the agency makes any record on the individual available to any person under compulsory legal process when such process becomes a matter of public record. Exemption from this requirement is appropriate because applying the requirement to the BOI System could reveal to the subject of a law enforcement investigation or action that a law enforcement agency used BOI in the investigation or action, thereby revealing the agency's investigative techniques and procedures.

(10) 5 U.S.C. 552a(g) provides an individual with civil remedies when: (a) an agency wrongfully refuses to amend a record or to review a request for amendment; (b) an agency wrongfully refuses to grant access to a record; (c) any determination relating to an individual is based on records that are not accurate, relevant, timely and complete; and (d) an agency fails to comply with any other provision of 5 U.S.C. 552a so as to adversely affect the individual. The BOI System should be exempted from this provision to the extent that the civil remedies relate to the provisions of 5 U.S.C. 552a from which the prior paragraphs of this section exempt the BOI System. There should be no civil remedies for failure to comply with provisions from which this system of records is exempted. Exemption from this provision will also protect FinCEN from baseless civil court actions that might hamper its ability to collate, analyze and disseminate data.

Any information from a system of records for which an exemption is claimed under 5 U.S.C. 552a(j)(2) or (k)(2) which is also included in another system of records retains the same exempt status such information has in the system of records for which such exemption is claimed.

Regulatory Analysis

This proposed rule is not a ''significant regulatory action'' under Executive Order 12866.

Pursuant to the requirements of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* it is hereby certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. The proposed regulation, issued under sections (j)(2) and (k)(2) of the Privacy Act, is to exempt certain information maintained by Treasury in the above-referenced systems of records from certain provisions of the Privacy Act. Small entities, as defined in the RFA, are not provided rights under the Privacy Act and are outside the scope of this regulation.

In accordance with the provisions of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.,* FinCEN has determined that this proposed rule will

not impose new record keeping, reporting, or other types of information collection requirements.

Lists of Subjects in 31 CFR Part 1

Privacy.

For the reasons stated in the preamble, part 1 of title 31 of the Code of Federal Regulations is proposed to be amended as follows:

PART 1—DISCLOSURE OF RECORDS

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

Authority: 5 U.S.C. 301, 552, 552a, 553; 31 U.S.C. 301, 321; 31 U.S.C. 3717.

■ 2. Amend § 1.36 by adding, in alphanumeric order, an entry for ''FinCEN .004'' in table 7 to paragraph (c)(1)(vii) and table 17 to paragraph (g)(1)(ix) to read as follows:

§ 1.36 Systems exempt in whole or in part from provisions of the Privacy Act and this part.

* * * * *

(c) * * *

(1) * * *

(vii) * * *

TABLE 7 TO PARAGRAPH (c)(1)(vii)

No.	Name of system
* * *	* * * *
FinCEN .004	Beneficial Ownership Information System (not exempt from 5 U.S.C. 552a(e)(3) and 5 U.S.C. 552a(e)(4)(I)).

* * * * *

(g) * * *

(1) * * *

(ix) * * *

TABLE 17 TO PARAGRAPH (g)(1)(ix)

No.	Name of system
* * *	* * * *
FinCEN .004	Beneficial Ownership Information System (not exempt from 5 U.S.C. 552a(e)(3) and 5 U.S.C. 552a(e)(4)(I)).

* * * * *

Ryan Law,

Deputy Assistant Secretary Privacy, Transparency, and Records, U.S. Department of the Treasury.

[FR Doc. 2023–19815 Filed 9–13–23; 8:45 am]

BILLING CODE 4810–02–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[USCG–2023–0366]

RIN 1625–AA00

Safety Zone; Hurricanes, Tropical Storms, and Other Storms With High Winds; Captain of the Port Zone Virginia

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to establish a safety zone for the navigable waters of the Sector Virginia Captain of the Port (COTP) Zone, to be enforced in the event of hurricanes, tropical storms, and other storms with high winds. This action is necessary to ensure the safety of the waters of the Sector Virginia COTP Zone. This proposed rulemaking would establish actions to be completed by industry and vessels within the COTP Zone before hurricanes, tropical storms, and other storms with high winds threatening the State of Virginia make landfall, and afterwards as well. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before October 16, 2023.

ADDRESSES: You may submit comments identified by docket number USCG–2023–0366 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 LCDR Ashley Holm, Chief Waterways Management Division U.S. Coast Guard; 757–617–7986, *Ashley.E.Holm@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background, Purpose, and Legal Basis

Virginia has the potential to be affected by hurricanes and tropical storms on a yearly basis, especially between the months of June and November. Additionally, severe storms generating high winds and rough seas are also common in the winter months. The Sector Virginia COTP proposes establishing a safety zone to protect mariners, port infrastructure, and the environment during and after these severe weather events. The Coast Guard is proposing this rulemaking under authority in 46 U.S.C. 70034.

III. Discussion of Proposed Rule

The Coast Guard proposes to establish a safety zone on the navigable waters of the Sector Virginia COTP Zone during hurricanes, tropical storms, and other storms with high winds. This safety zone would establish actions to be completed by local industry and vessels in the COTP zone prior to landfall of hurricanes, tropical storms, and other storms with high winds threatening Virginia and in the aftermath of landfall. Port Conditions (WHISKEY, X–RAY, YANKEE, ZULU, and RECOVERY) are standardized terms for states of operation instituted by the COTP which are clearly communicated to port

facilities, vessels, and members of the Marine Transportation System (MTS).

Actions to be taken by vessels is provided in the language of the proposed rule. In addition, ports and waterfront facilities are encouraged to take action when specific Port Conditions are declared. Under Port Condition WHISKEY, ports and waterfront facilities should remove all debris and secure potential flying hazards. Upon a declaration that Port Condition X–RAY is in effect, port facilities should ensure that potential flying debris and hazardous materials are removed, and that loose cargo and cargo equipment is secured. Upon a declaration of Port Condition YANKEE, terminal operators should terminate all cargo operations not associated with storm preparations. All facilities should continue to operate in accordance with approved Facility Security Plans (as defined at 33 CFR 101.105, and as further described in 33 CFR 105.400 to 105.415), and to comply with all applicable requirements of the Maritime Transportation Security Act of 2002 (46 U.S.C. chapter 701).

Under the proposed rule, the COTP would retain flexibility in controlling and reconstituting vessel traffic during periods of heavy weather, and it would allow for the expedited resumption of the MTS following such events. The proposed safety zone would consist of all waters of the territorial seas within the Sector Virginia COTP Zone, as defined in 33 CFR 3.25–10. Portions of the safety zone might be activated at different times, as conditions dictated. Notice of Port Conditions and their requirements would be given via Marine Safety Information Bulletins and Broadcast Notice to Mariners. 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, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the necessity to protect life, port infrastructure, and the environment during hurricanes, tropical storms, and other storms with high winds. The scope of the regulation is narrow and will only apply when a hurricane, tropical storm, or other storm with high winds impacts the navigable waters of the Virginia COTP Zone. These events are infrequent and of short duration. Regulatory restrictions will be lifted as soon as practicable.

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 rulemaking 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 Sector Virginia COTP Zone for the duration needed to ensure safe transit of vessels and industry before and after a hurricane, tropical storm, or other storm with high winds. 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–2023–0366 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: 46 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 § 165.520 to read as follows:

§ 165.520 Safety Zone; Hurricanes, Tropical Storms, and other Storms with High Winds; Captain of the Port Zone Virginia.

(a) *Regulated Areas.* All navigable waters, as defined in 33 CFR 2.36, within the Captain of the Port Zone (COPT) Virginia, as described in 33 CFR 3.25–10, or some portion of those waters, during specified conditions. Port conditions and safety zone activation may vary for different portions of the regulated area at different times, based on storm conditions and its projected track.

(b) *Definitions.* (1) *Captain of the Port* means Commander, Coast Guard Sector Virginia.

(2) *Representative* means any Coast Guard commissioned, warrant, or petty officer or civilian employee who has been authorized to act on the behalf of the Captain of the Port.

(3) *Port Condition WHISKEY* means a condition set by the COTP when National Weather Service (NWS) weather advisories indicate sustained gale force winds (39–54 mph/34–47 knots) are predicted to reach the COTP zone within 72 hours.

(4) *Port Condition X–RAY* means a condition set by the COTP when NWS weather advisories indicate sustained gale force winds (39–54 mph/34–47 knots) are predicted to reach the COTP zone within 48 hours.

(5) *Port Condition YANKEE* means a condition set by the COTP when NWS weather advisories indicate that sustained gale force winds (39–54 mph/34–47 knots) are predicted to reach the COTP zone within 24 hours.

(6) *Port Condition ZULU* means a condition set by the COTP when NWS weather advisories indicate that sustained gale force winds (39–54 mph/34–47 knots) are predicted to reach the COTP zone within 12 hours.

(7) *Port Condition RECOVERY* means a condition set by the COTP when NWS weather advisories indicate that sustained gale force winds (39–54 mph/34–47 knots) are no longer predicted for the regulated area. This port condition remains in effect until the regulated areas are deemed safe and are reopened to normal operations.

(c) *Regulations*—(1) *Port Condition WHISKEY.* All vessels must exercise due diligence in preparation for potential storm impacts. All oceangoing tank barges and their supporting tugs and all self-propelled oceangoing vessels over 500 gross tons (GT) must make plans to depart no later than setting of Port Condition Yankee unless authorized by the COTP. The COTP may modify the geographic boundaries of the regulated area and actions to be taken under Port Condition WHISKEY, based on the trajectory and forecasted storm conditions.

(2) *Port Condition X–RAY.* All vessels must ensure that potential flying debris and hazardous materials are removed, and that loose cargo and cargo equipment is secured. Vessels at facilities must carefully monitor their moorings and cargo operations. Additional anchor(s) must be made ready to let go, and preparations must be made to have a continuous anchor watch during the storm. Engine(s) must be made immediately available for maneuvering. Also, vessels must maintain a continuous listening watch on VHF Channel 16. All oceangoing tank barges and their supporting tugs and all self-propelled oceangoing vessels over 500 GT must prepare to depart the port and anchorages within the affected regulated area. These

vessels shall depart immediately upon the setting of Port Condition YANKEE. During this condition, slow-moving vessels may be ordered to depart to ensure safe avoidance of the incoming storm. Vessels that are unable to depart the port must contact the COTP to receive permission to remain in port. Vessels with COTP's permission to remain in port must implement their pre-approved mooring arrangement. The COTP may require additional precautions to ensure the safety of the ports and waterways. The COTP may modify the geographic boundaries of the regulated area and actions to be taken under Port Condition X–RAY based on the trajectory and forecasted storm conditions.

(3) *Port Condition YANKEE.* Affected ports are closed to all inbound vessel traffic. All oceangoing tank barges and their supporting tugs and all self-propelled oceangoing vessels over 500 GT must have departed the regulated area. The COTP may require additional precautions to ensure the safety of the ports and waterways. The COTP may modify the geographic boundaries of the regulated area and actions to be taken under Port Condition YANKEE based on the trajectory and forecasted storm conditions.

(4) *Port Condition ZULU.* Cargo operations are suspended, except final preparations that are expressly permitted by the COTP as necessary to ensure the safety of the ports and facilities. Other than vessels designated by the COTP, no vessels may enter, transit, move, or anchor within the regulated area. The COTP may modify the geographic boundaries of the regulated area and actions to be taken under Port Condition ZULU based on the trajectory and forecasted storm conditions.

(5) *Port Condition RECOVERY.* Designated areas are closed to all vessels. 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, or delaying 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 representative.

(6) *Regulated Area Notice.* The Coast Guard will provide notice of where, within the regulated area, a declared Port Condition is to be in effect via Broadcast Notice to Mariners, Marine Safety Information Bulletins, or by on-scene representatives.

(7) *Exception.* This regulation does not apply to authorized law enforcement agencies operating within the regulated area.

Dated: September 8, 2023.

J.A. Stockwell,

Captain, U.S. Coast Guard, Captain of the Port, Sector Virginia.

[FR Doc. 2023–19863 Filed 9–13–23; 8:45 am]

BILLING CODE 9110–04–P

POSTAL REGULATORY COMMISSION

39 CFR Part 3050

[Docket No. RM2023–10; Order No. 6673]

Periodic Reporting

AGENCY: Postal Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission is acknowledging a recent filing requesting the Commission initiate a rulemaking proceeding to consider changes to analytical principles relating to periodic reports (Proposal Five). This document informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* October 10, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *https://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Proposal Five
III. Notice and Comment
IV. Ordering Paragraphs

I. Introduction

On September 5, 2023, the Postal Service filed a petition pursuant to 39 CFR 3050.11 requesting that the Commission initiate a rulemaking proceeding to consider changes to analytical principles relating to periodic reports.[1] The Petition identifies the proposed analytical changes filed in this docket as Proposal Five.

II. Proposal Five

Background. Proposal Five relates to modifications to the Parcel Select (PS)/Parcel Return Service (PRS) mail processing and transportation cost models. Petition, Proposal Five at 1. The cost models were last presented in Docket No. ACR2022, Library References USPS–FY22–NP15 and USPS–FY22–NP16, respectively. *Id.* The proposed modifications to the mail processing and transportation cost models underlie recent operational and price structure changes. *Id.*

Previously, USPS Retail Ground (RG), First-Class Package Service (FCPS), and Parcel Select were listed as separate Competitive products within the Mail Classification Schedule (MCS) with Parcel Select Ground (PSG) as a price category within the PS product. *Id.* In order to improve service standards for RG and PSG, the Postal Service implemented operational changes to process and transport RG and PSG mail along with FCPS mail in the contiguous United States beginning FY 2022, Quarter 4.[2]

In addition, classification changes were made to the products on the MCS by removing RG from the Competitive product list, removing PSG as a price category from PS, and expanding the FCPS price structure to include mailpieces weighing up to 70 pounds thus subsuming the RG and PSG price categories under FCPS.[3]

In Docket Nos. CP2023–113 and CP2023–114, the Commission approved additional proposed classification changes to rename FCPS to USPS Ground Advantage and several changes to the PS price structure including: (1) eliminating the distinction of machinable and nonmachinable prices for Parcel Select Heavy Weight (PSHW), (2) establishing a Destination Hub (DHUB) price category for PSHW, (3) establishing a DHUB price category for Parcel Select Lightweight (PSLW), and

[1] Petition of the United States Postal Service for the Initiation of a Proceeding to Consider Proposed Changes in Analytical Principles (Proposal Five), September 5, 2023 (Petition). The Postal Service filed a notice of filing of non-public materials relating to Proposal Five. Notice of Filing of USPS–RM2023–10–NP1 and Application for Nonpublic Treatment, September 5, 2023.

[2] *Id.; see* Docket No. N2022–1, United States Postal Service's Request for an Advisory Opinion on Changes in the Nature of Postal Services, March 21, 2022, at 3.

[3] Petition, Proposal Five at 1–2; *see* Docket Nos. MC2022–81 and MC2022–82, Order Removing USPS Retail Ground from the Competitive Product List and Approving Competitive Classification Changes to First-Class Package Service and Parcel Select, October 28, 2022, at 1–2 (Order No. 6318).

(4) revising the PSLW price structure that focused on destination entry only.[4]

Proposal. The Postal Service proposes that the PS/PRS mail processing and transportation cost models be modified to accommodate both the previous price structure and the new price structure. Petition, Proposal Five at 2–3. The Postal Service confirms that both price structures were in place for portions of FY 2023. *Id.* at 3.

Rationale and impact. The Postal Service provided a modified mail processing cost model in the Excel file ''USPS–FY22–NP15.PROP.FIVE.xls'' and a modified transportation cost model in the Excel file ''USPS–FY22–NP16.PROP.FIVE.xls'' under seal in Library Reference USPS–RM2023–10–NP1. *Id.* at 3, 11.

The Postal Service states that the Docket No. ACR2022 Cost and Revenue Analysis (CRA) proportional adjustment factor is incorporated in the model as a value so that the factor does not recalculate based on proposed FY 2023 modifications and the CRA proportional adjustment factor will be calculated as usual when the Docket No. ACR2023 cost model input data become available. *Id.* at 3.

The Postal Service has incorporated DHUB cost estimates for machinable, nonmachinable, oversize PSHW, and PSLW mailpieces into the summary worksheet of the modified mail processing cost model. *Id.* The new price structure consists of four destination entry levels: destination network distribution center, destination sectional center facility, DHUB, and destination delivery unit (DDU). *Id.* at 4. There are numerous other changes to other pages in the workbook described. *Id.* at 4–11.

The Postal Service states that the transportation cost model has been expanded to include both DHUB and DDU transportation cost estimates. *Id.* However, since there is no DHUB data currently available the Postal Service used intermediate and long distance PSLW DDU costs as proxies for PSLW DHUB costs. *Id.* The Postal Service states that the current methodology used to develop the DHUB cost estimates in the transportation cost model is a temporary solution. *Id.* at 13. The Postal Service assures that the cost model will be modified so that the DHUB transportation costs will be estimated using the same methodology as other price categories once DHUB volume and cubic feet data become available. *Id.*

[4] Docket Nos. CP2023–113 and CP2023–114, Order Concerning Changes in Rates of General Applicability and Classifications for First-Class Package Service and Parcel Select, June 7, 2023, at 1 (Order No. 6536).

Finally, the Postal Service has provided the mail processing unit cost estimates and the transportation cost estimate impacts under seal in an Excel file in Library Reference USPS–RM2023–10–NP1. *Id.* The Postal Service asserts that adoption of the proposed cost models would have no impact on the FY 2022 CRA-level costs. *Id.*

III. Notice and Comment

The Commission establishes Docket No. RM2023–10 for consideration of matters raised by the Petition. More information on the Petition may be accessed via the Commission's website at *https://www.prc.gov.* Interested persons may submit comments on the Petition and Proposal Five no later than October 10, 2023. Pursuant to 39 U.S.C. 505, Philip T. Abraham is designated as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. RM2023–10 for consideration of the matters raised by the Petition of the United States Postal Service for the Initiation of a Proceeding to Consider Proposed Changes in Analytical Principles (Proposal Five), filed September 5, 2023.

2. Comments by interested persons in this proceeding are due no later than October 10, 2023.

3. Pursuant to 39 U.S.C. 505, the Commission appoints Philip T. Abraham to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this docket.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Erica A. Barker,

Secretary.

[FR Doc. 2023–19854 Filed 9–13–23; 8:45 am]

BILLING CODE 7710–FW–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 2 and 51

[EPA–HQ–OAR–2004–0489; FRL–8604–03–OAR]

Revisions to the Air Emissions Reporting Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Reopening of information collection request (ICR 2170.09) comment period.

SUMMARY: The Environmental Protection Agency (EPA) is reopening the comment period for the Information Collection Request (ICR) number 2170.09, for the proposed Air Emissions Reporting Requirements (AERR), published in the **Federal Register** on August 9, 2023. The EPA is reopening the comment period on this ICR to October 18, 2023.

DATES: The comment period for the ICR published on August 9, 2023 at 88 FR 54118 is reopened. Comments must be received on or before October 18, 2023.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2004–0489, by one of the following methods:

- *www.regulations.gov:* Follow the online instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.* Fax: (202) 566–9744.
- *Mail:* Air Emissions Reporting Requirements Rule, Docket No. EPA–HQ–OAR–2004–0489, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. NW, Washington, DC 20460. Please include two copies.
- *Hand Delivery:* Docket No. EPA–HQ–OAR–2004–0489, EPA Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Marc Houyoux, Office of Air Quality Planning and Standards, Air Quality Assessment Division, Emission Inventory and Analysis Group (C339–02), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–3649; email: *NEI_Help@epa.gov* (and include ''AERR'' on the subject line).

SUPPLEMENTARY INFORMATION: On Wednesday August 9, 2023, the EPA published proposed revisions to the Air Emissions Reporting Requirements along with the associated ICR in the **Federal Register**. The comment period for the AERR ICR was for 30 days, ending on September 8, 2023. The EPA

received a comment [1] requesting that the Agency extend the comment period for the ICR to match the comment period for the proposed action, which ends October 18, 2023. To ensure the public has sufficient time to review the ICR in conjunction with the associated proposed action, the EPA is reopening the comment period as requested by the commenter.

Dated: September 10, 2023.

James Hemby,

Deputy Director, Air Quality Assessment Division, Office of Air Quality and Planning Standards.

[FR Doc. 2023–19867 Filed 9–13–23; 8:45 am]

BILLING CODE 6560–50–P

[1] See submission *https://www.regulations.gov/comment/EPA-HQ-OAR-2004-0489-0110.*

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2002–0083; FRL–5919.1–03–OAR]

RIN 2060–AV82

National Emission Standards for Hazardous Air Pollutants: Integrated Iron and Steel Manufacturing Facilities Technology Review; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of comment period.

SUMMARY: On July 31, 2023, the Environmental Protection Agency (EPA) issued a proposal titled, ''National Emission Standards for Hazardous Air Pollutants: Integrated Iron and Steel Manufacturing Facilities Technology Review.'' The EPA is extending the comment period on the proposed rule from September 14, 2023, to September 29, 2023.

DATES: The public comment period for the proposed rule published in the **Federal Register** (FR) on July 31, 2023 (88 FR 49402) is being extended by 15 days. The comment period will now remain open until September 29, 2023, to allow additional time for stakeholders to review and comment on the proposal.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–HQ–OAR–2002–0083, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov* (our preferred method). Follow the online instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2002–0083 in the subject line of the message.
- *Fax:* (202) 566–9744. Attention Docket ID No. EPA–HQ–OAR–2002–0083.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA–HQ–OAR–2002–0083, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand/Courier Delivery:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operation 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 rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: For questions about this action, contact Phil Mulrine, Sector Policies and Programs Division (D243–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, P.O. Box 12055, Research Triangle Park, North Carolina 27711; telephone number (919) 541–5289; and email address *mulrine.phil@epa.gov.*

SUPPLEMENTARY INFORMATION:

Rationale. On July 31, 2023, the Environmental Protection Agency (EPA) issued a proposal titled, ''National Emission Standards for Hazardous Air Pollutants: Integrated Iron and Steel Manufacturing Facilities Technology Review,'' 88 FR 49402 (July 31, 2023). In the proposal, the EPA provided a public comment period until September 14, 2023. The EPA has received requests for additional time to review and comment on the proposed rule. After considering these requests, the EPA has decided to extend the public comment period another 15 days, until September 29, 2023, so that the comment period will be a total of 60 days. This extension will ensure that the public has additional time to review and comment on the proposed rule.

Docket. The EPA has established a docket for this rulemaking under Docket ID No. EPA–HQ–OAR–2002–0083. All documents in the docket are listed in *https://www.regulations.gov/.* Although listed, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not available through the internet based docket and will be publicly available only in hard copy. With the exception of such material, publicly available docket materials are available electronically in *Regulations.gov.*

Instructions. Direct your comments to Docket ID No. EPA–HQ–OAR–2002–0083. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *https://www.regulations.gov/,* including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit electronically to *https://www.regulations.gov/* any information that you consider to be CBI or other information whose disclosure is restricted by statute. This type of information should be submitted as discussed below.

The EPA may publish any comment received to its public docket. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

The *https://www.regulations.gov/* website allows you to submit your comment anonymously, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *https://www.regulations.gov/,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include

special characters or any form of encryption and should be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *https://www.epa.gov/dockets*.

Submitting CBI. Do not submit information containing CBI to the EPA through *https://www.regulations.gov/*. Clearly mark the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, note the docket ID, mark the outside of the digital storage media as CBI, and identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in instructions above. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI and note the docket ID. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2.

Our preferred method to receive CBI is for it to be transmitted electronically using email attachments, File Transfer Protocol (FTP), or other online file sharing services (*e.g.,* Dropbox, OneDrive, Google Drive). Electronic submissions must be transmitted directly to the OAQPS CBI Office at the email address *oaqpscbi@epa.gov* and, as described above, should include clear CBI markings and note the docket ID. If assistance is needed with submitting large electronic files that exceed the file size limit for email attachments, or if you do not have your own file sharing service, please email *oaqpscbi@epa.gov* to request a file transfer link. If sending CBI information through the U.S. Postal Service, please send it to the following address: OAQPS Document Control Officer (C404–02), OAQPS, U.S. Environmental Protection Agency, P.O. Box 12055, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA–HQ–OAR–2002–0083. The mailed CBI material should be double-wrapped and clearly marked. Any CBI markings should not show through the outer envelope.

Penny Lassiter,

Director, Sector Policies and Programs Division.

[FR Doc. 2023–19762 Filed 9–13–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 23–813; MB Docket No. 23–302; RM–11965; FR ID 170812]

Radio Broadcasting Services; Lac du Flambeau, Wisconsin

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rule making filed by L.D.F. Business Development Corp., the non-gaming wholly-owned business entity of the Lac du Flambeau Band of Lake Superior Chippewa Indians (LDF Tribe), proposing to amend the FM Table of Allotments, by allotting Channel 225A at Lac du Flambeau, Wisconsin, as a Tribal allotment and the community's first local service. A staff engineering analysis indicates that Channel 225A can be allotted to Lac du Flambeau, Wisconsin, consistent with the minimum distance separation requirements of the Commission's rules, with a site restriction of 12.1 km (7.5 miles) northwest of the community. The reference coordinates are 46–01–14 NL and 89–44–54 WL. Lac du Flambeau, Wisconsin is located within 320 kilometers (199 miles) of the U.S.-Canada border. Commission staff has requested Canadian concurrence.

DATES: Comments must be filed on or before October 30, 2023, and reply comments on or before November 15, 2023.

ADDRESSES: Secretary, Federal Communications Commission, 45 L Street NE, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner and its counsel as follows: Melodie A. Virtue, Esq., Brad C. Deutsch, Esq., c/o L.D.F. Business Development Corp., Foster Garvey PC, 1000 Potomac Street NW, Suite 200, Washington, DC 20007, *Melodie.Virtue@foster.com, Brad.Deutsch@foster.com.*

FOR FURTHER INFORMATION CONTACT: Rolanda F. Smith, Media Bureau, (202) 418–2054, *Rolanda-Faye.Smith@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a synopsis of the Federal Communications Commission's (Commission) Notice of Proposed Rule Making, MB Docket No. 23–302, adopted September 6, 2023, and released September 6, 2023. The full text of this Commission decision is available online at *https://apps.fcc.gov/ecfs.* The full text of this document can also be downloaded in Word or Portable Document Format (PDF) at *https://www.fcc.gov/edocs.* This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

Federal Communications Commission.

Nazifa Sawez,

Assistant Chief, Audio Division, Media Bureau.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336, 339.

■ 2. In § 73.202, in paragraph (b), amend the Table of FM Allotments under Wisconsin by adding in alphabetical an entry for ''Lac du Flambeau'' to read as follows:

§ 73.202 Table of Allotments.

* * * * *

(b) * * *

TABLE 1 TO PARAGRAPH (b)

[U.S. States]

	Channel No.
* * * * *	
Wisconsin	
* * * * *	
Lac du Flambeau	225A
* * * * *	

* * * * *

[FR Doc. 2023–19836 Filed 9–13–23; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register

Vol. 88, No. 177

Thursday, September 14, 2023

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

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

[Docket #: RBS–23–BUSINESS–0011]

Notice of Solicitation of Applications for the Intermediary Relending Program for Fiscal Year 2024

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice.

SUMMARY: The Rural Business-Cooperative Service (RBCS or Agency), an agency of the United States Department of Agriculture (USDA), invites applications under the Intermediary Relending Program (IRP) for fiscal year (FY) 2024, subject to availability of funding. This Notice is being issued prior to passage of a FY 2024 Consolidated Appropriations Act in order to allow applicants enough time to leverage financing, prepare and submit their applications, and give the Agency time to process program applications within FY 2024. Based on FY 2023 appropriated funding, the Agency estimates that approximately $18,889,000 will be available for FY 2024. Successful applications will be selected by the Agency for funding and subsequently awarded to the extent that funding may ultimately be made available through appropriations. The Agency advises that all interested parties bear the financial burden of preparing and submitting an application in response to this Notice whether or not funding is appropriated for this program in FY 2024.

DATES: The deadlines for completed applications to be received in the USDA Rural Development (RD) State Office for quarterly funding competitions is no later than 4:30 p.m. (local time) on: First Quarter—September 30, 2023, Second Quarter—December 31, 2023, Third Quarter—March 31, 2024, and Fourth Quarter—June 30, 2024.

ADDRESSES: Applications must be submitted to the USDA RD State Office for the state where the applicant is located. Applications may be submitted in paper or electronic format to the appropriate RD State Office and must be received by 4:30 p.m. local time on the deadline date(s) to compete for available funds in the fiscal quarter. Applicants are encouraged to contact their respective RD State Office for an email contact to submit an electronic application prior to the submission deadline date(s). A list of the USDA RD State Office contacts can be found at: *https://www.rd.usda.gov/about-rd/state-offices.*

FOR FURTHER INFORMATION CONTACT: Lori Pittman, Program Management Division, Business Programs, Rural Business-Cooperative Service, U.S. Department of Agriculture, 1400 Independence Avenue SW, MS 3226, Room 5160–S, Washington, DC 20250–3226, *lori.pittman1@usda.gov,* or call (202) 720–9815. For further information on this Notice, please contact the USDA RD State Office in the State in which the applicant's headquarters is located. A list of RD State Office contacts is provided at the following link: *https://www.rd.usda.gov/about-rd/state-offices.*

SUPPLEMENTARY INFORMATION:

Overview

Federal Awarding Agency Name: Rural Business-Cooperative Service.

Funding Opportunity Title: Intermediary Relending Program.

Announcement Type: Notice of Solicitation of Application (NOSA).

Assistance Listing Number: 10.767.

Dates: The deadlines for completed applications to be received in the USDA RD State Office for quarterly funding competitions is no later than 4:30 p.m. (local time) on: First Quarter—September 30, 2023, Second Quarter—December 31, 2023, Third Quarter—March 31, 2024, and Fourth Quarter—June 30, 2024.

Rural Development Priorities: The Agency encourages applicants to consider projects that will advance the following key priorities (more details available at *https://www.rd.usda.gov/priority-points*):

- *Addressing Climate Change and Environmental Justice.* Reducing climate pollution and increasing resilience to the impacts of climate change through economic support to rural communities;
- *Advancing Racial Justice, Place-Based Equity, and Opportunity.* Ensuring all rural residents have equitable access to Rural Development (RD) programs and benefits from RD funded projects; and
- *Creating More and Better Market Opportunities.* Assisting rural communities recover economically through more and better market opportunities and through improved infrastructure.

A. Program Description

1. *Purpose of the Program.* This program provides low-interest loans to local lenders—''intermediaries''—who then relend to businesses to help improve economic conditions and create jobs in rural communities. This purpose is achieved through the loans made to intermediaries that establish a revolving loan fund for the purpose of providing loans to ultimate recipients to promote community development, establish new businesses, establish and support microlending programs, and create or retain employment opportunities in rural areas. All applicable program requirements in their entirety can be found at 7 CFR part 4274, subpart D.

2. *Statutory and Regulatory Authority.* This program is authorized under section 310H of the Consolidated Farm and Rural Development Act (7 U.S.C. 1936b) and is administered through regulations at 7 CFR part 4274, subpart D.

The Consolidated Appropriations Act, 2023, authorized set-aside funding to projects and intermediaries serving Federally Recognized Native American Tribes, and for Mississippi Delta Region Counties (as determined in accordance with Pub. L. 100–460). Eligible applicants for the set-aside funds, assuming that similar set-aside funds are appropriated for fiscal year 2024, must demonstrate that at least 75 percent of the benefits of an approved loan in this program will assist ultimate recipients in the designated areas. Applications for any set-aside funds must be submitted to the RD State Office where the project is located by 4:30 p.m. (local time) on the following deadline dates. The deadline to submit completed applications for Federally Recognized Tribes and Mississippi Delta Region Counties' projects is May 31, 2024. It is possible that funds may also be appropriated by Congress for projects

located in Rural Empowerment Zone/ Enterprise Communities/Rural Economic Area Partnership areas. Completed applications for these projects, subject to available funding, must be submitted by July 15, 2024.

3. *Definitions.* The definitions applicable to this notice are published at 7 CFR 4274.302.

4. *Application of Awards.* The Agency will review, evaluate and score applications received in response to this Notice based on the provisions found in 7 CFR 4274.340 and as indicated in this Notice. Awards under the IRP will be made on a competitive basis using specific selection criteria contained in 7 CFR 4274.341(b). The Agency advises all interested parties that the applicant bears the full burden in preparing and submitting an application in response to this notice regardless of whether or not funding is appropriated for the IRP in FY 2024.

B. Federal Award Information

Type of Award: Loan.

Fiscal Year Funds: FY 2024.

Available Funds: Funding for the IRP program in FY 2024 will be determined in an Appropriations Act for FY 2024.

Award Amounts: The Agency anticipates a maximum award of $1 million for eligible Intermediaries submitting a loan request.

Anticipated Award Dates

(a) *Regular Funding:* First Quarter—December 1, 2023, Second Quarter—March 1, 2024, Third Quarter—June 1, 2024, Fourth Quarter—September 1, 2024.

(b) *Federally Recognized Tribes and Mississippi Delta Region Counties Funding:* June 15, 2024.

(c) Empowerment Zones/Enterprise Communities/Rural Economic Area Partnership Funding: August 1, 2024.

Performance Period: None.

Renewal or Supplemental Awards: None.

Type of Assistance Instrument: Direct Loan.

C. Eligibility Information

1. *Eligible Applicants.* IRP loans may be made to a private non-profit corporation, a public agency, an Indian Tribe, or a cooperative entity, identified as an eligible intermediary in accordance with 7 CFR 4274.310.

2. *Cost Share or Matching.* The IRP revolving fund share of the eligible project cost of an ultimate recipient's project funded under this Notice shall not exceed the lesser of (a) $400,000; and (b) Fifty percent of the originally-approved Agency IRP loan amount to an intermediary. No more than 75 percent of the total cost of an ultimate recipient's project can be funded from Agency IRP loan funds. Points awarded for leveraging will be considered in accordance with the requirements specified in 7 CFR 4274.341(b)(4).

3. *Other.* Applications will only be accepted from eligible intermediaries that will establish, or have established, revolving loan programs for the purpose of providing loans to ultimate recipients for business purposes and community development in a rural area.

There are no ''responsiveness'' or ''threshold'' eligibility criteria for these loans. However, not more than one loan will be approved by the Agency for an intermediary in any single fiscal year unless the additional request is from this program's set-aside funding.

Applications will not be considered for funding if they do not provide enough information to determine eligibility, are not suitable for evaluation, or are missing required elements as stated in 7 CFR 4274.340.

D. Application and Submission Information

1. *Address to Request Application Package.* For further information, entities wishing to apply for assistance should contact the USDA RD State Office where they are located, provided in the **ADDRESSES** section of this notice, to obtain copies of the application package. Applicants are also encouraged to contact their respective RD State Office for an email contact to submit an electronic application prior to the submission deadline date(s). Please note that applicants may locate the downloadable application package for this program by the Assistance Listing Number provided in the Overview Section above.

2. *Content and Form of Application Submission.* An application must contain all the required elements described in 7 CFR 4274.340, and each selection priority criterion outlined in 7 CFR 4274.341(b) must be addressed in the application. An original copy of the application must be filed with a RD State Office for the state where the Intermediary is located.

The applicant documentation and forms needed for a complete application are located in 7 CFR 4274.340. There are no specific formats or limitations on the number of pages required for an application narrative, and applicants may request any Agency forms and addresses from the **ADDRESSES** section of this notice. Any form that requires an original signature, but is signed electronically in the application submission, must be signed in ink by the authorized person prior to the disbursement of funds.

3. *System for Award Management and Unique Entity Identifier.*

(a) At the time of application, each applicant must have an active registration in the System for Award Management (SAM) before submitting its application in accordance with 2 CFR part 25. In order to register in SAM, entities will be required to obtain a Unique Entity Identifier (UEI). Instructions for obtaining the UEI are available at *https://sam.gov/content/entity-registration.*

(b) Applicants must maintain an active SAM registration, with current, accurate and complete information, at all times during which it has an active Federal award or an application under consideration by a Federal awarding agency.

(c) Each applicant must ensure that it completes the Financial Assistance General Certifications and Representations in SAM.

(d) Each applicant must provide a valid UEI in its application, unless determined exempt under 2 CFR 25.110.

(e) The Agency will not make an award until the applicant has complied with all SAM requirements including providing the UEI. If an applicant has not fully complied with the requirements by the time the Agency is ready to make an award, the Agency may determine that the applicant is not qualified to receive a Federal award and use that determination as a basis for making a Federal award to another applicant.

4. *Submission Dates and Times.* Applications, including applications for set-aside funding, must be received by the specified USDA RD State Office by the dates and times as indicated above to compete for available funds. If the due date falls on a Saturday, Sunday or federal holiday, the application is due the next business day. The Agency will determine the application receipt date based on the actual date an application is received electronically, in person, or when a paper application is postmarked. The Agency will not solicit or consider new scoring or eligibility information that is submitted after the application deadline. RBCS also reserves the right to ask applicants for clarifying information and additional verification of assertions in the application.

5. *Intergovernmental Review.* Executive Order (E.O.) 12372, ''Intergovernmental Review of Federal Programs,'' applies to this program. This E.O. requires that Federal agencies provide opportunities for consultation on proposed assistance with State and

local governments. Many states have established a Single Point of Contact (SPOC) to facilitate this consultation. For a list of States that maintain a SPOC, please see the White House website: *https://www.whitehouse.gov/omb/management/office-federal-financial-management/.* If your State has a SPOC, you may submit a copy of the application directly for review. Any comments obtained through the SPOC must be provided to your State Office for consideration as part of your application. If your state has not established a SPOC, you may submit your application directly to the Agency. Indian Tribes are exempt from this requirement.

6. *Funding Restrictions.* The intent of the IRP is identified above in section A.1 of this notice. There are no funding restrictions beyond that the loan proceeds be used for eligible type purposes stated in 7 CFR 4274.320. Building construction is an eligible use of funds under the program and all projects must be located in a rural area of a State. Any administrative costs must be approved annually by the Agency.

7. *Other Submission Requirements.* Please note that applicants may locate the downloadable application package for this program by the Assistance Listing Number provided in the Application and Submission Information, Content and Form of Application Submission Section above.

E. Application Review Information

1. *Criteria.* All eligible and complete applications will be evaluated and scored based on the selection criteria and weights contained in 7 CFR 4274.341(b) and in this section of the Notice. Failure to address any of the application criteria by the application deadline will result in the application being determined ineligible, and the application will not be considered for funding.

(a) *Discretionary Points.* The Administrator may assign up to 10 discretionary points to an application when under their approval authority. Permissible justifications in accordance with 7 CFR 4274.341(b)(10) are geographic distribution of funds or special President/Secretary of Agriculture initiatives such as local foods, regional development, persistent poverty, energy-related, etc. The number of points to be awarded will be awarded for either or both items. Secretary of Agriculture initiatives include:

(1) Assisting rural communities recover economically through more and better market opportunities and through improved infrastructure. Applicant would receive priority points if the project is located in or serving a rural community whose economic well-being ranks in the most distressed tier (distress score of 80 or higher) of the Distressed Communities Index using the Distressed Communities Look-Up Map available at *https://www.rd.usda.gov/priority-points.*

(2) Ensuring all rural residents have equitable access to RD programs and benefits from RD funded projects. Using the Social Vulnerability Index (SVI) Look-Up Map (available at *https://www.rd.usda.gov/priority-points*), an applicant would receive priority points if the project is:

- Located in or serving a community with score 0.75 or above on the SVI;
- Is a Federally recognized tribe, including Tribal instrumentalities and entities that are wholly owned by Tribes; or
- Is a project where at least 50 percent of the project beneficiaries are members of Federally Recognized Tribes and non-Tribal applicants include a Tribal Resolution of Consent from the Tribe or Tribes that the applicant is proposing to serve.

(3) Reducing climate pollution and increasing resilience to the impacts of climate change through economic support to rural communities. Using the Disadvantaged Community and Energy Community Look-Up Map (available at *https://www.rd.usda.gov/priority-points*), applicants will receive priority in two ways:

- If the project is located in or serves a Disadvantaged Community as defined by the Climate and Economic Justice Screening Tool (CEJST), from the White House Council on Environmental Quality (CEQ), or
- If the project is located in or serves an Energy Community as defined by the Inflation Reduction Act (IRA).

See the website, *https://www.rd.usda.gov/priority-points,* for options.

2. *Review and Selection Process.* The RD State Office will review applications to determine if they are eligible for assistance based on the requirements contained in 7 CFR part 4274, subpart D. If determined eligible, the application will be submitted to the National Office for funding competition with all eligible applications received by the quarterly application deadline or the deadline indicated for set-aside funding. The Agency Administrator reserves the right to award up to 10 discretionary points as identified under 7 CFR 4274.341(b)(10).

In order to distribute funds among the greatest number of projects possible during the respective funding periods, applications will be reviewed, organized and ranked in order from highest to lowest and funded up to the maximum funding available during each quarterly funding cycle in FY 24.

F. Federal Award Administration Information

1. *Federal Award Notices.* Successful applicants will receive notification for funding from the USDA RD State Office. Applicants must comply with all applicable statutes and regulations before the loan award will be obligated. An eligible application competing for regular IRP funds, but not selected, will be reconsidered in the three subsequent quarterly funding competitions, for a total of four competitions (and may be considered in a following fiscal year), provided the application and eligibility requirements have not changed. After competing in four consecutive quarterly competitions, any unsuccessful application for regular funds will receive written notification indicating that its application will no longer be considered for funding. Applicants competing for set-aside funding have only one application period per fiscal year to apply for set-aside funding. Unsuccessful applications for set-aside funding will receive written notification indicating that their application was not successful. An applicant with an unsuccessful application for set-aside funding may elect, in writing, to submit its project for IRP regular fund competitions commencing with the next quarterly application period.

2. *Administrative and National Policy Requirements.* Additional requirements that apply to intermediaries selected for this Program can be found in 7 CFR part 4274, subpart D. All successful applicants will be notified by letter which will include a Letter of Conditions, and a Letter of Intent to Meet Conditions, which are not approval determinations. The loan will be considered approved when all conditions in the Letter of Conditions have been met and the Agency obligates the funding for the project.

3. *Reporting.* In addition, all recipients of Federal financial assistance are required to report information about first-tier sub-awards and executive compensation (see 2 CFR part 170). You will be required to have the necessary processes and systems in place to comply with the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282) reporting requirements (see 2 CFR 170.200(b), unless you are exempt under 2 CFR 170.110(b)).

Intermediaries must collect and maintain data provided by Ultimate

Recipients on race, sex, and national origin and also ensure that Ultimate Recipients collect and maintain this data. Race and ethnicity data will be collected in accordance with the Office of Management and Budget (OMB) **Federal Register** notice, ''Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity'' (62 FR 58782), October 30, 1997. Sex data will be collected in accordance with Title IX of the Education Amendments of 1972. These items should not be submitted with the application but should be made available upon request by the Agency.

The applicant and the Ultimate Recipients must comply with title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, the Americans with Disabilities Act (ADA), section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Executive Order 12250, Executive Order 13166 Limited English Proficiency (LEP), and 7 CFR part 1901, subpart E.

G. Federal Awarding Agency Contact(s)

For general questions about this notice see the point of contact provided in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

H. Build America, Buy America Act

Funding to Non-Federal Entities. Awardees that are Non-Federal Entities, defined pursuant to 2 CFR 200.1 as any State, local government, Indian Tribe, Institution of Higher Education, or nonprofit organization, shall be governed by the requirements of section 70914 of the Build America, Buy America Act (BABAA) within the Infrastructure Investment and Jobs Act (Pub. L. 117–58). Any requests for waiver of these requirements must be submitted pursuant to USDA's guidance available online at *https://www.usda.gov/ocfo/federal-financial-assistance-policy/USDABuyAmericaWaiver.*

I. Other Information

1. *Paperwork Reduction Act.* In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the information collection requirements associated with the programs, as covered in this notice, have been approved by Office of Management and Budget (OMB) under OMB Control Number 0570–0021.

2. *National Environmental Policy Act:* All recipients under this Notice are subject to the requirements of 7 CFR part 1970 and must comply in accordance with 7 CFR 4274.305(b).

3. *Federal Funding Accountability and Transparency Act.* All applicants, in accordance with 2 CFR part 25, must be registered in SAM and have a UEI number as stated in Section D.3. of this notice. All recipients of Federal financial assistance are required to report information about first-tier sub-awards and executive total compensation in accordance with 2 CFR part 170.

4. *Civil Rights Act.* All loans made under this notice are subject to title VI of the Civil Rights Act of 1964 as required by USDA (7 CFR part 15, subpart A—Nondiscrimination in Federally-Assisted Programs of the Department of Agriculture—Effectuation of Title VI of the Civil Rights Act of 1964) and section 504 of the Rehabilitation Act of 1973, title VIII of the Civil Rights Act of 1968, title IX, Executive Order 13166 (Limited English Proficiency), Executive Order 11246, and the Equal Credit Opportunity Act of 1974.

5. *Nondiscrimination Statement.* In accordance with Federal civil rights laws and USDA civil rights regulations and policies, the USDA, its Mission Areas, agencies, staff offices, employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Program information may be made available in languages other than English. Persons with disabilities who require alternative means of communication to obtain program information (*e.g.,* Braille, large print, audiotape, American Sign Language) should contact the responsible Mission Area, agency, or staff office or the 711 Relay Service.

To file a program discrimination complaint, a complainant should complete a Form AD–3027, USDA Program Discrimination Complaint Form, which can be obtained online at *https://www.usda.gov/sites/default/files/documents/ad-3027.pdf,* from any USDA office, by calling (866) 632–9992, or by writing a letter addressed to USDA. The letter must contain the complainant's name, address, telephone number, and a written description of the alleged discriminatory action in sufficient detail to inform the Assistant Secretary for Civil Rights (ASCR) about the nature and date of an alleged civil rights violation. The completed AD–3027 form or letter must be submitted to USDA by:

(1) *Mail:* U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410; or,

(2) *Fax:* (833) 256–1665 or (202) 690–7442; or

(3) *Email: program.intake@usda.gov.*

USDA is an equal opportunity provider, employer, and lender.

Karama Neal,

Administrator, Rural Business-Cooperative Service. USDA Rural Development.

[FR Doc. 2023–19927 Filed 9–13–23; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

[Docket #: RBS–22–BUSINESS–0029]

Notice of Processing Timeline Change for the Rural Energy for America Program for Fiscal Year 2023

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice.

SUMMARY: The Rural Business-Cooperative Service (the Agency) is issuing a notice of the Agency's intention to remove the self-imposed restriction that all Fiscal Year (FY) 2023 applications that were submitted under the Rural Energy for America Program (REAP) prior to June 30, 2023, and were not funded in the national unrestricted pooling competitions, must be withdrawn.

DATES: This notice is effective September 14, 2023.

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:

Background

The Agency published two funding opportunity notices and a correction notice in the **Federal Register** for REAP for FY23. The first notice published December 16, 2022 (87 FR 77059), the second notice on March 31, 2023 (88 FR 19239), and the correction notice published May 31, 2023 (88 FR 34823). The two funding notices state that obligations will take place through

September 30, 2023, and complete and eligible applications which were not funded in the national unrestricted pooling must be withdrawn. The Agency is removing the self-imposed deadline on the national unrestricted pooling competitions for FY23 due to the overwhelming response to REAP for FY 2023. The Agency will continue processing applications received by June 30, 2023, into the first quarter of FY 2024 for participation in these national competitions. Unfunded applications from the national competitions will not be moved into the next FY 2024 funding cycle and must be withdrawn.

Karama Neal,

Administrator, Rural Business-Cooperative Service.

[FR Doc. 2023–19868 Filed 9–13–23; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

[Docket #: RBS–23–BUSINESS–0012]

Notice of Solicitation of Applications for the Rural Microentrepreneur Assistance Program for Fiscal Year 2024

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice.

SUMMARY: The Rural Business-Cooperative Service (RBCS or Agency), an agency of the United States Department of Agriculture (USDA), Rural Development (RD), is making an initial announcement to invite applications for loans and grants under the Rural Microentrepreneur Assistance Program (RMAP) for fiscal year (FY) 2024, subject to the availability of funding. This notice is being issued prior to the passage of a FY 2024 Appropriations Act, which may or may not provide funding for this program, in order to allow applicants sufficient time to leverage financing, prepare and submit their applications, and give the Agency time to process applications within FY 2024. Based on FY 2023 appropriated funding, the Agency estimates that approximately $29,000,000 will be available for FY 2024. Successful applications will be selected by the Agency for funding and subsequently awarded to the extent that funding may ultimately be made available through appropriations. All applicants are responsible for any expenses incurred in developing their applications or any costs incurred prior to the obligation date.

DATES: The deadlines for completed applications to be received in the RD State Office for quarterly funding competitions are no later than 11:59 p.m. Eastern time on: First Quarter, September 30, 2023; Second Quarter, December 31, 2023; Third Quarter, March 31, 2024; and Fourth Quarter, June 30, 2024. If the due date falls on a Saturday, Sunday, or Federal holiday, the application is due the next business day.

The subsequent microlender technical assistance grant (existing Microenterprise Development Organizations (MDOs) with a microentrepreneur revolving loan fund) will be made, non-competitively, based on the microlender's microlending activity and availability of funds. To determine the microlender technical assistance grant awards for FY2024, if available, the Agency will use the microlender's outstanding balance of microloans as of June 30, 2024, to calculate the eligible grant amount. MDOs that are in compliance with the terms of their loan agreement may apply for this annual grant.

ADDRESSES: Applications must be submitted electronically to the RD State Office for the State where the project is located. Applicants are encouraged to contact their respective RD State Office for an email contact to submit an electronic application prior to the submission deadline date(s). A list of the RD State Office contacts can be found at: *http://www.rd.usda.gov/contact-us/state-offices.* This funding opportunity will be made available for informational purposes on *www.grants.gov.*

FOR FURTHER INFORMATION CONTACT: Shamika Johnson at *shamika.johnson@usda.gov,* Program Management Division, Business Programs, Rural Business-Cooperative Service, U.S. Department of Agriculture, 1400 Independence Avenue SW, Mail Stop 3226, Room 5160–S, Washington, DC 20250–3226, or call (202) 720–1400. For further information on this notice, please contact the RD State Office in the State in which the applicant's headquarters is located. A list of RD State Office contacts is provided at the following link: *http://www.rd.usda.gov/contact-us/state-offices.*

SUPPLEMENTARY INFORMATION:

Overview

Federal Awarding Agency Name: Rural Business-Cooperative Service (RBCS).

Funding Opportunity Title: Rural Microentrepreneur Assistance Program (RMAP).

Announcement Type: Notice of Solicitation of Application (NOSA).

Funding Opportunity Number: RD–RBCS–24–RMAP.

Assistance Listing: 10.870.

Dates: The deadlines for completed applications to be received in the RD State Office for quarterly funding competitions are no later than 11:59 p.m. Eastern time on: First Quarter, September 30, 2023; Second Quarter, December 31, 2023; Third Quarter, March 31, 2024, and Fourth Quarter, June 30, 2024.

Rural Development Key Priorities: The Agency encourages applicants to consider projects that will advance the following key priorities (more details available at *https://www.rd.usda.gov/priority-points*):

- Assisting rural communities recover economically through more and better market opportunities and through improved infrastructure;
- Ensuring all rural residents have equitable access to RD programs and benefits from RD funded projects; and
- Reducing climate pollution and increasing resilience to the impacts of climate change through economic support to rural communities.

A. Program Description

1. *Purpose of the Program.* The purpose of RMAP is to support the development and ongoing success of rural microentrepreneurs and microenterprises, each as defined in 7 CFR 4280.302. RMAP provides the following types of support: loan only, combination loan and technical assistance grant, and subsequent technical assistance grants to microenterprise development organizations (MDOs). Loan funds are used by the MDO to establish or recapitalize a revolving loan program for making microloans to a rural microentrepreneur business. Grant funds are used by the MDO to provide technical assistance and entrepreneurship training to rural individuals and businesses.

2. *Statutory and Regulatory Authority.* RMAP is authorized by Section 379E of the Consolidated Farm and Rural Development Act (Pub. L. 87–128), as amended, and is codified as 7 U.S.C. 2008s and implemented by 7 CFR part 4280, subpart D.

3. *Definitions.* The definitions applicable to this notice are published at 7 CFR 4280.302.

4. *Application Awards.* The Agency will review, evaluate, and score applications received in response to this

notice based on the provisions found in 7 CFR part 4280, subpart D, and as indicated in this notice. Awards under RMAP will be made using the application scoring criteria contained in 7 CFR 4280.316 and this notice. The Agency advises all interested parties that the applicant bears the burden in preparing and submitting an application in response to this notice regardless of whether or not funding is appropriated for this program in FY 2024.

B. Federal Award Information

Type of Award: Loans and/or Grants.

Fiscal Year Funds: FY 2024.

Available Funds: Dependent upon FY 2024 appropriations. Funding is anticipated to be approximately $29,000,000 based on FY 2023 amounts. RBCS may at its discretion, increase the total level of funding available in this funding round from any available source provided the awards meet the requirements of the statute which made the funding available to the Agency.

Award Amounts: The Agency anticipates the following maximum amounts per award: Loans—$500,000; Grants—$100,000.

Anticipated Award Dates:

(a) *Regular Funding:* First Quarter—December 1, 2023, Second Quarter—March 1, 2024, Third Quarter—June 1, 2024, Fourth Quarter—September 1, 2024.

(b) *Subsequent Annual Microlender Technical Assistance Grants:* September 30, 2024.

Performance Period: Subsequent Annual Microlender Technical Assistance Grants September 30, 2024 to September 30, 2025.

Renewal or Supplemental Awards: Unless withdrawn by the applicant, completed applications that receive a score of at least 60 (7 CFR 4280.310(c)) but have not yet been funded, will be retained by the Agency for consideration in subsequent reviews through a total of four consecutive quarterly reviews. Applications that remain unfunded after four quarterly reviews, including the initial quarter in which the application was competed, will not be considered further for an award.

Type of Assistance Instrument: Direct Loan, Financial Assistance Agreement.

C. Eligibility Information

1. *Eligible Applicants.* Eligible applicants are domestic organizations that are non-profit entities, Indian tribes (25 U.S.C. 5304(e)) or public institutions of higher education. Eligible applicants must provide training and technical assistance, make microloans, facilitate access to capital, or have an effective plan or program to deliver such services. The applicant must meet the eligibility requirements in 7 CFR 4280.310 and must not be delinquent on any Federal debt or otherwise disqualified from participation in this program to be eligible to apply. The Agency will check the Do Not Pay portal to determine if the applicant has been debarred or suspended at the time of application and also prior to funding any grant award. All other restrictions in this notice will apply.

2. *Cost Sharing or Matching.* The cost share requirement shall be met by the microlender in accordance with the requirements specified in 7 CFR 4280.311(d).

The MDO is required to provide a match of not less than 15 percent of the total amount of the grant in the form of matching funds, indirect costs, or in-kind goods or services.

3. *Other Eligibility Requirements.* Applications will only be accepted from eligible MDOs. Applications will not be considered for funding if they do not provide sufficient information to determine eligibility or are otherwise not suitable for evaluation. Such applications will be withdrawn and not considered for funding.

D. Application and Submission Information

1. *Address to Request Application Package.* For further information, entities wishing to apply for assistance should contact the RD State Office as identified in the **ADDRESSES** section of this notice to obtain an electronic copy of the application package.

An MDO may submit an initial application for a loan with a microlender technical assistance grant, or an initial or subsequent loan-only (without a microlender technical assistance grant). Loan applications must be submitted electronically to the RD State Office where the project is located and must be organized in the same order set forth in 7 CFR 4280.315. Applicants are strongly encouraged to contact their respective RD State Office for an email contact to submit an electronic application prior to the submission deadline date(s).

2. *Content and Form of Application Submission.* An application must contain all of the required elements outlined in 7 CFR 4280.315 and in this notice. Each application must address the applicable scoring criteria presented in 7 CFR 4280.316 for the type of funding being requested.

For entities applying for program loan funds to become an RMAP microlender only, the following items are also required: (1) Form RD 1910–11, ''Applicant Certification Federal Collection Policies for Consumer or Commercial Debts;'' available at *https://forms.sc.egov.usda.gov/efcommon/eFileServices/eForms/RD1910-11.PDF;* (2) Demonstration that the applicant is eligible to apply to participate in this program; and (3) Certification by the applicant that it cannot obtain sufficient credit elsewhere to fund the activities called for under this program with similar rates and terms.

Current MDO entities may be eligible for subsequent annual microlender technical assistance grants that are awarded subject to funding availability and determined non-competitively based on Agency appropriations for the fiscal year. The MDO must submit a prescribed worksheet, listing the outstanding balance of their microloans and unexpended grant funds as of June 30, 2024, and a letter certifying that their organization still meets all the requirements set forth in 7 CFR part 4280, subpart D, and that no significant changes have occurred within the last year that would affect its ability to carry out the MDO functions. In addition, all MDOs who request Subsequent Annual Microlender Technical Assistance Grants must complete their reporting into the Lenders Interactive Network Connection (LINC) for the Federal fiscal quarter ending June 30, 2024 which will verify the outstanding balance of their microloans as stated in their request for grant funds. The deadline for reporting into LINC and requesting a technical assistance grant is no later than 4:30 p.m. (Eastern time) on August 1, 2024.

3. *System for Award Management and Unique Entity Identifier.*

(a) At the time of application, each applicant must have an active registration in the System for Award Management (SAM) before submitting its application in accordance with 2 CFR part 25. In order to register in SAM, entities will be required to obtain a Unique Entity Identifier (UEI). Instructions for obtaining the UEI are available at *https://sam.gov/content/entity-registration.*

(b) Applicants must maintain an active SAM registration, with current, accurate and complete information, at all times during which it has an active Federal award or an application under consideration by a Federal awarding agency.

(c) Applicant must ensure they complete the Financial Assistance General Certifications and Representations in SAM.

(d) Applicants must provide a valid UEI in its application, unless determined exempt under 2 CFR 25.110.

(e) The Agency will not make an award until the applicant has complied with all SAM requirements including providing the UEI. If an applicant has not fully complied with the requirements by the time the Agency is ready to make an award, the Agency may determine that the applicant is not qualified to receive a Federal award and use that determination as a basis for making a Federal award to another applicant.

4. *Submission Dates and Times.* Competitions for the available loan and grant funds will be made quarterly for applications that are received no later than 11:59 p.m. Eastern time on: First Quarter, September 30, 2023; Second Quarter, December 31, 2024; Third Quarter, March 31, 2024; and Fourth Quarter, June 30, 2024.

Applications must be received by the RD State Office by the dates and times as indicated above to compete for available funds in that fiscal quarter. If the due date falls on a Saturday, Sunday, or Federal holiday, the application is due the next business day.

The Agency will not solicit or consider new scoring or eligibility information that is submitted after the application deadline. RBCS also reserves the right to ask applicants for clarifying information and additional verification of assertions in the application.

5. *Intergovernmental Review.* Executive Order (E.O.) 12372, ''Intergovernmental Review of Federal Programs,'' applies to this program. This E.O. requires that Federal agencies provide opportunities for consultation on proposed assistance with State and local governments. Many states have established a Single Point of Contact (SPOC) to facilitate this consultation. For a list of states that maintain a SPOC, please see the White House website: *https://www.whitehouse.gov/omb/management/office-federal-financial-management/.* If your state has a SPOC, you may submit a copy of the application directly for review. Any comments obtained through the SPOC must be provided to your RD State Office for consideration as part of your application. If your state has not established a SPOC, you may submit your application directly to the Agency. Applications from Federally recognized Indian Tribes are not subject to this requirement.

6. *Funding Restrictions.* No funds made available under this notice shall be used for ineligible purposes outlined in 7 CFR 4280.313(e).

7. *Other Submission Requirements.* All applications must be submitted as a complete application, in one package.

E. Application Review Information

1. *Criteria.* All eligible and complete applications for new loan and grant funds will be evaluated and scored based on the selection criteria and weights contained in 7 CFR part 4280, subpart D. Failure to address any one of the criteria by the application deadline will result in the application being determined ineligible and the application will not be considered for funding. An application must receive at least 60 points out of 100 possible points in the scoring criteria stated in 7 CFR 4280.316 to be considered for funding in the quarter in which it is scored.

2. *Review and Selection Process.* The RD State Offices will review applications to determine if they are eligible for assistance based on requirements contained in 7 CFR part 4280, subpart D. If determined eligible, the application will be submitted to the National Office, where it will be reviewed and prioritized by ranking each application received in that quarter, from highest to lowest score order. All applications will be funded from the highest to lowest score until funds have been exhausted for each funding cycle. Funding of projects is subject to the MDO's satisfactory submission of the additional items required by that subpart and the USDA RD Letter of Conditions.

F. Federal Award Administration Information

1. *Federal Award Notices.* Successful applicants will receive notification for funding from the RD State Office. Applicants must comply with all applicable statutes and regulations before the award will be approved. Provided the application and eligibility requirements have not changed, an application not selected will be reconsidered for three subsequent funding competitions for a total of four competitions. If an application is withdrawn, it can be resubmitted and will be evaluated as a new application. Unsuccessful applications will receive notification by mail, detailing why the application was unsuccessful.

2. *Administrative and National Policy Requirements.* Additional requirements that apply to MDOs selected for this program can be found in 7 CFR part 4280, subpart D. The USDA and the Agency have adopted the USDA grant regulations at 2 CFR chapter IV. This regulation incorporates the latest revisions to the Office of Management and Budget (OMB) regulations 2 CFR part 200 and 2 CFR part 400 for monitoring and servicing RMAP funding.

3. *Reporting.* In addition to any reports required by 2 CFR part 200 and 2 CFR part 400, the MDO must provide reports as required by 7 CFR part 4280, subpart D.

Intermediaries must collect and maintain data provided by Ultimate Recipients defined by 7 CFR 4280.3 on race, sex, and national origin and must also ensure that Ultimate Recipients collect and maintain this data. Race and ethnicity data will be collected in accordance with OMB **Federal Register** notice, ''Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity'' (62 FR 58782), October 30, 1997. Sex data will be collected in accordance with Title IX of the Education Amendments of 1972. These items should not be submitted with the application but should be available upon request by the Agency.

The applicant and the Ultimate Recipients must comply with Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, Executive Order 12250, Executive Order 13166 Limited English Proficiency (LEP), and 7 CFR part 1901, subpart E.

G. Federal Awarding Agency Contact(s)

For general questions about this notice, please contact the RD State Office as provided in the **ADDRESSES** section of this notice.

H. Other Information

1. *Paperwork Reduction Act.* In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the information collection requirements associated with RMAP, as covered in this notice, have been approved by OMB under OMB Control Number 0570–0062.

2. *National Environmental Policy Act.* All recipients under this notice are subject to the requirements of 7 CFR part 1970. However, awards for technical assistance and training under this notice are classified as a Categorical Exclusion according to 7 CFR 1970.53(b), and usually do not require any additional documentation. RBCS will review each grant application to determine its compliance with 7 CFR part 1970. The applicant may be asked to provide additional information or documentation to assist RBCS with this determination.

3. *Federal Funding Accountability and Transparency Act.* All applicants, in accordance with 2 CFR part 25, must be registered in SAM and have a UEI number as stated in Section D.3 of this notice.

4. *Civil Rights Act.* All grants made under this notice are subject to title VI of the Civil Rights Act of 1964 as required by the USDA (7 CFR part 15, subpart A—Nondiscrimination in Federally-Assisted Programs of the Department of Agriculture—Effectuation of Title VI of the Civil Rights Act of 1964) and section 504 of the Rehabilitation Act of 1973, title VIII of the Civil Rights Act of 1968, title IX, Executive Order 13166 (Limited English Proficiency), Executive Order 11246, and the Equal Credit Opportunity Act of 1974.

5. *Nondiscrimination Statement.* In accordance with Federal civil rights laws and USDA civil rights regulations and policies, the USDA, its Mission Areas, agencies, staff offices, employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Program information may be made available in languages other than English. Persons with disabilities who require alternative means of communication to obtain program information (*e.g.,* Braille, large print, audiotape, American Sign Language) should contact the responsible Mission Area, agency, or staff office or the 711 Relay Service.

To file a program discrimination complaint, a complainant should complete a Form AD–3027, USDA Program Discrimination Complaint Form, which can be obtained online at *https://www.usda.gov/sites/default/files/documents/ad-3027.pdf,* from any USDA office, by calling (866) 632–9992, or by writing a letter addressed to USDA. The letter must contain the complainant's name, address, telephone number, and a written description of the alleged discriminatory action in sufficient detail to inform the Assistant Secretary for Civil Rights (ASCR) about the nature and date of an alleged civil rights violation. The completed AD–3027 form or letter must be submitted to USDA by:

(1) *Mail:* U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410; or

(2) *Fax:* (833) 256–1665 or (202) 690–7442; or

(3) *Email: program.intake@usda.gov.*

USDA is an equal opportunity provider, employer, and lender.

Karama Neal,

Administrator, Rural Business-Cooperative Service, USDA Rural Development.

[FR Doc. 2023–19928 Filed 9–13–23; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

[Docket #: RBS–23–BUSINESS–0010]

Notice of Solicitation of Applications for Inviting Applications for the Rural Economic Development Loan and Grant Programs for Fiscal Year 2024

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice.

SUMMARY: The Rural Business-Cooperative Service (RBCS or Agency), a Rural Development (RD) agency of the United States Department of Agriculture (USDA), invites applications for loans and grants under the Rural Economic Development Loan and Grant Programs (REDLG or Programs) for fiscal year (FY) 2024, subject to the availability of funding. This notice is being issued prior to the passage of a FY 24 Consolidated Appropriations Act, which may or may not provide funding for this program, to allow applicants sufficient time to leverage financing, prepare and submit their applications, and give the Agency time to process applications within FY 2024. Based on FY 2023 appropriated funding, the Agency estimates that approximately $90,000,000 will be available for FY 2024. Successful applications will be selected by the Agency for funding and subsequently awarded to the extent that funding may ultimately be made available through appropriations. All applicants are responsible for any expenses incurred in developing their applications.

DATES: The deadlines for completed applications to be received in the RD State Office for quarterly funding competitions are no later than 4:30 p.m. (local time) on: First Quarter, September 30, 2023; Second Quarter, December 31, 2023; Third Quarter, March 31, 2024 and Fourth Quarter, June 30, 2024. The Agency will not consider any application received after the deadline for funding competition in that fiscal quarter.

ADDRESSES: Applications must be submitted in paper or electronically to the RD State Office for the state where the project is located. A list of the RD State Office contacts can be found at: *https://www.rd.usda.gov/about-rd/state-offices.* This notice will also be announced at *www.grants.gov.*

FOR FURTHER INFORMATION CONTACT: Cindy Mason at *cindy.mason@usda.gov,* Program Management Division, Business Programs, Rural Business-Cooperative Service, U.S. Department of Agriculture, 1400 Independence Avenue SW, Stop 3226, Room 5160-South, Washington, DC 20250–3226, or call (202) 720–1400. For further information on this notice, please contact the RD State Office in the state which the applicant's headquarters is located. A list of RD State Office contacts is provided at the following link: *https://www.rd.usda.gov/about-rd/state-offices.*

SUPPLEMENTARY INFORMATION:

Overview

Federal Awarding Agency Name: Rural Business-Cooperative Service (RBCS).

Funding Opportunity Type: Rural Economic Development Loans and Grants (REDLG).

Announcement Type: Notice of Solicitation of Application (NOSA).

Funding Opportunity Number: RD–RBCS–24–REDLG.

Assistance Listing Number: 10.854.

Dates: The deadlines for complete applications to be received in the RD State Office for quarterly funding competitions are no later than 4:30 p.m. (local time) on: First Quarter, September 30, 2023; Second Quarter, December 31, 2023; Third Quarter, March 31, 2024, and Fourth Quarter, June 30, 2024.

Rural Development Key Priorities: The Agency encourages applicants to consider projects that will advance the following key priorities (more details available at *https://www.rd.usda.gov/priority-points*):

- Assisting rural communities recover economically through more and better market opportunities and through improved infrastructure;
- Ensuring all rural residents have equitable access to Rural Development (RD) programs and benefits from RD funded projects; and
- Reducing climate pollution and increasing resilience to the impacts of climate change through economic support to rural communities.

A. Program Description

1. *Purpose of the Program.* The Rural Economic Development Loan (REDL) and Grant (REDG) Programs (REDLG or Program(s)) provide financing to eligible Rural Utilities Service (RUS) electric or telecommunications borrowers (Intermediaries) to promote rural economic development and job creation projects. Assistance provided to rural and Tribal areas, as defined, under this program may include business startup costs, business expansion, business incubators, technical assistance feasibility studies, advanced telecommunications services and computer networks for medical, educational, and job training services, and Community Facilities, as defined at 7 CFR 4280.3, projects for economic development.

2. *Statutory and Regulatory Authority.* These Programs are authorized under 7 U.S.C. 940c–2 and implemented by 7 CFR part 4280, subpart A.

The Consolidated Appropriations Act, 2023, (Pub. L. 117–328, division A, title VII), section 736 designates funding for projects in persistent poverty counties. Persistent poverty counties as defined in section 736 is ''any county that has had 20 percent or more of its population living in poverty over the past 30 years, as measured by the 1990 and 2000 decennial censuses, and 2007–2011 American Community Survey 5-year average, or any territory or possession of the United States''. Another provision in SEC. 736 expands the eligible population in persistent poverty counties to include any county seat of such a persistent poverty county that has a population that does not exceed the authorized population limit by more than 10 percent. This provision expands the current 50,000 population limit to 55,000 for only county seats located in persistent poverty counties. Therefore, assuming the Appropriations Act for 2024 has similar language, applicants and/or beneficiaries located in persistent poverty county seats with populations up to 55,000 (per the 2010 Census) are eligible.

3. *Definitions.* The definitions applicable to this notice are published at 7 CFR 4280.3.

4. *Application of Awards.* The Agency will review, evaluate, and score applications received in response to this notice based on the provisions found in 7 CFR part 4280, subpart A, and as indicated in this notice. Awards under the REDLG programs will be made on a competitive basis using specific selection criteria contained in 7 CFR part 4280, subpart A and as indicated in this notice. The applicant bears the full burden in preparing and submitting an application in response to this notice regardless of whether or not funding is appropriated for the programs in FY 2024.

B. Federal Award Information

Type of Awards: Loans and Grants.
Fiscal Year Funds: FY 2024.
Available Funds: Dependent upon FY 2024 appropriations. Funding is anticipated to be approximately $90,000,000 based on FY 2023 amounts.
Award Amounts: The Agency anticipates the following maximum amounts per award: Loans—$2,000,000; Grants—$300,000.
Anticipated Award Dates: First Quarter, November 30, 2023; Second Quarter, February 29, 2024; Third Quarter, May 31, 2024; and Fourth Quarter, August 31, 2024.
Performance Period: December 1, 2023, through September 30, 2025.
Renewal or Supplemental Awards: None.
Type of Assistance Instrument: Direct Loan and Financial Assistance Agreement.

C. Eligibility Information

1. *Eligible Applicants.* Loans and grants may be made to any entity that is identified by USDA RD as an eligible borrower under the Rural Electrification Act of 1936, as amended (Act). In accordance with 7 CFR 4280.13, applicants that are not delinquent on any Federal debt or not otherwise disqualified from participation in these Programs are eligible to apply. Notwithstanding any other provision of law, any former RUS borrower that has repaid or prepaid an insured, direct, or guaranteed loan under the Act, or any not-for-profit utility that is eligible to receive an insured or direct loan under such Act shall be eligible for assistance under section 313B(a) of such Act in the same manner as a borrower under such Act. All other restrictions in this notice will apply.

2. *Cost Sharing or Matching.* For loans, either the ultimate recipient or the intermediary must provide supplemental funds for the project equal to at least 20 percent of the loan to the intermediary. For grants, the intermediary must establish a revolving loan fund and contribute an amount equal to at least 20 percent of the grant. The supplemental contribution must come from the intermediary's which may not be from other Federal grants, unless permitted by law.

3. *Other.*

(a) There are no ''responsiveness'' or ''threshold'' eligibility criteria for these loans and grants. There is no limit on the number of applications an applicant may submit under this announcement.

(b) None of the funds made available by this or any other Act may be used to enter into a contract, memorandum of understanding, or cooperative agreement with, make a grant to, or provide a loan or loan guarantee to any corporation that:

(i) Has any unpaid Federal tax liability, that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability where the awarding agency is aware of the unpaid tax liability, unless a Federal agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

(ii) Was convicted of a felony criminal violation under any Federal law within the preceding 24 months, where the awarding agency is aware of the conviction, unless a Federal agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

(c) Applications will not be considered for funding if they do not provide sufficient information to determine eligibility or are missing required elements.

D. Application and Submission Information

1. *Address to Request Application Package.* For further information, entities wishing to apply for assistance should contact the RD State Office provided in the **ADDRESSES** section of this notice to obtain copies of the application package. If an applicant requires alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, etc.) please contact the 711 Relay Service.

2. *Content and Form of Application Submission.* An application must contain all of the required elements outlined in 7 CFR 4280.39 and address each selection priority criterion outlined in 7 CFR 4280.42(b). Failure to address any of the criterion will result in a zero-point score for that criterion and will impact the overall evaluation of the application.

3. *System for Award Management and Unique Entity Identifier.*

(a) At the time of application, each applicant must have an active registration in the System for Award Management (SAM) before submitting

its application in accordance with 2 CFR part 25. In order to register in SAM, entities will be required to obtain a Unique Entity Identifier (UEI). Instructions for obtaining the UEI are available at *https://sam.gov/content/entity-registration.*

(b) Applicants must maintain an active SAM registration, with current, accurate and complete information, at all times during which it has an active Federal award or an application under consideration by a Federal awarding agency.

(c) Applicant must ensure they complete the Financial Assistance General Certifications and Representations in SAM.

(d) Applicants must provide a valid UEI in its application, unless determined exempt under 2 CFR 25.110.

(e) The Agency will not make an award until the applicant has complied with all SAM requirements including providing the UEI. If an applicant has not fully complied with the requirements by the time the Agency is ready to make an award, the Agency may determine that the applicant is not qualified to receive a Federal award and use that determination as a basis for making a Federal award to another applicant.

4. *Submission Dates and Times.*

(a) *Application Technical Assistance Deadline Date.* Prior to official submission of grant applications, applicants may request technical assistance or other application guidance from the Agency, as long as such requests are made at least 15 days prior to each quarter submission date. Technical assistance is not meant to be an analysis or assessment of the quality of the materials submitted, a substitute for agency review of completed applications, nor a determination of eligibility, if such determination requires in-depth analysis.

(b) *Application Deadline Dates.* Completed applications must be received no later than 4:30 p.m. (local time) on: First Quarter, September 30, 2023; Second Quarter, December 31, 2023; Third Quarter, March 31, 2024; and Fourth Quarter, June 30, 2024. Applications must be in the RD State Office by the dates and times as indicated. If the due date falls on a Saturday, Sunday, or Federal holiday, the application is due the next business day. If completed applications are not received by the deadline established above, the application will neither be reviewed nor considered in that quarter under any circumstances.

The Agency will not solicit or consider new scoring or eligibility information that is submitted after the application deadline. The Agency also reserves the right to ask applicants for clarifying information and additional verification of assertions in the application.

5. *Intergovernmental Review.* Executive Order (E.O.) 12372, ''Intergovernmental Review of Federal Programs,'' applies to this program. This E.O. requires that Federal agencies provide opportunities for consultation on proposed assistance with State and local governments. Many states have established a Single Point of Contact (SPOC) to facilitate this consultation. For a list of States that maintain a SPOC, please see the White House website: *https://www.whitehouse.gov/omb/management/office-federal-financial-management/.* If your State has a SPOC, you may submit a copy of the application directly for review. Any comments obtained through the SPOC must be provided to your State Office for consideration as part of your application. If your state has not established a SPOC, you may submit your application directly to the Agency. Applications from Federally recognized Indian Tribes are not subject to this requirement.

6. *Funding Restrictions.* The grantee may utilize a previously approved indirect cost rate. Otherwise, the applicant may elect to charge the 10 percent indirect cost permitted under 2 CFR 200.414(f). An indirect cost rate determination may be requested with the application; however, due to the time required to evaluate indirect cost rates, it is likely that all funds will be awarded before the indirect cost rate is determined. No foreign travel is permitted. Pre-Federal award costs will only be permitted with prior written approval by the Agency.

7. *Other Submission Requirements.*

(a) There are no specific limitations on the number of pages, font size and type face, margins, paper size, number of copies, and the sequence or assembly requirements.

(b) The component pieces of this application should contain original signatures on the original application. Any form that requires an original signature but is signed electronically in the application submission, must be signed in ink by the authorized person prior to the disbursement of funds.

(c) An original copy of the application package must be filed with the RD State Office for the State where the intermediary is located.

(d) Applicants may submit applications in hard copy or electronic format as previously indicated in the Application and Submission Information section of this notice. If the applicant wishes to hand deliver its application, the addresses for these deliveries can be located in the **ADDRESSES** section of this notice. Applicants are encouraged to contact their respective State Office for an email contact to submit an electronic application prior to the submission deadline date(s).

Applicants intending to mail applications must allow sufficient time to permit delivery on or before the closing deadline date and time. Acceptance by the United States Postal Service or private mailer does not constitute delivery. Facsimile (FAX) or postage due applications will not be accepted.

E. Application Review Information

1. *Criteria.* All eligible and complete applications will be evaluated and scored based on the selection criteria and weights contained in 7 CFR part 4280, subpart A. Failure to address any one of the criteria by the application deadline will result in the application being determined ineligible, and the application will not be considered for funding.

2. *Review and Selection Process.* The RD State Offices will review applications to determine if they are eligible for assistance based on requirements contained in 7 CFR part 4280, subpart A. If determined eligible, applications will be submitted to the National Office. Funding of projects is subject to the intermediary's satisfactory submission of the additional items required by that subpart and the RD Letter of Conditions. Discretionary priority points, under 7 CFR 4280.43(e), may be awarded with documented justification for the following categories:

(a) Assisting rural communities recover economically through more and better market opportunities and through improved infrastructure. Applicant would receive priority points if the project is located in or serving a rural community whose economic well-being ranks in the most distressed tier (distress score of 80 or higher) of the Distressed Communities Index using the Distressed Communities Look-Up Map available at *https://www.rd.usda.gov/priority-points.*

(b) Ensuring all rural residents have equitable access to RD programs and benefits from RD funded projects. Using the Social Vulnerability Index (SVI) Look-Up Map (available at *https://www.rd.usda.gov/priority-points*), an applicant would receive priority points if the project is:

- Located in or serving a community with score 0.75 or above on the SVI;

• Is a Federally recognized tribe, including Tribal instrumentalities and entities that are wholly owned by Tribes; or

• Is a project where at least 50 percent of the project beneficiaries are members of Federally Recognized Tribes and non-Tribal applicants include a Tribal Resolution of Consent from the Tribe or Tribes that the applicant is proposing to serve.

(c) Reduce climate pollution and increasing resilience to the impacts of climate change through economic support to rural communities. Using the Disadvantaged Community and Energy Community Look-Up Map (available at *https://www.rd.usda.gov/priority-points*), applicants will receive priority in two ways:

• If the project is located in or serves a *Disadvantaged Community* as defined by the Climate and Economic Justice Screening Tool (CEJST), from the White House Council on Environmental Quality (CEQ), or

• If the project is located in or serves an *Energy Community* as defined by the Inflation Reduction Act (IRA).

See the website, *https://www.rd.usda.gov/priority-points,* for options.

F. Federal Award Administration Information

1. *Federal Award Notices.* Successful applicants will receive notification for funding from the RD State Office. Applicants must comply with all applicable statutes and regulations before the loan/grant award can be approved. Provided the application and eligibility requirements have not changed, an eligible application not selected will be reconsidered in three subsequent quarterly funding competitions for a total of four competitions. If an application is withdrawn by the applicant, it can be resubmitted and will be evaluated as a new application.

2. *Administrative and National Policy Requirements.* Additional requirements that apply to intermediaries or grantees selected for these programs can be found in 7 CFR part 4280, subpart A; Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards of the U.S. Department of Agriculture codified in 2 CFR 400.1 to 400.2, and 2 CFR part 415 to 422, and successor regulations to these parts.

Awards are subject to USDA grant regulations at 2 CFR part 400 which adopts the Office of Management and Budget (OMB) regulations 2 CFR part 200.

All successful applicants will be notified by letter which will include a Letter of Conditions, and a Letter of Intent to Meet Conditions. This letter is not an authorization to begin performance. If the applicant wishes to consider beginning performance prior to the loan or grant being officially closed, all pre-award costs must be approved in writing and in advance by the Agency. The loan or grant will be considered officially awarded when all conditions in the Letter of Conditions have been met and the Agency obligates the funding for the project.

The following additional requirements apply to intermediaries or grantees selected for these Programs:

(a) Form RD 4280–2 ''Rural Business-Cooperative Service Financial Assistance Agreement.''

(b) Letter of Conditions.

(c) Form RD 1940–1, ''Request for Obligation of Funds.''

(d) Form RD 1942–46, ''Letter of Intent to Meet Conditions.''

(e) LLL, ''Disclosure of Lobbying Activities,'' if applicable.

(f) Form SF 270, ''Request for Advance or Reimbursement.''

(g) Form RD 400–4, ''Assurance Agreement'' must be completed by the applicant and each prospective ultimate recipient.

(h) Intermediaries or grantees must collect and maintain data provided by ultimate recipients on race, sex, and national origin and ensure ultimate recipients collect and maintain this data. Race and ethnicity data will be collected in accordance with OMB **Federal Register** notice, ''Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity'' (62 FR 58782), October 30, 1997. Sex data will be collected in accordance with Title IX of the Education Amendments of 1972. These items should not be submitted with the application but should be available upon request by the Agency.

3. *Reporting.*

(a) A financial status report and a project performance activity report will be required of all grantees on a quarterly basis until initial funds are expended and yearly thereafter, if applicable, based on the Federal fiscal year. The grantee will complete the project within the total time available to it in accordance with the scope of work and any necessary modifications thereof prepared by the grantee and approved by the Agency. A final project performance report will be required with the final financial status report. The final report may serve as the last quarterly report. The final report must provide complete information regarding the jobs created and supported as a result of the grant if applicable. Grantees must continuously monitor performance to ensure that time schedules are being met, projected work by time periods is being accomplished, and other performance objectives are being achieved. Grantees must submit an original of each report to the Agency no later than 30 days after the end of the quarter. The project performance reports must include, but not be limited to, the following:

(i) A comparison of actual accomplishments to the objectives established for that period;

(ii) Problems, delays, or adverse conditions, if any, which have affected or will affect attainment of overall project objectives, prevent meeting time schedules or objectives, or preclude the attainment of particular project work elements during established time periods. This disclosure shall be accompanied by a statement of the action taken or planned to resolve the situation;

(iii) Objectives and timetable established for the next reporting period;

(iv) Any special reporting requirements, such as jobs supported and created, businesses assisted, or economic development which results in improvements in median household incomes, and any other specific requirements, should be placed in the reporting section of the Letter of Conditions; and

(v) Within 90 days after the conclusion of the project, the intermediary will provide a final project evaluation report. The last quarterly payment will be withheld until the final report is received and approved by the Agency. Even though the intermediary may request reimbursement on a monthly basis, the last 3 months of reimbursements will be withheld until a final report, project performance, and financial status report are received and approved by the Agency.

(b) In addition to any reports required by 2 CFR part 200 and 2 CFR 400.1 to 400.2 and 2 CFR part 415 to 422, the intermediary or grantee must provide reports as required by 7 CFR part 4280, subpart A.

G. Federal Awarding Agency Contact(s)

For general questions about this announcement, please contact your RD State Office provided in the **ADDRESSES** section of this notice.

H. Build America, Buy America

Funding to Non-Federal Entities. Awardees that are Non-Federal Entities, defined pursuant to 2 CFR 200.1 as any

State, local government, Indian tribe, Institution of Higher Education, or nonprofit organization, shall be governed by the requirements of Section 70914 of the Build America, Buy America Act (BABAA) within the Infrastructure Investment and Jobs Act (Pub. L. 117–58). Any requests for waiver of these requirements must be submitted pursuant to USDA's guidance available online at *https://www.usda.gov/ocfo/federal-financial-assistance-policy/USDABuyAmericaWaiver.*

I. Other Information

1. *Paperwork Reduction Act.* In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the information collection requirements associated with the programs, as covered in this notice, have been approved by the Office of Management and Budget (OMB) under OMB Control Number 0570–0035.

2. *National Environmental Policy Act.* All recipients under this notice are subject to the requirements of 7 CFR part 1970. Awards for technical assistance and training under this notice are classified as a Categorical Exclusion according to 7 CFR 1970.53(b), and usually do not require any additional documentation. RBCS will review each grant application to determine its compliance with 7 CFR part 1970. The applicant may be asked to provide additional information or documentation to assist RBCS with this determination.

3. *Federal Funding Accountability and Transparency Act.* All applicants, in accordance with 2 CFR part 25, must be registered in SAM and have a UEI number as stated in section D.3 of this notice. All recipients of Federal financial assistance are required to report information about first-tier sub-awards and executive total compensation in accordance with 2 CFR part 170.

4. *Civil Rights Act.* All grants made under this notice (to applicant and ultimate recipient) are subject to title VI of the Civil Rights Act of 1964 as required by the USDA (7 CFR part 15, subpart A—Nondiscrimination in Federally-Assisted Programs of the Department of Agriculture—Effectuation of Title VI of the Civil Rights Act of 1964) and section 504 of the Rehabilitation Act of 1973, title VIII of the Civil Rights Act of 1968, title IX, Executive Order 12250, Executive Order 13166 (Limited English Proficiency), Executive Order 11246, and the Equal Credit Opportunity Act of 1974, Americans with Disabilities Act (ADA), and 7 CFR part 1901, subpart E.

5. *Nondiscrimination Statement.* In accordance with Federal civil rights laws and USDA civil rights regulations and policies, the USDA, its Mission Areas, agencies, staff offices, employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Program information may be made available in languages other than English. Persons with disabilities who require alternative means of communication to obtain program information (*e.g.,* Braille, large print, audiotape, American Sign Language) should contact the responsible Mission Area, agency, or staff office or the 711 Relay Service.

To file a program discrimination complaint, a complainant should complete a Form AD–3027, USDA Program Discrimination Complaint Form, which can be obtained online at *https://www.usda.gov/sites/default/files/documents/ad-3027.pdf* from any USDA office, by calling (866) 632–9992, or by writing a letter addressed to USDA. The letter must contain the complainant's name, address, telephone number, and a written description of the alleged discriminatory action in sufficient detail to inform the Assistant Secretary for Civil Rights (ASCR) about the nature and date of an alleged civil rights violation. The completed AD–3027 form or letter must be submitted to USDA by:

(1) *Mail:* U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410; or

(2) *Fax:* (833) 256–1665 or (202) 690–7442; or

(3) *Email: program.intake@usda.gov.*

USDA is an equal opportunity provider, employer, and lender.

Karama Neal,

Administrator, Rural Business-Cooperative Service, USDA Rural Development.

[FR Doc. 2023–19925 Filed 9–13–23; 8:45 am]

BILLING CODE 3410–XY–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Briefing of the Minnesota Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Notice of public briefing.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act, that the Minnesota Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a public briefing via Zoom at 1:00 p.m. CT on Friday, December 8, 2023. The purpose of this briefing is to hear testimony on housing affordability in the state.

DATES: Friday, December 8, 2023, from 1:00 p.m.–3:00 p.m. Central Time.

ADDRESSES: The meeting will be held via Zoom.

Registration Link (Audio/Visual): https://www.zoomgov.com/j/1606567675.

Join by Phone (Audio Only): (833) 435–1820 USA Toll-Free; Meeting ID: 160 656 7675.

FOR FURTHER INFORMATION CONTACT: Ana Victoria Fortes, Designated Federal Officer, at *afortes@usccr.gov* or (202) 519–2938.

SUPPLEMENTARY INFORMATION: This committee meeting is available to the public through the registration link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Closed captioning will be available for individuals who are deaf, hard of hearing, or who have certain cognitive or learning impairments. To request additional accommodations, please email Liliana Schiller, Support Services Specialist, at *lschiller@usccr.gov* at least 10 business days prior to the meeting.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following

the meeting. Written comments may be emailed to Ana Victoria Fortes at *afortes@usccr.gov.* Persons who desire additional information may contact the Regional Programs Coordination Unit at (312) 353–8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Minnesota Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Coordination Unit at *lschiller@usccr.gov.*

Agenda

I. Welcome & Roll Call
II. Introductory Remarks
III. Panelist Presentations & Committee Q&A
IV. Public Comment
V. Closing Remarks
VI. Adjournment

Dated: September 11, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–19913 Filed 9–13–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

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

AGENCY: U.S. Commission on Civil Rights.

ACTION: Notice of public meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act, that the Minnesota Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a public meeting via Zoom at 12:30 p.m. CT on Thursday, September 28, 2023. The purpose of this meeting is to plan for a series of briefings regarding the Committee's project on housing affordability in the state.

DATES: Thursday, September 28, 2023, from 12:30 p.m.–1:45 p.m. Central Time.

ADDRESSES: The meeting will be held via Zoom.

Registration Link (Audio/Visual): https://www.zoomgov.com/j/1601155643.

Join by Phone (Audio Only): (833) 435–1820 USA Toll-Free; Meeting ID: 160 115 5643.

FOR FURTHER INFORMATION CONTACT: Ana Victoria Fortes, Designated Federal Officer, at *afortes@usccr.gov* or (202) 519–2938.

SUPPLEMENTARY INFORMATION: This committee meeting is available to the public through the registration link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Closed captioning will be available for individuals who are deaf, hard of hearing, or who have certain cognitive or learning impairments. To request additional accommodations, please email Liliana Schiller, Support Services Specialist, at *lschiller@usccr.gov* at least 10 business days prior to the meeting.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Ana Victoria Fortes at *afortes@usccr.gov.* Persons who desire additional information may contact the Regional Programs Coordination Unit at (312) 353–8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Minnesota Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Coordination Unit at *lschiller@usccr.gov.*

Agenda

I. Welcome & Roll Call
II. Discussion: Housing Affordability in Minnesota
III. Public Comment
IV. Next Steps
V. Adjournment

Dated: September 11, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–19916 Filed 9–13–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

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

AGENCY: U.S. Commission on Civil Rights.

ACTION: Notice of public meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act, that the Minnesota Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a public meeting via Zoom at 12:30 p.m. CT on Thursday, October 19, 2023. The purpose of this meeting is to continue planning for a series of briefings on the Committee's project regarding housing affordability in the state.

DATES: Thursday, October 19, 2023, from 12:30 p.m.–1:45 p.m. Central Time.

ADDRESSES: The meeting will be held via Zoom.

Registration Link (Audio/Visual): https://www.zoomgov.com/j/1613823566.

Join by Phone (Audio Only): (833) 435–1820 USA Toll-Free; Meeting ID: 161 382 3566.

FOR FURTHER INFORMATION CONTACT: Ana Victoria Fortes, Designated Federal Officer, at *afortes@usccr.gov* or (202) 519–2938.

SUPPLEMENTARY INFORMATION: This committee meeting is available to the public through the registration link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Closed captioning will be available for individuals who are deaf, hard of hearing, or who have certain cognitive or learning

impairments. To request additional accommodations, please email Liliana Schiller, Support Services Specialist, at *lschiller@usccr.gov* at least 10 business days prior to the meeting.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Ana Victoria Fortes at *afortes@usccr.gov.* Persons who desire additional information may contact the Regional Programs Coordination Unit at (312) 353–8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Minnesota Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Coordination Unit at *lschiller@usccr.gov.*

Agenda

I. Welcome & Roll Call
II. Discussion: Housing Affordability in Minnesota
III. Public Comment
IV. Next Steps
V. Adjournment

Dated: September 11, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–19914 Filed 9–13–23; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Briefing of the Minnesota Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Notice of public briefing.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act, that the Minnesota Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a public briefing via Zoom at 1:00 p.m. CT on Friday, November 10, 2023. The purpose of this briefing is to hear testimony on housing affordability in the state.

DATES: Friday, November 10, 2023, from 1:00 p.m.–3:00 p.m. Central Time.

ADDRESSES: The meeting will be held via Zoom.

Registration Link (Audio/Visual): https://www.zoomgov.com/j/1604053054.

Join by Phone (Audio Only): (833) 435–1820 USA Toll-Free; Meeting ID: 160 405 3054.

FOR FURTHER INFORMATION CONTACT: Ana Victoria Fortes, Designated Federal Officer, at *afortes@usccr.gov* or (202) 519–2938.

SUPPLEMENTARY INFORMATION: This committee meeting is available to the public through the registration link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Closed captioning will be available for individuals who are deaf, hard of hearing, or who have certain cognitive or learning impairments. To request additional accommodations, please email Liliana Schiller, Support Services Specialist, at *lschiller@usccr.gov* at least 10 business days prior to the meeting.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Ana Victoria Fortes at *afortes@usccr.gov.* Persons who desire additional information may contact the Regional Programs Coordination Unit at (312) 353–8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Minnesota Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Coordination Unit at *lschiller@usccr.gov.*

Agenda

I. Welcome & Roll Call
II. Introductory Remarks
III. Panelist Presentations & Committee Q&A
IV. Public Comment
V. Closing Remarks
VI. Adjournment

Dated: September 11, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–19915 Filed 9–13–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–914, A–557–824, A–549–846, A–583–871, A–552–835]

Boltless Steel Shelving Units Prepackaged for Sale From India, Malaysia, Taiwan, Thailand and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable September 14, 2023.

FOR FURTHER INFORMATION CONTACT: Andrew Huston (India), Samuel Frost (Malaysia), Joy Zhang (Taiwan), Fred Baker (Thailand), or Eliza DeLong (the Socialist Republic of Vietnam (Vietnam)); AD/CVD Operations, Offices VII, V, III, and VI, respectively, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4261, (202) 482–8180, (202) 482–1168, (202) 482–2924, or (202) 482–3878, respectively.

SUPPLEMENTARY INFORMATION:

Background

On May 15, 2023, the U.S. Department of Commerce (Commerce) initiated the less-than-fair-value (LTFV) investigations of imports of boltless steel shelving units prepackaged for sale (boltless steel shelving) from India, Malaysia, Taiwan, Thailand, and Vietnam.[1] Currently, the preliminary determinations are due no later than October 2, 2023.

Postponement of Preliminary Determination

Section 733(b)(1)(A) of the Tariff Act of 1930, as amended (the Act), requires

[1] *See Boltless Steel Shelving Units Prepackaged for Sale from India, Malaysia, Taiwan, Thailand and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigation,* 88 FR 32188 (May 19, 2023).

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 August 31, 2023, Edsal Manufacturing Co., Inc. (the petitioner) submitted a timely request that Commerce postpone the preliminary determinations in the LTFV investigations for India, Malaysia, Taiwan, Thailand, and Vietnam.[2] The petitioner stated that it requests postponement due to concerns that Commerce will need more time to issue supplemental questionnaires to address deficiencies in the respondents' initial questionnaire responses.[3]

For the reasons stated above, and because there are no compelling reasons to deny the request, Commerce, in accordance with section 733(c)(1)(A) of the Act and 19 CFR 351.205(e), is postponing the deadline for the preliminary determinations by 50 days (*i.e.,* 190 days after the date on which these investigations were initiated). As a result, Commerce will issue its preliminary determinations no later than November 21, 2023. In accordance with section 735(a)(1) of the Act and 19 CFR 351.210(b)(1), the deadline for the final determinations in these investigations will continue to be 75 days after the date of the preliminary determinations, unless postponed at a later date.

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).

[2] *See* Petitioner's Letter, ''Petitioner's Request for Postponement of Preliminary Determinations,'' dated August 31, 2023.

[3] *Id.* at 2.

Dated: September 8, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–19896 Filed 9–13–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–133, C–570–134]

Certain Metal Lockers and Parts Thereof From the People's Republic of China: Final Results of Antidumping Duty Changed Circumstances Reviews, and Intent To Revoke the Antidumping and Countervailing Duty Orders, in Part

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) is issuing the final results of changed circumstances reviews (CCRs) of the antidumping duty (AD) and countervailing duty (CVD) orders on certain metal lockers and parts thereof (metal lockers) from the People's Republic of China (China), to revoke the orders, in part, with respect to certain gun safes.

DATES: Applicable September 14, 2023.

FOR FURTHER INFORMATION CONTACT: Matthew Palmer, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1678.

SUPPLEMENTARY INFORMATION:

Background

On July 24, 2023, Commerce published its initiation and preliminary results in the CCRs on metal lockers from China,[1] in which Commerce found that changed circumstances warranted revocation of the *Orders,*[2] in part, with respect to such gun safes, with an effective date retroactive to the date of the *Orders.* We provided interested parties with the opportunity to comment and request a public hearing regarding the *Preliminary Results.*

On August 7, 2023, Academy, Ltd., (Academy), submitted a case brief,[3] and Fort Knox, Inc. (Fort Knox) submitted a letter in lieu of a case brief.[4] On August 14, 2023, Tractor Supply Company (TSC) and List Industries, Inc. (List) and Tennsco LLC (Tennsco) (collectively, the petitioners) submitted rebuttal briefs.[5]

Scope of the Orders

The scope of the *Orders* covers certain metal lockers, with or without doors, and parts thereof (metal lockers). The subject certain metal lockers are classified under Harmonized Tariff Schedule of the United States (HTSUS) subheading 9403.20.0078. Parts of subject certain metal lockers are classified under HTS subheading 9403.90.8041. In addition, subject certain metal lockers may also enter under HTS subheading 9403.20.0050. While HTSUS subheadings are provided for convenience and Customs purposes, the written description of the scope of the *Orders* is dispositive. For a full description of the revised scope of the *Orders, see* Appendix II.

Analysis of Comments Received

All issues raised by the parties in the case brief, letter in lieu of a case brief, and rebuttal briefs are addressed in the Issues and Decision Memorandum[6] and are listed in 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.*

[1] *See Certain Metal Lockers and Parts Thereof from the People's Republic of China: Initiation and Expedited Preliminary Results of Changed Circumstances Reviews, and Intent to Revoke the Antidumping and Countervailing Duty Orders, in Part,* 88 FR 47474 (July 24, 2023) (*Preliminary Results*).

[2] *See Certain Metal Lockers and Parts Thereof from the People's Republic of China: Antidumping and Countervailing Duty Orders,* 86 FR 46826 (August 20, 2021) (*Orders*).

[3] *See* Academy's Letter, ''Metal Lockers from the People's Republic of China: Academy, Ltd.'s Case Brief,'' dated August 7, 2023 (Academy's Case Brief).

[4] *See* Fort Knox's Letter, ''Letter in Lieu of Case Brief, Comments of Fort Knox, Inc. on Preliminary Results of CCR and Intent to Revoke the Orders, in Part,'' dated August 7, 2023 (Fort Knox's Comments).

[5] *See* TSC's Letter, ''Rebuttal Brief,'' dated August 14, 2023 (TSC's Rebuttal Brief); and *See* Petitioners' Letter, ''Rebuttal Brief of Petitioner,'' dated August 14, 2023 (Petitioners' Rebuttal Brief).

[6] *See* Memorandum, ''Certain Metal Lockers and Parts Thereof from the People's Republic of China: Final Results of Changed Circumstances Reviews,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

Final Results of Changed Circumstances Reviews and Revocation of the Orders, in Part

Upon review of the comments received,[7] Commerce continues to determine that domestic locker producers accounting for greater than 85 percent of the domestic industry have expressed support for TSC's requested CCRs,[8] which includes support from the original petitioners and other domestic locker producers,[9] and as a result, Commerce finds that changed circumstances warrant revocation of the *Orders,* in part, with respect to certain gun safes, as described in the revised scope language.[10]

As a result of this determination, Commerce finds that entries of certain gun safe models imported by TSC, specifically, TS12–30 and TS20–30,[11] are excluded from the *Orders.*

Application of the Final Results of These Reviews

TSC requested that Commerce apply the final results of these reviews retroactively to the date of the *Orders, i.e.,* August 20, 2021. Section 751(d)(3) of the Tariff Act of 1930, as amended (the Act) provides that ''{a} determination under this section to revoke an order . . . shall apply with respect to unliquidated entries of the subject merchandise which are entered, or withdrawn from warehouse, for consumption on or after the date determined by the administering authority.'' We note that substantially all of the domestic industry, which is in support of the partial revocation, also agrees with applying the partial revocation retroactive to the date of the *Orders.* Thus, because all parties are in agreement, and Commerce has no administrability concerns with the proposed effective date of the partial revocation being the date of the *Orders,* the final results of these CCRs are applicable, effective August 20, 2021.

Instructions to CBP

Because we determine that there are changed circumstances that warrant the revocation of the *Orders,* in part, we will instruct CBP to liquidate without regard to antidumping and countervailing duties, and to refund any estimated antidumping and countervailing duties on, all unliquidated entries of the merchandise covered by this partial revocation, effective the date of the *Orders,* August 20, 2021.

Commerce intends to issue instructions to CBP no earlier than 35 days after the date of publication of these final results of CCRs in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the 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).

Administrative Protective Order

This notice serves as a final reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

This notice is published in accordance with sections 751(b)(1) and 777(i)(1) of the Act and 19 CFR 351.216(b), 351.221(b), and 351.221(c)(3).

Dated: September 7, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix I—List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the *Orders*
IV. Discussion of the Issues
  Comment 1: Commerce Should Not Withdraw Protections Afforded to U.S. Gun Safe Manufacturers
  Comment 2: The Current and Proposed Scope Language Pertaining to Gun Safe Exclusions Should be Broadened
V. Recommendation

Appendix II—Revised Scope of the Orders

The scope of the *Orders* covers certain metal lockers, with or without doors, and parts thereof (metal lockers). The subject metal lockers are secure metal storage devices less than 27 inches wide and less than 27 inches deep, whether floor standing, installed onto a base or wall-mounted. In a multiple locker assembly (whether a welded locker unit, otherwise assembled locker unit or knocked down unit or kit), the width measurement shall be based on the width of an individual locker not the overall unit dimensions. All measurements in this scope are based on actual measurements taken on the outside dimensions of the single-locker unit. The height is the vertical measurement from the bottom to the top of the unit. The width is the horizontal (side to side) measurement of the front of the unit, and the front of the unit is the face with the door or doors or the opening for internal access of the unit if configured without a door. The depth is the measurement from the front to the back of the unit. The subject certain metal lockers typically include the bodies (back, side, shelf, top and bottom panels), door frames with or without doors which can be integrated into the sides or made separately, and doors.

The subject metal lockers typically are made of flat-rolled metal, metal mesh and/or expanded metal, which includes but is not limited to alloy or non-alloy steel (whether or not galvanized or otherwise metallically coated for corrosion resistance), stainless steel, or aluminum, but the doors may also include transparent polycarbonate, Plexiglas or similar transparent material or any combination thereof. Metal mesh refers to both wire mesh and expanded metal mesh. Wire mesh is a wire product in which the horizontal and transverse wires are welded at the cross-section in a grid pattern. Expanded metal mesh is made by slitting and stretching metal sheets to make a screen of diamond or other shaped openings.

Where the product has doors, the doors are typically configured with or for a handle or other device or other means that permit the use of a mechanical or electronic lock or locking mechanism, including, but not limited to: A combination lock, a padlock, a key lock (including cylinder locks) lever or knob lock, electronic key pad, or other electronic or wireless lock. The handle and locking mechanism, if included, need not be integrated into one another. The subject locker may or may not also enter with the lock or locking device included or installed. The doors or body panels may also include vents (including wire mesh or expanded metal mesh vents) or perforations. The bodies, body components and doors are typically powder coated, otherwise painted or epoxy coated or may be unpainted. The subject merchandise includes metal lockers imported either as welded or otherwise assembled units (ready for installation or use) or as knocked down units or kits (requiring assembly prior to installation or use).

The subject lockers may be shipped as individual or multiple locker units preassembled, welded, or combined into banks or tiers for ease of installation or as sets of component parts, bulk packed (*i.e.,* all backs in one package, crate, rack, carton or container and sides in another package, crate, rack, carton or container) or any combination thereof. The knocked down lockers are shipped unassembled requiring a supplier, contractor or end-user to assemble the individual lockers and locker banks prior to installation.

The scope also includes all parts and components of lockers made from flat-rolled

[7] *See* Academy's Case Brief; and Fort Knox's Comments; and Academy's Request to Reject Fort Knox's Comments; and TSC's Rebuttal Brief; and Petitioners' Rebuttal Brief.

[8] *See* TSC's Letter, ''Request for Changed Circumstances Review,'' dated June 8, 2023 (TSC's Request).

[9] *See* TSC's Request at 2 (citing Exhibit 1); *see also* Petitioner's Letter, ''Response to Changed Circumstance Review Request,'' dated June 22, 2023 (Petitioner's Comments) at 12–13.

[10] *See* Appendix II.

[11] *See* TSC's Request at 1.

metal or expanded metal (*e.g.,* doors, frames, shelves, tops, bottoms, backs, side panels, *etc.*) as well as accessories that are attached to the lockers when installed (including, but not limited to, slope tops, bases, expansion filler panels, dividers, recess trim, decorative end panels, and end caps) that may be imported together with lockers or other locker components or on their own. The particular accessories listed for illustrative purposes are defined as follows:

a. *Slope tops:* Slope tops are slanted metal panels or units that fit on the tops of the lockers and that slope from back to front to prevent the accumulation of dust and debris on top of the locker and to discourage the use of the tops of lockers as storage areas. Slope tops come in various configurations including, but not limited to, unit slope tops (in place of flat tops), slope hoods made of a back, top and end pieces which fit over multiple units and convert flat tops to a sloping tops, and slope top kits that convert flat tops to sloping tops and include tops, backs and ends.

b. *Bases:* Locker bases are panels made from flat-rolled metal that either conceal the legs of the locker unit, or for lockers without legs, provide a toe space in the front of the locker and conceal the flanges for floor anchoring.

c. *Expansion filler panel:* Expansion filler panels or fillers are metal panels that attach to locker units to cover columns, pipes or other obstacles in a row of lockers or fill in gaps between the locker and the wall. Fillers may also include metal panels that are used on the sides or the top of the lockers to fill gaps.

d. *Dividers:* Dividers are metal panels that divide the space within a locker unit into different storage areas.

e. *Recess trim:* Recess trim is a narrow metal trim that bridges the gap between lockers and walls or soffits when lockers are recessed into a wall.

f. *Decorative end panels:* End panels fit onto the exposed ends of locker units to cover holes, bolts, nuts, screws and other fasteners. They typically are painted to match the lockers.

g. *End caps:* End caps fit onto the exposed ends of locker units to cover holes, bolts, nuts, screws and other fasteners.

The scope also includes all hardware for assembly and installation of the lockers and locker banks that are imported with or shipped, invoiced, or sold with the imported locker or locker system except the lock.

Excluded from the scope are wire mesh lockers. Wire mesh lockers are those with each of the following characteristics:

(1) At least three sides, including the door, made from wire mesh;

(2) the width and depth each exceed 25 inches; and

(3) the height exceeds 90 inches.

Also excluded are lockers with bodies made entirely of plastic, wood, or any nonmetallic material.

Also excluded are exchange lockers with multiple individual locking doors mounted on one master locking door to access multiple units. Excluded exchange lockers have multiple individual storage spaces, typically arranged in tiers, with access doors for each of the multiple individual storage space mounted on a single frame that can be swung open to allow access to all of the individual storage spaces at once. For example, uniform or garment exchange lockers are designed for the distinct function of securely and hygienically exchanging clean and soiled uniforms. Thus, excluded exchange lockers are a multi-access point locker whereas covered lockers are a single access point locker for personal storage. The excluded exchange lockers include assembled exchange lockers and those that enter in 'knock down' form in which all of the parts and components to assemble a completed exchange locker unit are packaged together. Parts for exchange lockers that are imported separately from the exchange lockers in 'knock down' form are not excluded.

Also excluded are metal lockers that are imported with an installed electronic, internet-enabled locking device that permits communication or connection between the locker's locking device and other internet connected devices.

Also excluded are locks and hardware and accessories for assembly and installation of the lockers, locker banks and storage systems that are separately imported in bulk and are not incorporated into a locker, locker system or knocked down kit at the time of importation. Such excluded hardware and accessories include but are not limited to locks and bulk imported rivets, nuts, bolts, hinges, door handles, door/frame latching components, and coat hooks. Accessories of sheet metal, including but not limited to end panels, bases, dividers and sloping tops, are not excluded accessories.

Mobile tool chest attachments that meet the physical description above are covered by the scope of the *Orders,* unless such attachments are covered by the scope of the *Orders* on certain tool chests and cabinets from China. If the *Orders* on certain tool chests and cabinets from China are revoked, the mobile tool chest attachments from China will be covered by the scope of the *Orders.*

The scope also excludes metal safes with each of the following characteristics: (1) Pry resistant, concealed hinges; (2) body walls and doors of steel that are at least 17 gauge (0.05625 inch or 1.42874 mm thick); and (3) an integrated locking mechanism that includes at least two round steel bolts 0.75 inch (19 mm) or larger in diameter; or three bolts 0.70 inch (17.78 mm) or more in diameter; or four or more bolts at least 0.60 inch (15.24 mm) or more in diameter, that project from the door into the body or frame of the safe when in the locked position.

The scope also excludes gun safes meeting each of the following requirements:

(1) Shall be able to fully contain firearms and provide for their secure storage.

(2) Shall have a locking system consisting of at minimum a mechanical or electronic combination lock. The mechanical or electronic combination lock utilized by the safe shall have at least 10,000 possible combinations consisting of a minimum three numbers, letters, or symbols. The lock shall be protected by a casehardened (Rc 60+) drill-resistant steel plate, or drill-resistant material of equivalent strength.

(3) Boltwork shall consist of a minimum of three steel locking bolts of at least ½ inch thickness that intrude from the door of the safe into the body of the safe or from the body of the safe into the door of the safe, which are operated by a separate handle and secured by the lock.

(4) The exterior walls shall be constructed of a minimum 12-gauge thick steel for a single-walled safe, or the sum of the steel walls shall add up to at least 0.100 inches for safes with walls made from two pieces of flat-rolled steel.

(5) Doors shall be constructed of a minimum one layer of 7-gauge steel plate reinforced construction or at least two layers of a minimum 12-gauge steel compound construction.

(6) Door hinges shall be protected to prevent the removal of the door. Protective features include, but are not limited to: Hinges not exposed to the outside, interlocking door designs, dead bars, jeweler's lugs and active or inactive locking bolts.

The scope also excludes gun safes meeting each of the following requirements:

(1) Shall be able to fully contain firearms and provide for their secure storage.

(2) Shall have a locking system consisting of at minimum a mechanical or electronic combination lock with a lock body that is integrated into the door of the safe. The mechanical or electronic combination lock utilized by the safe shall have at least 10,000 possible combinations consisting of a minimum three numbers, letters, or symbols.

(3) Bolt work shall consist of a minimum of three steel locking bolts of at least 1/2-inch diameter that intrude from the door of the safe into the body of the safe or from the body of the safe into the door of the safe, which are operated by a separate handle and secured by the lock.

(4) The exterior walls (inclusive of the floor and top) shall be constructed of a minimum 14-gauge thick steel and shall be lined with one or more layers of fire-retardant gypsum board bonded, affixed with brackets or otherwise securely attached to the exterior walls. The fire retardant gypsum board shall be at least 15 mm in thickness for a single layer or shall sum to at least 19 mm in thickness where multiple layers are combined together.

(5) Doors shall be constructed of a minimum of one layer of 14-gauge steel lined with a minimum of one layer of 15 mm thick, fire-retardant gypsum board bonded, affixed with brackets or otherwise securely attached to the door. The doors shall fit into jambs equipped with a fire seal fitted completely around the door frame consisting of a hydrated sodium silicate encapsulated in a plastic film or sleeve that, when heat-activated by temperatures of over 210 degrees, expands to cover the space between the jambs and door, providing a barrier to prevent the intrusion of flames, gas, or smoke into the safe.

(6) Door hinges shall be protected to prevent the removal of the door. Protective features include but are not limited to: hinges not exposed to the outside, interlocking door designs, dead bars, jeweler's lugs and active or inactive locking bolts.

(7) The excluded safe must be imported in the fully assembled condition.

The scope also excludes metal storage devices that (1) have two or more exterior exposed drawers regardless of the height of the unit, or (2) are no more than 30 inches tall and have at least one exterior exposed drawer.

Also excluded from the scope are free standing metal cabinets less than 30 inches tall with a single opening, single door and an installed tabletop.

The scope also excludes metal storage devices less than 27 inches wide and deep that: (1) Have two doors hinged on the right and left side of the door frame respectively covering a single opening and that open from the middle toward the outer frame; or (2) are free standing or wall-mounted, single-opening units 20 inches or less high with a single door.

The subject certain metal lockers are classified under Harmonized Tariff Schedule of the United States (HTSUS) subheading 9403.20.0078. Parts of subject certain metal lockers are classified under HTS subheading 9403.90.8041. In addition, subject certain metal lockers may also enter under HTS subheading 9403.20.0050. While HTSUS subheadings are provided for convenience and Customs purposes, the written description of the scope of the *Orders* is dispositive.

[FR Doc. 2023–19897 Filed 9–13–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD199]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Ferry Berth Construction in Tongass Narrows in Ketchikan, Alaska

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

ACTION: Notice; Issuance of an incidental harassment authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that NMFS has issued an incidental harassment authorization (IHA) to the Alaska Department of Transportation and Public Facilities (ADOT&PF) to incidentally harass marine mammals during construction activities associated with ferry berth construction in Tongass Narrows in Ketchikan, Alaska.

DATES: This authorization is effective from September 11, 2023 to September 10, 2024.

ADDRESSES: Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities.* In case of problems accessing these documents, please call the contact listed below.

FOR FURTHER INFORMATION CONTACT: Kate Fleming, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are proposed or, if the taking is limited to harassment, a notice of a proposed IHA is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth. The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

Summary of Request

On January 24, 2023, NMFS received a request from ADOT&PF for an IHA to take marine mammals incidental to the construction of and improvements to four (initially five—see explanation below) ferry berths in Tongass Narrows in Ketchikan, Alaska. On February 23, 2023, ADOT&PF submitted a memo proposing additional construction activities at this project site, which was later retracted on March 21, 2023. Following NMFS' review of the application and discussions between NMFS and ADOT&PF, on May 2, 2023, ADOT&PF asked NMFS to halt processing of the IHA until it submitted an acoustic monitoring report associated with previous work at the project site. ADOT&PF submitted the report on May 24, 2023. NMFS reviewed and accepted the results in the report, and the application was deemed adequate and complete on June 27, 2023. ADOT&PF's request is for take of 11 species of marine mammals, by Level B harassment and, for Steller sea lion (*Eumetopias jubatus*), harbor seal (*Phoca vitulina*), northern elephant seal (*Mirounga angustirostris*), harbor porpoise (*Phocoena phocoena*), and Dall's porpoise (*Phocoenoides dalli*), Level A harassment. Neither ADOT&PF nor NMFS expect serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

NMFS previously issued two consecutive IHAs to ADOT&PF for this work (85 FR 673, January 7, 2020), which covered construction at the following six sites: Revilla New Ferry Berth and Upland Improvements (Revilla New Berth), New Gravina Island Shuttle Ferry Berth/Related Terminal Improvements (Gravina New Berth), Gravina Airport Ferry Layup Facility, Gravina Freight Facility, Revilla Refurbish Existing Ferry Berth Facility, and Gravina Refurbish Existing Ferry Berth Facility (Figure 1). Due to various project delays (and two minor changes to the phase 1 IHA activities), the phase 1 IHA was renewed (86 FR 23938, May 05, 2021) and the phase 2 IHA was reissued (87 FR 12117, March 3, 2022). Upon the expiration of the phase 1 renewal, because a subset of work had still not been completed, ADOT&PF requested, and NMFS issued, a new IHA (87 FR 15387, March 18, 2022) which was renewed upon its expiration (88 FR 13802, March 6, 2023). The reissued phase 2 IHA expired on February 28, 2023. While the current renewal IHA (88 FR 13802, March 6, 2023) does not expire until March 5, 2024, ADOT&PF proposed new project components that warrant a new IHA, and a subset of activities covered under the reissued phase 2 IHA remain incomplete. As such, ADOT&PF requested a new IHA to authorize take of marine mammals associated with all remaining work at the Tongass Narrows sites. Work at the Gravina Airport Ferry Layup Facility was completed prior to the application for this new IHA. Since the submission of ADOT&PF's 2023 IHA

application, work has also been completed at the Gravina Freight Facility. As such, remaining work planned is limited to four project sites: Revilla New Berth, Gravina New Berth, Revilla Refurbish Existing Ferry Berth Facility, and Gravina Refurbish Existing Ferry Berth Facility. ADOT&PF has complied with all the requirements (*e.g.,* mitigation, monitoring, and reporting) of the previous IHAs with the exception of one incident in which ADOT&PF reported that a pile had been removed without the presence of a Protected Species Observer (PSO) on site. ADOT&PF reported the incident immediately and retrained the Construction Contractor's Foreman and ADOT&PF's on-site representative. ADOT&PF also notified NMFS on May 18, 2023 that 12 20'' piles that were not included in the renewal, but were included in the initial IHA on which the renewal was based, were driven after expiration of the initial IHA (while the renewal was effective).

Monitoring results from the previous IHAs are discussed in the Potential Effects of Specified Activities on Marine Mammals and their Habitat and the Estimated Take of Marine Mammals section.

Description of Specified Activity

ADOT&PF is making improvements to two existing ferry berths and constructing two new ferry berths on Gravina Island and Revillagigedo (Revilla) Island in Tongass Narrows, near Ketchikan, in southeast Alaska (see Figure 1 of the notice of proposed IHA (88 FR 46746; July 20, 2023). The existing ferry facilities improve access to developable land on Gravina Island, improve access to the Ketchikan International Airport, and facilitate economic development in the Ketchikan Gateway Borough. The new ferry berths provide redundancy to the existing ferry berths. The project's planned activities that have the potential to take marine mammals, by Level A harassment and Level B harassment, include down-the-hole (DTH) drilling of rock sockets and tension anchors, vibratory installation and removal of temporary steel pipe piles and/or H-piles, vibratory and impact installation of permanent steel pipe piles, and vibratory removal of permanent piles (in cases where work is being redone). The marine construction associated with the planned activities is expected to occur over 131 non-consecutive days over 1 year.

A detailed description of the planned construction project is provided in the **Federal Register** notice for the proposed IHA (88 FR 46746, July 20, 2023). Since that time, no changes have been made to planned activities. Therefore, a detailed description is not provided here. Please refer to that **Federal Register** notice for the description of the specified activity.

Comments and Responses

A notice of NMFS' proposal to issue an IHA to ADOT&PF was published in the **Federal Register** on July 20, 2023 (88 FR 46746). That notice described, in detail, ADOT&PF's activities, the marine mammal species that may be affected by the activities, and the anticipated effects on marine mammals. In that notice, we requested public input on the request for authorization described therein, our analyses, the proposed authorization, and any other aspect of the notice of proposed IHA, and requested that interested persons submit relevant information, suggestions, and comments. During the 30-day public comment period, NMFS did not receive any public comments.

Changes From the Proposed IHA to Final IHA

Since the **Federal Register** notice of the proposed IHA was published (88 FR 46746, July 20, 2023), NMFS published the final 2022 Alaska and Pacific Stock Assessment Reports (SARs), which describe revised stock structures under the MMPA for humpback whales and southeast Alaska harbor porpoise (Carretta *et al.,* 2023; Young *et al.,* 2023). In the notice of proposed IHA, we explained that although we typically consider updated peer-reviewed data provided in draft SARs to be the best available science, and use the information accordingly, we make exception for proposed revised stock structures. Upon finalization of these revised stock structures, we have made appropriate updates, including descriptions of the potentially affected stocks (see Table 1), attribution of take numbers to stock (see Estimated Take of Marine Mammals), and by updating our analyses to ensure the necessary determinations are made for the new stocks (see Negligible Impact Analysis and Determination and Small Numbers).

Additionally, as requested by ADOT&PF, NMFS made two changes to the PSO requirements since publication of the proposed IHA. First, NMFS revised the requirement for PSOs to be independent of the activity contractor (for example, employed by a subcontractor), to reflect that PSOs must be independent (not be part of the construction crew) but not necessarily employed by a subcontractor. This change is intended to align this requirement with that in the active IHA to allow PSOs who are currently working on the project to continue to do so. Second, NMFS proposed to require ADOT&PF to employ three PSOs for DTH activities. After publication of the proposed IHA, ADOT&PF requested for NMFS to revise this measure to require two PSOs for DTH activities, given that the zone sizes for DTH activities, like those of impact pile driving, are small enough to be adequately monitored by two PSOs. NMFS concurred, and therefore, the final IHA requires ADOT&PF to employ at least two PSOs for DTH activities, rather than three.

Finally, NMFS corrected a typographical error in Table 8 of the notice of the proposed IHA (88 FR 46746, July 20, 2023). The table omitted the Level B harassment isopleth for DTH of tension anchors, which should have been listed as 1,274 m. The corresponding table in the proposed IHA at the time of publishing was correct.

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history of the potentially affected species. NMFS fully considered all of this information, and we refer the reader to these descriptions, incorporated here by reference, instead of reprinting the information. Additional information regarding population trends and threats may be found in NMFS' SARs (*https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS' website (*https://www.fisheries.noaa.gov/find-species).*

Table 1 lists all species or stocks for which take is expected and authorized for this activity, and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). While no serious injury or mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species or stocks and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS' stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS' U.S. Alaska and Pacific Ocean SARs All values presented in Table 1 are the most recent available at the time of publication (Caretta *et al.,* 2023, Young *et al.,* 2023) and are available online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.*

TABLE 1—MARINE MAMMAL SPECIES LIKELY IMPACTED BY THE SPECIFIED ACTIVITIES [1]

Common name	Scientific name	Stock	ESA/MMPA status; Strategic (Y/N) [2]	Stock abundance (CV, N_{min}, most recent abundance survey) [3]	PBR	Annual M/SI [4]
Order Artiodactyla—Infraorder Cetacea—Mysticeti (baleen whales)						
Family Balaenopteridae (rorquals):						
Minke Whale [5]	*Balaenoptera acutorostrata*	Alaska	-,-,N	N/A (N/A, N/A, N/A)	UND	0
Fin Whale [6]	*Balaenoptera physalus*	Northeast Pacific	E, D, Y	3,168 (0.26, 2,554, 2013)	UND	0.6
Humpback Whale [7]	*Megaptera novaeangliae*	Hawai'i	-,-,N	11,278 (0.56, 7,265, 2020)	127	19.6
		Mexico—North Pacific	T, D, Y	N/A (N/A, N/A, 2006)	UND	0.56
Family Eschrichtiidae:						
Gray whale	*Eschrichtius robustus*	Eastern North Pacific	-,-,N	26,960 (0.05, 25,849, 2016)	801	131
Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae:						
Pacific White-sided Dolphin.	*Lagenorhynchus obliquidens*	N Pacific	-,-,N	26,880 (N/A, N/A, 1990)	UND	0
Killer Whale	*Orcinus orca*	Eastern North Pacific Alaska Resident.	-,-,N	1,920, (N/A, 1,920, 2019)	19	1.3
		Eastern North Pacific Northern Resident.	-,-,N	302 (N/A, 302, 2018)	2.2	0.2
		West Coast Transient	-,-,N	349 (N/A, 349, 2018)	3.5	0.4
Family Phocoenidae (porpoises):						
Harbor Porpoise [8]	*Phocoena phocoena*	Southern Southeast Alaska Inland Waters.	-,-,Y	890 (0.37, 610, 2019)	6.1	7.4
Dall's Porpoise [9]	*Phocoenoides dalli*	Alaska	-,-,N	15,432 (0.097, 13,110, 2021)	131	37
Order Carnivora—Pinnipedia						
Family Otariidae (eared seals and sea lions):						
Steller Sea Lion	*Eumetopias jubatus*	Eastern	-,-,N	43,201 (N/A, 43,201, 2017)	2,592	112
Family Phocidae (earless seals):						
Northern Elephant Seal	*Mirounga angustirostris*	CA Breeding	-,-,N	187,386 (N/A, 85,369, 2013)	5,122	13.7
Harbor Seal	*Phoca vitulina*	Clarence Strait	-,-,N	27,659 (N/A, 24,854, 2015)	746	40

[1] Information on the classification of marine mammal species can be found on the web page for The Society for Marine Mammalogy's Committee on Taxonomy (*https://marinemammalscience.org/science-and-publications/list-marine-mammal-species-subspecies/;* Committee on Taxonomy (2022)).
[2] ESA status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.
[3] NMFS marine mammal stock assessment reports online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.* CV is coefficient of variation; Nmin is the minimum estimate of stock abundance. In some cases, CV is not applicable.
[4] These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.
[5] No population estimates have been made for the number of minke whales in the entire North Pacific. Some information is available on the numbers of minke whales on some areas of Alaska, but in the 2009, 2013 and 2015 offshore surveys, so few minke whales were seen during the surveys that a population estimate for the species in this area could not be determined (Rone *et al.,* 2017). Therefore, this information is N/A (not available).
[6] The best available abundance estimate for this stock is not considered representative of the entire stock as surveys were limited to a small portion of the stock's range. Based upon this estimate and the Nmin, the PBR value is likely negatively biased for the entire stock.
[7] Abundance estimates for the Mexico-North Pacific Stock of humpback whale are based upon data collected more than 8 years ago and therefore, current estimates are considered unknown.
[8] Abundance estimates assumed that detection probability on the trackline was perfect; work is underway on a corrected estimate. Additionally, preliminary data results based on eDNA analysis show genetic differentiation between harbor porpoise in the northern and southern regions on the inland waters of southeast Alaska. Geographic delineation is not yet known. Data to evaluate population structure for harbor porpoise in Southeast Alaska have been collected and are currently being analyzed. Should the analysis identify different population structure than is currently reflected in the Alaska SARs, NMFS will consider how to best revise stock designations in the future.
[9] Previous abundance estimates covering the entire stock's range are no longer considered reliable and the current estimates presented in the SARs and reported here only cover a portion of the stock's range. Therefore, the calculated Nmin and PBR is based on the 2015 survey of only a small portion of the stock's range. PBR is considered to be biased low since it is based on the whole stock whereas the estimate of mortality and serious injury is for the entire stock's range.

As indicated above, all 11 species (with 13 managed stocks) in Table 1 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur.

A detailed description of the species likely to be affected by ADOT&PF's project, including brief introductions to the species and relevant stocks as well as available information regarding populations trends and threats, and

information regarding local occurrence, were provided in the **Federal Register** notice for the proposed IHA (88 FR 46746, July 20, 2023).The 2022 Alaska and Pacific SARs described a revised stock structure for humpback whales which modifies the previous stocks designated under the MMPA to align more closely with the ESA-designated DPSs (Caretta et al., 2023; Young et al., 2023). Specifically, the three previous North Pacific humpback whale stocks (Central and Western North Pacific stocks and a CA/OR/WA stock) were replaced by five stocks, largely corresponding with the ESA-designated DPSs. These include Western North Pacific and Hawaii stocks and a Central America/Southern Mexico-CA/OR/WA stock (which corresponds with the Central America DPS). The remaining two stocks, corresponding with the Mexico DPS, are the Mainland Mexico-CA/OR/WA and Mexico-North Pacific stocks (Caretta *et al.,* 2023; Young *et al.,* 2023). The former stock is expected to occur along the west coast from California to southern British Columbia, while the latter stock may occur across the Pacific, from northern British Columbia through the Gulf of Alaska and Aleutian Islands/Bering Sea region to Russia.

In the proposed IHA, NMFS stated that the Central North Pacific stock of humpback whale was likely to be impacted by ADOT&PF's activities. Given the revised stock structure, NMFS has reanalyzed the potential for take of each stock of humpback whale and determined that the Hawaii stock and the Mexico- North Pacific stock are likely to be impacted by ADOT&PF's activities.

The 2022 Alaska SARs described a revised stock structure for southeast Alaska harbor porpoise, which were split from one stock into three: the Northern Southeast Alaska Inland Waters, Southern Southeast Alaska Inland Waters, and Yakutat/Southeast Alaska Offshore Waters harbor porpoise stocks (Young *et al.,* 2023). This update better aligns harbor porpoise stock structure with genetics, trends in abundance, and information regarding discontinuous distribution trends (Young *et al.,* 2023). Harbor porpoises found in the Tongass Narrows area are assumed to be members of the Southern Southeast Alaska Inland Waters stock, based on the geographical range of the stock. Please refer to the notice of the proposed IHA (88 FR 46746, July 20, 2023) for species descriptions. Please also refer to the NMFS' website (*https://www.fisheries.noaa.gov/find-species*) for generalized species accounts, and to the SARs (*https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) for more information about the changes to humpback whale and harbor porpoise stock structures.

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007, 2019) recommended that marine mammals be divided into hearing groups based on directly measured (behavioral or auditory evoked potential techniques) or estimated hearing ranges (behavioral response data, anatomical modeling, *etc.*). Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 2.

TABLE 2—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018]

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, Cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.,* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

The effects of underwater noise from ADOT&PF's construction activities have the potential to result in behavioral harassment of marine mammals in the vicinity of the project area. The notice of the proposed IHA (88 FR 46746, July 20, 2023) included a discussion of the effects of anthropogenic noise on marine mammals and the potential effects of underwater noise from ADOT&PF's construction activities on marine mammals and their habitat. That information and analysis is incorporated by reference into these final IHA determinations and is not repeated here; please refer to the **Federal Register** notice of proposed IHA (88 FR 46746, July 20, 2023).

Estimated Take of Marine Mammals

This section provides an estimate of the number of incidental takes authorized through this IHA, which

informs both NMFS' consideration of ''small numbers,'' and the negligible impact determinations.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes will primarily be by Level B harassment, as use of the acoustic sources (*i.e.,* impact and vibratory pile driving and removal and DTH) has the potential to result in disruption of behavioral patterns for individual marine mammals. There is also some potential for auditory injury (Level A harassment) to result, primarily for high frequency cetaceans, phocids, and otariids because predicted auditory injury zones are larger than for other hearing groups. Auditory injury is unlikely to occur for other groups. The mitigation and monitoring measures are expected to minimize the severity of the taking to the extent practicable.

As described previously, no serious injury or mortality is anticipated or authorized for this activity. Below we describe how the take numbers are estimated.

For acoustic impacts, generally speaking, we estimate take by considering: (1) acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) the number of days of activities. We note that while these factors can contribute to a basic calculation to provide an initial prediction of potential takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the take estimates.

Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source or exposure context (*e.g.,* frequency, predictability, duty cycle, duration of the exposure, signal-to-noise ratio, distance to the source), the environment (*e.g.,* bathymetry, other noises in the area, predators in the area), and the receiving animals (hearing, motivation, experience, demography, life stage, depth) and can be difficult to predict (*e.g.,* Southall *et al.,* 2007, 2021, Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a metric that is both predictable and measurable for most activities, NMFS typically uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS generally predicts that marine mammals are likely to be behaviorally harassed in a manner considered to be Level B harassment when exposed to underwater anthropogenic noise above root-mean-squared pressure received levels (RMS SPL) of 120 dB (referenced to 1 micropascal (re 1 μPa)) for continuous (*e.g.,* vibratory pile driving, drilling) and above RMS SPL 160 dB re 1 μPa for non-explosive impulsive (*e.g.,* impact pile driving) or intermittent (*e.g.,* scientific sonar) sources. This take estimation includes disruption of behavioral patterns resulting directly in response to noise exposure (*e.g.,* avoidance), as well as the resulting indirectly form the associated impacts such as Temporary Threshold Shift (TTS) or masking. ADOT&PF's planned activity includes the use of continuous (vibratory pile driving/removal and DTH) and impulsive (impact pile driving and DTH) sources, and therefore the RMS SPL thresholds of 120 and 160 dB re 1 μPa are applicable.

Level A harassment—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). ADOT&PF's planned activity includes the use of impulsive (impact pile driving and DTH) and non-impulsive (vibratory pile driving/removal and DTH) sources.

These thresholds are provided in Table 3 below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS' 2018 Technical Guidance, which may be accessed at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 3—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset thresholds * (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	*Cell 1:* $L_{p,0\text{-pk,flat}}$: 219 dB; $L_{E,p,LF,24h}$: 183 dB	*Cell 2:* $L_{E,p,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	*Cell 3:* $L_{p,0\text{-pk,flat}}$: 230 dB; $L_{E,p,MF,24h}$: 185 dB	*Cell 4:* $L_{E,p,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	*Cell 5:* $L_{p,0\text{-pk,flat}}$: 202 dB; $L_{E,p,HF,24h}$: 155 dB	*Cell 6:* $L_{E,p,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	*Cell 7:* $L_{p,0\text{-pk.flat}}$: 218 dB; $L_{E,p,PW,24h}$: 185 dB	*Cell 8:* $L_{E,p,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	*Cell 9:* $L_{p,0\text{-pk,flat}}$: 232 dB; $L_{E,p,OW,24h}$: 203 dB	*Cell 10:* $L_{E,p,OW,24h}$: 219 dB.

* Dual metric thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds are recommended for consideration.

Note: Peak sound pressure level ($L_{p,0\text{-}pk}$) has a reference value of 1 μPa, and weighted cumulative sound exposure level ($L_{E,p}$) has a reference value of 1μPa²s. In this Table, thresholds are abbreviated to be more reflective of International Organization for Standardization standards (ISO 2017). The subscript "flat" is being included to indicate peak sound pressure are flat weighted or unweighted within the generalized hearing range of marine mammals (*i.e.,* 7 Hz to 160 kHz). The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The weighted cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these thresholds will be exceeded.

Ensonified Area

Here, we describe operational and environmental parameters of the activity that are used in estimating the area ensonified above the acoustic thresholds, including source levels and transmission loss coefficient.

The sound field in the project area is the existing background noise plus additional construction noise from the planned project. Marine mammals are expected to be affected via sound generated by the primary components of the project (*i.e.,* impact pile driving, vibratory pile driving and removal, and DTH).

The intensity of pile driving sounds is greatly influenced by factors such as the type of piles (material and diameter), hammer type, and the physical environment (*e.g.,* sediment type) in which the activity takes place. The ADOT&PF evaluated SPL measurements available for certain pile types and sizes from similar activities elsewhere to determine appropriate proxy levels for their planned activities. The ADOT&PF also initially referred to preliminary results from a sound source verification study to determine SPLs for DTH of 8-inch tension anchors and Transmission Loss values (TLs) for all DTH activities. As discussed in the Summary of Request section above, a Sound Source Verification (SSV) report detailing sound source values and TL coefficients collected at the project site was subsequently submitted.

To determine appropriate proxy SPLs for impact and vibratory pile driving of all pile types, NMFS completed a comprehensive review of source levels relevant to Southeast Alaska to generate regionally-specific source levels. NMFS compiled all available data from Puget Sound and Southeast Alaska and adjusted the data to standardize distance from the measured pile to 10 meters (m). NMFS then calculated average source levels for each project and for each pile type. NMFS weighted impact pile driving project averages by the number of strikes per pile following the methodology in Navy (2015). The source levels for these various pile types, sizes and methods are listed in Table 4. Additionally, ADOT&PF requested, and NMFS agreed, to use the 24-inch sound source values for impact or vibratory pile driving of 14-inch H-piles, because the source value of smaller piles of the same general type (steel) are not expected to exceed a larger pile.

NMFS recommends treating DTH systems as both impulsive and continuous, non-impulsive sound source types simultaneously. Thus, impulsive thresholds are used to evaluate Level A harassment, and continuous thresholds are used to evaluate Level B harassment. NMFS (2022) recommended guidance on DTH systems (*https://media.fisheries.noaa.gov/2022-11/PUBLIC%20DTH%20Basic%20Guidance_November%202022.pdf*) outlines its recommended source levels for DTH systems. NMFS has applied that guidance in this analysis (see Table 4 for NMFS' source levels). Note that the values in this table represent the SPL referenced to a distance of 10 m (33 (feet) ft) from the source.

TL is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography. The general formula for underwater TL is:

TL = B * Log10(R1/R2),

Where:

TL = transmission loss in dB
B = transmission loss coefficient; for practical spreading equals 15
R1 = the distance of the modeled SPL from the driven pile, and
R2 = the distance from the driven pile of the initial measurement

Absent site-specific acoustical monitoring with differing measured transmission loss, a practical spreading value of 15 is used as the transmission loss coefficient in the above formula. Site-specific transmission loss data for the Tongass Narrows are not available for vibratory pile installation and removal and impact pile driving; therefore, the default coefficient of 15 is used to determine the distances to the Level A harassment and Level B harassment thresholds for these activities and associated pile types. In the case of DTH activities, ADOT&PF conducted SSV at the project site for DTH of 24-inch rock sockets and 8-inch tension anchors. NMFS reviewed the TL data from this monitoring and has incorporated the most conservative transmission loss values measured for each pile type at the project site in its analysis herein (Table 4).

TABLE 4—ESTIMATES OF MEAN UNDERWATER SOUND LEVELS GENERATED DURING VIBRATORY AND IMPACT PILE INSTALLATION, DTH, AND VIBRATORY PILE REMOVAL

	RMS SPL (dB re 1 μPa)	SEL_{ss} (dB re 1 μPa² sec)	Peak SPL (dB re 1 μPa)	References levels (TL)	TL coefficient [1]
Vibratory Hammer					
30-inch steel piles	166	NA	NA	NMFS Analysis—C. Hotchkin April 24, 2023.	15
24-inch steel piles	163	NA	NA	NMFS Analysis—C. Hotchkin April 24, 2023.	15
Steel 14″ H-piles [2]	163	NA	NA	24-inch as proxy	15
DTH of Rock Sockets and Tension Anchors—Continuous					
24-inch (Rock Socket)	167	NA	NA	Heyvaert & Reyff 2021; (Reyff and Ambaskar 2023).	19.5

TABLE 4—ESTIMATES OF MEAN UNDERWATER SOUND LEVELS GENERATED DURING VIBRATORY AND IMPACT PILE INSTALLATION, DTH, AND VIBRATORY PILE REMOVAL—Continued

	RMS SPL (dB re 1 μPa)	SEL_{ss} (dB re 1 μPa[2] sec)	Peak SPL (dB re 1 μPa)	References levels (TL)	TL coefficient[1]
8-inch DTH (Tension Anchor)	156	NA	NA	Reyff & Heyvaert 2019; Reyff 2020; (Reyff and Ambaskar 2023).	17.1
Impact Hammer					
30-inch steel piles	195	183	210	NMFS Analysis—C. Hotchkin April 24, 2023.	15
24-inch steel piles	190	177	203	Caltrans 2015, Caltrans 2020	15
Steel 14″ H-piles[2]	190	177	203	24-inch as proxy	15
DTH of rock sockets and tension anchors—Impulsive					
24-inch (Rock Socket)	NA	159	184	Heyvaert & Reyff 2021; (Reyff and Ambaskar 2023).	19.9
8-inch (Tension anchor)	NA	144	170	Reyff 2020; (Reyff and Ambaskar 2023)	17.1

[1] NMFS recommends a default transmission loss of 15 * $\log_{10}(R)$ when site-specific data are not available (NMFS, 2020; NMFS, 2022).
[2] For 14-inch H piles, NMFS uses sound source level data from 24-inch piles as a conservative proxy.
Note: all SPLs are unattenuated and represent the SPL referenced to a distance of 10 m from the source; NA = Not applicable; dB re 1 μPa = decibels (dB) referenced to a pressure of 1 microPascal, measures underwater SPL; dB re 1 μPa2-sec = dB referenced to a pressure of 1 microPascal squared per second, measures underwater Sound Exposure Level (SEL).

All Level B harassment isopleths are reported in Table 5 below. Of note, based on the geography of Tongass Narrows and the surrounding islands, sound will not reach the full distance of the Level B harassment isopleth in most directions. Generally, due to interaction with land, only a thin slice of the possible area will be ensonified to the full distance of the Level B harassment isopleth.

TABLE 5—LEVEL B HARASSMENT ISOPLETHS BY ACTIVITY AND PILE SIZE

Activity	Pile diameter (inch)	Level B harassment isopleth (m)
Vibratory Installation and Removal	30	11,659
	24	7,365
	14	
DTH Rock Sockets	24	2,572
DTH Tension Anchor	8	1,274
Impact Installation	30	2,154
	24	1,000
	14	

The ensonified area associated with Level A harassment is more technically challenging to predict due to the need to account for a duration component. Therefore, NMFS developed an optional User Spreadsheet tool to accompany the Technical Guidance that can be used to relatively simply predict an isopleth distance for use in conjunction with marine mammal density or occurrence to help predict potential takes. We note that because of some of the assumptions included in the methods underlying this optional tool, we anticipate that the resulting isopleth estimates are typically going to be overestimates of some degree, which may result in an overestimate of potential take by Level A harassment. However, this optional tool offers the best way to estimate isopleth distances when more sophisticated modeling methods are not available or practical. For stationary sources such as pile driving or removal or DTH using any of the methods discussed above, the optional User Spreadsheet tool predicts the distance at which, if a marine mammal remained at that distance for the duration of the activity, it is expected to incur PTS. Inputs used in the optional User Spreadsheet tool, and the resulting estimated isopleths, are reported in Table 6 and Table 7.

TABLE 6—NMFS USER SPREADSHEET INPUTS

	Vibratory pile driving		DTH		Impact	
	30-inch steel piles	24-inch steel piles or steel H-pile	Rock socket (24 inch)	Tension anchor (8-inch)	30-inch steel piles	24-inch steel piles or steel H-pile
	Installation or removal	Installation or removal	Installation	Installation	Installation	Installation
Spreadsheet Tab Used	A.1) Vibratory Pile Driving.	A.1) Vibratory Pile Driving.	E.2) DTH Pile Driving.	E.2) DTH Pile Driving.	E.1) Impact Pile Driving.	E.1) Impact Pile Driving.
Source Level (SPL)	166 RMS	163 RMS	167 RMS, 159 SEL	156 RMS, 144 SEL	183 SEL	177 SEL.

TABLE 6—NMFS USER SPREADSHEET INPUTS—Continued

	Vibratory pile driving		DTH		Impact	
	30-inch steel piles	24-inch steel piles or steel H-pile	Rock socket (24 inch)	Tension anchor (8-inch)	30-inch steel piles	24-inch steel piles or steel H-pile
	Installation or removal	Installation or removal	Installation	Installation	Installation	Installation
Transmission Loss Coefficient.	15	15	19.5, 19.9	17.1, 17.1	15	15.
Weighting Factor Adjustment (kHz).	2.5	2.5	2	2	2	2.
Activity Duration (hours) within 24 hours.	0.5–6 *	0.5–8 *	1–8	1–8.		
Strike rate strike per second.			10	19.		
Number of strikes per pile.					50 (temporary); 200 (permanent).	50 (temporary); 200 (permanent).
Number of piles per day.	1–6	1–8	1	1	1–3	1–3.
Distance of sound pressure level measurement.	10	10	10	10	10	10.

* A range of activity durations (vibratory and DTH), strikes per pile (impact), piles per day are listed because ADOT&PF anticipates that they can install or remove piles of the same size at different rates at different sites. Duration estimates for DTH assume that multiple rock sockets and tension anchors will be installed each day, with a maximum daily duration of 8 hours.

Level A harassment thresholds for impulsive sound sources (impact pile driving and DTH) are defined for both cumulative sound exposure level (SELcum) and Peak SPL with the threshold that results in the largest modeled isopleth for each marine mammal hearing group used to establish the Level A harassment isopleth. In this project, Level A harassment isopleths based on SELcum were always larger than those based on Peak SPL. It should be noted that there is a duration component when calculating the Level A harassment isopleth based on SELcum, and this duration depends on the number of piles that will be driven in a day and strikes per pile. For some activities, ADOT&PF plans to drive variable numbers of piles per day throughout the project (See ''Average Piles per Day (Range)'' in Table 1 of the **Federal Register** notice for the proposed IHA, (88 FR 46746, July 20, 2023)). NMFS accounted for this variability in its analysis. For each activity, ADOT&PF provided the minimum and maximum potential durations of the activity. In some cases the difference in the Level A harassment zone size between the minimum and maximum duration anticipated for an activity for a given hearing group is quite large. ADOT&PF expressed concerns about implementing the largest Level A harassment zones for an activity on days where activity levels would be much lower, particularly given that the shutdown zones for an activity (Table 9) are based upon the Level A harassment zone sizes. Therefore, for low frequency cetaceans and phocids, in order to provide flexibility while ensuring the number of Level A harassment zones and associated shutdown zones are manageable, NMFS has identified two Level A harassment isopleths for a given activity in cases where the differences between zone sizes associated with the minimum and maximum potential activity duration spans >100 m. At the beginning of each pile driving day, ADOT&PF will determine the maximum number or duration that piles will be driven that day and implement the Level A harassment zone associated with that amount of activity.

TABLE 7—DISTANCES TO LEVEL A HARASSMENT ISOPLETHS, BY HEARING GROUP, AND LEVEL B HARASSMENT ZONES, DURING PILE INSTALLATION AND REMOVAL

Activity	Pile diameter(s) (inches)	Max. daily duration/ number of piles *	Level A harassment Isopleths, by hearing group (m)					Level B harassment isopleth (m; hearing groups)
			LF	MF	HF	PW	OW	
			Minke whale, fin whale, humpback whale, gray whale	Pacific white-sided dolphin, killer whale	Harbor porpoise, Dall's porpoise	Harbor seal, northern elephant seal	Steller sea lion	
Vibratory Installation or Removal	30	≤360	48.6	4.3	71.8	29.5	2.1	11,659
	24 or 14	≤480	37.1	3.3	54.9	22.6	1.6	7,356
DTH (Rock Socket)	24	≤120	210.3	27.8	392.8	107.1	29.8	2,572
		121–180				214.9		
		181–480	344.3					
DTH (Tension Anchor)	8	≤480	118.7	6.4	138.4	68.6	6.9	1,274
Impact, 200 strikes	30	1	542.1	25.3	846.2	182.8	27.7	2,154
		2				380.2		
		3	710.4					

TABLE 7—DISTANCES TO LEVEL A HARASSMENT ISOPLETHS, BY HEARING GROUP, AND LEVEL B HARASSMENT ZONES, DURING PILE INSTALLATION AND REMOVAL—Continued

Activity	Pile diameter(s) (inches)	Max. daily duration/ number of piles *	Level A harassment Isopleths, by hearing group (m)					Level B harassment isopleth (m; hearing groups)
			LF	MF	HF	PW	OW	
			Minke whale, fin whale, humpback whale, gray whale	Pacific white-sided dolphin, killer whale	Harbor porpoise, Dall's porpoise	Harbor seal, northern elephant seal	Steller sea lion	
	24 or 14	1	136.0	10.1	336.9	72.8	11.0	1,000
		2	282.8	....	....	151.4	....	....
		3	....	....	....	....	....	....
Impact, 50 strikes	24 or 14	1–3	112.2	4.0	133.7	60.1	4.4	1,000

* For low frequency cetaceans and phocids, in cases where the Level A harassment zone spanned ≥100 m between the minimum and maximum duration for the same activity, NMFS analyzed a shorter activity duration to allow for flexibility.

Marine Mammal Occurrence and Take Estimation

In this section we provide information about the occurrence of marine mammals, including density, or group dynamics of marine mammals, that will inform the take calculations. Additionally, we describe how the occurrence information is synthesized to produce a quantitative estimate of the take that is reasonably likely to occur and authorized. Note that take estimates included in ADOT&PF's application reflect 152 construction days rather than 131 (see Summary of Request section, in which it is described that one site has been completed since submission of the application). A summary of take, including a percentage of population for each of the species, is shown in Table 8.

Minke Whale

There are no known occurrences of minke whales within the project area. No minke whales where reported during ADOT&PF's previous construction activities at the project site (ADOT&PF 2021, 2023), nor during other recent projects in the Tongass Narrows (*e.g.,* City of Ketchikan (COK) Rock Pinnacle Blasting Project, Sitkiewicz 2020, Ward Cove Cruise Ship Dock in 2020, Power Systems and Supplies of Alaska, 2020). However, since their range extends into the project area, and they have been observed in southeast Alaska, including in Clarence Strait (Dahlheim *et al.,* 2009), it is possible the species could occur in the project area. Still, future observations of minke whale in the project area are expected to be rare.

ADOT&PF conservatively requested take by Level B harassment of three minke whales every 4 months across the 12 months that the IHA is active. NMFS concurs with ADOT&PF's estimated group size and frequency, but finds it more appropriate to estimate take according to the number of actual months in which construction is planned. As such, NMFS conservatively authorizes four takes by Level B harassment (3 minke whales × 1.25 months = 4 takes by Level B harassment).

ADOT&PF is planning to implement shutdown zones for low-frequency cetaceans that exceed the Level A harassment isopleth for all activities. Therefore, especially in combination with the infrequent occurrence of minke whales entering the project area, implementation of the established shutdown zones is expected to eliminate the potential for take by Level A harassment of minke whale. Therefore, ADOT&PF did not request take by Level A harassment of minke whale, nor is NMFS authorizing any.

Fin Whale

Fin whales typically inhabit deep, offshore waters and often travel in open seas away from coasts, and are often observed in social groups of two to seven. However, a single fin whale was recently observed in Clarence Strait (Scheurer, personal communication). Since the ensonified area extends to the mouth of Tongass Narrows, where it meets Clarence Strait, there is a chance that fin whale could occur in the project area during construction. As such, NMFS conservatively authorizes two takes by Level B harassment of fin whale.

ADOT&PF is planning to implement shutdown zones for low-frequency cetaceans that exceed the Level A harassment isopleth for all activities. Therefore, especially given the rare occurrence of fin whale in the surrounding area, implementation of the established shutdown zones is expected to eliminate the potential for take by Level A harassment of fin whale. Therefore, ADOT&PF did not request take by Level A harassment of fin whale, nor is NMFS authorizing any.

Humpback Whale

While no systematic studies have documented humpback whale abundance near Ketchikan, anecdotal information suggests that this species is present in low numbers year-round in Tongass Narrows. Additionally, during ADOT&PF's 215 days of monitoring associated with previous construction, 80 humpback whales were observed, or 0.37 humpback whales per day (ADOT&PF 2021, 2023). According to ADOT&PF, the average group size was 1.25 humpback whales, and the maximum group size was 4.

ADOT&PF conservatively estimates, and NMFS concurs, that one humpback whale may occur in the Level B harassment zone each day of planned in-water work (1 humpback whale × 131 days = 131 takes by Level B harassment).

ADOT&PF is planning to implement shutdown zones for low-frequency cetaceans that exceed the Level A harassment isopleth for all activities. Therefore, implementation of the established shutdown zones is expected to eliminate the potential for take by Level A harassment of humpback whale. Therefore, ADOT&PF did not request take by Level A harassment of humpback whale, nor is NMFS authorizing any.

In the proposed IHA, NMFS anticipated that all takes of humpback whale would be of the Central North Pacific stock. Given the revised stock structure described in the Description of Marine Mammals in the Area of Specified Activities section, NMFS has reanalyzed the potential for take of each stock of humpback whale and anticipates that the authorized takes would be of the new Hawaii stock and

new Mexico-North Pacific stock. To determine the number of estimated takes of each stock, NMFS assumes that two percent of humpback whales occurring in Southeast Alaska are from the Mexico-North Pacific stock and the remaining humpback whales are from the Hawai'i stock (Wade *et al.,* 2021).

Gray Whale

Gray whales are rare in the project area and unlikely to occur in Tongass Narrows. They were not observed during the Dahlheim *et al.* (2009) surveys of Alaska's inland waters with surveys conducted in the spring, summer and fall months. No gray whales where reported during ADOT&PF's previous construction activities at the project site (ADOT&PF 2021, 2023), nor during other recent projects in the Tongass Narrows (*e.g.,* COK Rock Pinnacle Blasting Project, Sitkiewicz 2020; Ward Cove Cruise Ship Dock in 2020, Power Systems and Supplies of Alaska, 2020). However a gray whale could migrate through or near the project, during November especially. Gray whales are generally solitary and travel together, alone, or in small groups.

ADOT&PF requested 24 takes by Level B harassment of gray whales (1 group × 2 gray whales × 12 months that the IHA is active). NMFS concurs with ADOT&PF's estimated group size and frequency, but finds it more appropriate to base take estimates on planned duration of in-water work. As such, NMFS authorizes 10 takes by Level B harassment (1 group × 2 gray whales × 5 months = 10 takes by Level B harassment).

ADOT&PF is planning to implement shutdown zones for low-frequency cetaceans that exceed the Level A harassment isopleth for all activities. Therefore, especially in combination with the low occurrence of gray whales in the project area, implementation of the planned shutdown zones is expected to eliminate the potential for take by Level A harassment of gray whale. Therefore, ADOT&PF did not request take by Level A harassment of gray whale, nor is NMFS authorizing any.

Pacific White-Sided Dolphin

Pacific white-sided dolphins were not observed during the 215 days of marine mammal monitoring associated with ADOT&PF's previous construction activities at this site (ADOT&PF 2021, 2023). There were also no sightings of Pacific white-sided dolphins during previous monitoring conducted during other recent construction projects in the Tongass Narrows (Sitkiewicz 2020, Power Systems and Supplies of Alaska, 2020).

While rare in the inside passageways of Southeast Alaska, a group of 164 Pacific white-sided dolphins were observed in the Dixon entrance to the south of Tongass Narrows during aerial surveys in 1997 (Muto *et al.* 2018), and this species was also documented in Revillagigedo Channel, Behm Canal, and Clarence Strait during surveys conducted from April to May between 1991 and 1993 (Dahlheim and Towell 1994). Finally, Dalheim *et al.* (2009) frequently encountered Pacific white-sided dolphins in Clarence Strait. Observations were noted most typically in open strait environments, near the open ocean. Mean group size was over 20, with no recorded winter observations nor observations made in the Nichols Passage or Behm Canal, located on either side of the Tongass Narrows. This observational data, combined with anecdotal information, indicates that while Pacific white-sided dolphins are rare in the area, they could occur in the project area during construction.

ADOT&PF requested Level B harassment take of one group of 50 Pacific white-sided dolphins. However, to remain consistent with mean groups sizes detected near Tongass Narrows (Dalheim *et al.,* 2009), NMFS is authorizing three groups of 20 pacific white sided dolphins (60 takes by Level B harassment of Pacific white-sided dolphin).

ADOT&PF is planning to implement shutdown zones for mid-frequency cetaceans that exceed the Level A harassment isopleth for all activities. Additionally, the Level A harassment isopleths for mid-frequency cetaceans are quite small, and therefore, shutdown zones should be easily implemented. Therefore, especially in combination with the low occurrence of Pacific white-sided dolphins in the project area, implementation of the established shutdown zones is expected to eliminate the potential for take by Level A harassment of Pacific white-sided dolphin. Therefore, ADOT&PF did not request take by Level A harassment of Pacific white-sided dolphin, nor is NMFS is authorizing any.

Killer Whale

While no systematic studies of killer whales have been conducted in or around Tongass Narrows, killer whales are observed in Tongass Narrows year-round, and anecdotal reports suggest they are most common during the summer Chinook salmon run (May–July) (84 FR 36891, July 30, 2019). Across the 215 days of monitoring during ADOT&PF's previous Tongass Narrows construction activities, a total of 78 killer whales were observed, for an observation rate of 0.36 per day (ADOT&PF 2021, 2023). According to ADOT&PF, the average group size observed was 4.6 killer whales and the maximum group size was 8.

While ADOT&PF requested 180 takes by Level B harassment ((1 group × 12 killer whales × 9 months) + (2 groups × 12 killer whales × 3 months) = 180 takes by Level B harassment)), NMFS finds it more appropriate to base take estimates off the maximum group size (8 killer whales) observed during monitoring of previous construction activities and the planned duration of in-water work (5 months). As such, NMFS authorizes 64 takes by Level B harassment ((2 pods × 8 killer whales × 3 months) + (1 pod × 8 killer whales × 2 months) = 64 takes by Level B harassment).

ADOT&PF is planning to implement shutdown zones for mid-frequency cetaceans that exceed the Level A harassment isopleth for all activities. Additionally, the Level A harassment isopleths for mid-frequency cetaceans are quite small and therefore shutdown zones should be easily implemented. Therefore, implementation of the established shutdown zones is expected to eliminate the potential for take by Level A harassment of killer whale. Therefore, ADOT&PF did not request take by Level A harassment of killer whale, nor is NMFS authorizing any.

Harbor Porpoise

Abundance data for harbor porpoise in Southeast Alaska were collected during 18 seasonal surveys spanning 22 years, from 1991 to 2012 (Dahlheim *et al.* 2015). The project area falls within the Clarence Strait to Ketchikan region, as identified by this study for the survey effort. Harbor porpoise densities in this region in summer were low, ranging from 0.01 to 0.02 harbor porpoises/kilometers^2. During ADOT&PF's 215 days of monitoring during previous construction activities at this project site, the daily average observations of harbor porpoise in the project area was 0.1 (ADOT&PF 2021, 2023). According to ADOT&PF, the maximum group size observed during this monitoring was five.

ADOT&PF estimates that two groups of five harbor porpoise may occur in the Level B harassment zone across the 12 months that the IHA is active. NMFS concurs with ADOT&PF's estimated group size but finds it appropriate to increase the frequency of occurrence estimate in the Level B harassment zone from two groups per month to three groups per month of work. Additionally,

NMFS finds it more appropriate to estimate take by Level B harassment according to the planned duration of in-water work (3 groups × 5 harbor porpoises × 5 months = 75 takes by Level B harassment). Additionally, ADOT&PF requested take by Level A harassment of one group of five harbor porpoise every 4 months across 12 months that the IHA is active. However, NMFS finds it more appropriate to estimate take by Level A harassment according to the number of months in which the Level A harassment zone may extend beyond the established shutdown zone (*i.e.,* 2.9 months, when DTH systems may be employed to install 24-inch piles, or 24-inch and 30-inch piles may be installed with an impact pile driver (200 strikes)). As such, NMFS authorizes 15 takes by Level A harassment of harbor porpoise (1 group × 5 harbor porpoise × 2.9 months = 15 takes by Level B harassment) and 60 takes by Level B harassment ((3 groups × 5 harbor porpoise × 5 months) − 15 takes by Level A harassment = 60 takes by Level B harassment).

In the proposed IHA, NMFS anticipated that all takes of harbor porpoise would be of the Southern Southeast Alaska Inland Water stock. Given the revised stock structure described in the Description of Marine Mammals in the Area of Specified Activities section, NMFS has reanalyzed the potential for take of each stock of harbor porpoise and anticipates that the authorized takes would be of the new Southern Southeast Alaska Inland Waters stock, as that is the only stock that overlaps the project area.

Dall's Porpoise

Dall's porpoise have occasionally been observed during previous construction projects completed in Tongass Narrows (Power Systems and Supplies of Alaska, 2020), including during ADOT&PF's 215 days of monitoring (ADOT&PF 2021, 2023). ADOT&PF reported that the average group size observed was 5.6 and the maximum group size was 10. To estimate take, ADOT&PF has assumed that Dall's porpoise may occur in pods of 15 and across the 12 months that the IHA is active. NMFS finds it more appropriate to base take estimates off the maximum group size (10 Dall's porpoise) observed during monitoring of previous construction activities and according to estimated duration of planned pile driving and DTH activities.

As such, while ADOT&PF estimates that one pod of 15 Dall's porpoise may occur within the Level B harassment zone across each of the 12 months that the IHA is active, NMFS finds it more appropriate to conservatively estimate that 2 pods of 10 Dall's porpoise may occur in the Level B harassment zone each month in which in-water work is planned (2 pod × 10 Dall's porpoise × 5 months = 100).

Additionally, ADOT&PF has estimated that one pod of 15 Dall's porpoise may occur within the Level A harassment zone across the 12 months that the IHA is active. However, NMFS finds it more appropriate to estimate 10 takes by Level A harassment of Dall's porpoise across the 2.9 months in which the Level A harassment zone may extend beyond the shutdown zone for this species, which could occur when DTH systems are employed to install 24-inch piles or an impact pile driver (200 strikes) is used to install 24-inch and 30-inch piles (1 group × 10 Dall's porpoise = 10 takes by Level A harassment). Therefore, NMFS is authorizing 10 takes by Level A harassment of Dall's porpoise. Finally, the authorized take by Level B harassment has been calculated as the total calculated Dall's porpoise takes by Level B harassment minus the authorized takes by Level A harassment (100 takes by Level B harassment − 10 takes by Level A harassment = 90 takes by Level B harassment). Therefore, NMFS is authorizing 90 takes by Level B harassment of Dall's porpoise.

Steller Sea Lion

Steller sea lions may be found in Tongass Narrows year-round, with anecdotal reports suggesting an increase in abundance from March to early May during the herring spawning season, and another increase in late summer associated with salmon runs. During the 215 days of marine mammal monitoring that took place during construction of previous components of the Tongass Narrows Project, a total of 322 Steller sea lions were observed (ADOT&PF 2021, 2023). According to ADOT&PF, the average group size was 1.25 individuals and maximum group size observed was five individuals. At least one Steller sea lion was observed during each month that monitoring took place. Monitoring during construction of the nearby Ward Cove Dock recorded 4.1 individuals per day (Power Systems & Supplies of Alaska, 2020).

ADOT&PF estimates that one group of 10 Steller sea lions may be taken by Level B harassment each day that in-water work is planned. Based on ADOT&PF's 215 days of project-related monitoring, NMFS finds it more appropriate to estimate that 1 group of 5 Steller sea lions may be present in the Level B harassment zone each day (1 group × 5 Steller sea lion × 131 construction days = 655 takes by Level B harassment).

ADOT&PF is required to implement a shutdown zone that exceeds the Level A harassment zone for Steller sea lions during all project activities. However, ADOT&PF expects that Steller sea lions could enter the Level A harassment zone undetected on rare occasions. As such, ADOT&PF requests take by Level A harassment of 5 percent of Steller sea lions authorized for take by Level B harassment. NMFS concurs that, given the various structures along the shoreline in the project area, Steller sea lions could enter the Level A harassment zone and remain in the zone undetected for a long enough duration to incur PTS before a shutdown occurs. However, NMFS anticipates that 5 percent of the take by Level B harassment would result in an overestimate of Level A harassment. NMFS anticipates that 10 Steller sea lions could enter the Level A harassment zone and remain in the zone undetected for a long enough duration to incur PTS before a shutdown occurs across the 131 days of planned in-water work. As such, NMFS is authorizing 10 takes by Level A harassment and 645 takes by Level B harassment ((1 group × 5 individuals × 131 construction days) − 10 takes by Level A harassment = 645 takes by Level B harassment).

Northern Elephant Seal

Although northern elephant seals are known to visit the Gulf of Alaska to feed on benthic prey, they rarely occur on the beaches of Alaska. Despite the low probability of northern elephant seals entering the project area, there have been recent reports of elephant seals occurring in and near the Tongass Narrows, and two northern elephant seals were observed during ADOT&PF's Tongass Narrows construction in 2022. As such, ADOT&PF requested take by Level B harassment of one elephant seal per 6-day work week. NMFS concurs that one take by Level B harassment per work week is appropriate. However, because ADOT&PF plans 7-day work weeks, NMFS calculates the total number of work weeks to occur within 131 construction days as 19 weeks rather than ADOT&PF's planned 22 weeks (1 Northern elephant seal × 19 work weeks = 19 takes by Level B harassment).

For most project activities, the established shutdown zone will exceed the Level A harassment zone for Northern elephant seal. However, the Level A harassment zone may extend beyond the established shutdown zone for this species on 37 days (when DTH systems may be employed to install 24-

inch piles or 30-inch piles may be installed with an impact pile driver (200 strikes)). While unlikely given the already low occurrence of Northern elephant seals, on those days, a Northern elephant seal could occur in the Level A harassment zone and remain in the zone for a long enough duration to incur PTS, and NMFS is conservatively authorizing five takes by Level A harassment. As such, NMFS is authorizing 14 takes by Level B harassment (1 Northern elephant seal × 19 work weeks − 5 takes by Level A harassment = 14 takes by Level B harassment).

Harbor Seal

During marine mammal monitoring associated with ADOT&PF's previous Tongass Narrows construction activities, 550 harbor seals were observed with an average of 1.2 harbor seals per day and a maximum group size of 5. The COK pinnacle rock blasting project recorded a total of 21 harbor seal sightings of 24 individuals over 76.2 hours of pre- and post-blast monitoring (Sitkiewicz 2020). Additionally, information from PSOs associated with on-going construction indicates that a small number of harbor seals are regularly sighted at about 820 ft (250 m) from the project location (Wyatt, personal communication). Additionally, there are two key harbor seal haulouts about 7.1 miles (11.5 kilometers) from the project area on a mid-channel island to the southeast of the project site. Each haulout was monitored in 2022 with 10 harbor seals observed at one haulout and 50 harbor seals observed at the other (Richland, personal communication).

ADOT&PF estimates, and NMFS concurs, that up to 2 groups of 3 harbor seals could enter the Level B harassment zone per day (2 groups × 3 harbor seals × 131 days = 786). Further, NMFS also estimates that half the harbor seals occurring at the haulout sites within the project area could enter the Level B harassment zone on days when the ensonified area (during 30″ vibratory pile driving) reaches these haulout sites (30 harbor seals × 13 days = 390).

ADOT&PF also estimates that 1 harbor seal could be taken by Level A harassment on each day of in-water work (1 harbor seal × 131 days = 131 takes by Level A harassment). For most project activities, the shutdown zone exceeds the Level A harassment zone. However, when an impact pile driver (200 strikes) is used to install 30-inch piles, the Level A harassment zone exceeds the associated shutdown zone. This could occur on 13 days. NMFS anticipates that three harbor seals could be taken by Level A harassment on each day that the Level A harassment isopleth for this species extends beyond the shutdown zone. Therefore, NMFS is authorizing 39 takes by Level A harassment (3 harbor seal × 13 days = 39 takes by Level A harassment) and 1,137 takes by Level B harassment (786 takes by Level B harassment + 390 takes by Level B harassment − 39 takes by Level A harassment = 1,137 takes by Level B harassment).

TABLE 8—AUTHORIZED TAKE BY STOCK AND HARASSMENT TYPE AND AS A PERCENTAGE OF STOCK ABUNDANCE

Species	Stock	Authorized take		Authorized take as a percentage of stock abundance
		Level B harassment	Level A harassment	
Minke whale	Alaska	4	0	
Fin whale	Northeast Pacific	2	0	0.1
Humpback whale	Hawai'i [1]	128	0	1.1
	Mexico—North Pacific [1]	3	0	
Gray whale	Eastern North Pacific	10	0	0.04
Pacific white-sided dolphin	North Pacific	60	0	0.2
Killer whale	Eastern North Pacific Alaska Resident	64	0	3.3
	Eastern North Pacific Northern Resident			21.2
West Coast Transient				16.3
Harbor porpoise	Southern Southeast Alaska Inland [2]	60	15	8.4
Dall's porpoise	Alaska	90	10	0.8
Steller sea lion	Eastern U.S	645	10	1.5
Northern Elephant seal	California Breeding	14	5	<0.1
Harbor seal	Clarence Strait	1,137	39	4.3

[1] Given the revised stock structure for humpback whale, described in the Description of Marine Mammals in the Area of Specified Activities section, NMFS assumes that two percent of humpback whales occurring in Southeast Alaska are from the Mexico—North Pacific stock and the remaining humpback whales are from the Hawai'i stock (Wade *et al.,* 2021).

[2] Given the revised stock structure described in the Description of Marine Mammals in the Area of Specified Activities section, NMFS assumed all the authorized takes would be of the new Southern Southeast Alaska Inland Waters stock, as that is the only stock that overlaps the project area.

Mitigation

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses. NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, NMFS considers two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if

implemented as planned), the likelihood of effective implementation (probability implemented as planned); and

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, and impact on operations.

ADOT&PF must ensure that construction supervisors and crews, the monitoring team and relevant ADOT&PF staff are trained prior to the start of all pile driving and DTH activity, so that responsibilities, communication procedures, monitoring protocols, and operational procedures are clearly understood. New personnel joining during the project must be trained prior to commencing work.

Protected Species Observers

ADOT&PF must employ PSOs and establish monitoring locations as described in the NMFS-approved Marine Mammal Monitoring Plan and Section 5 of the IHA. ADOT&PF must monitor the project area to the maximum extent possible based on the required number of PSOs, required monitoring locations, and environmental conditions. For all vibratory pile driving and removal, ADOT&PF must employ at least three PSOs. For all impact pile driving and DTH, ADOT&PF must employ at least two PSOs. As noted in the Changes from the Proposed IHA to Final IHA section, in the proposed IHA, NMFS proposed to require ADOT&PF to employ three PSOs for DTH activities. After publication of the proposed IHA, ADOT&PF requested for NMFS to revise this measure to require two PSOs for DTH activities, given that the zone sizes for DTH activities were more commensurate with that of impact pile driving. NMFS concurred, and therefore, the final IHA requires ADOT&PF to employ at least two PSOs for DTH activities, rather than three. The placement of the PSOs during all pile driving and removal and DTH activities will ensure that the entire shutdown zone is visible.

Pre- and Post-Activity Monitoring

Monitoring must take place from 30 minutes prior to initiation of pile driving or DTH activity (*i.e.,* pre-clearance monitoring) through 30 minutes post-completion of pile driving or DTH activity. Pre-start clearance monitoring must be conducted during periods of visibility sufficient for the lead PSO to determine that the shutdown zones indicated in Table 9 are clear of marine mammals. Pile driving may commence following 30 minutes of observation when the determination is made that the shutdown zones are clear of marine mammals. Further, while not a requirement in the IHA, the 2023 Biological Opinion requires that if a work stoppage occurs and PSOs do not monitor the boundaries of the Level B harassment zone continuously during the work stoppage, the entire Level B harassment zone must be surveyed again for the presence of ESA-listed species before work may resume. Additionally, the 2023 Biological Opinion requires that in-water activities take place only between civil dawn and civil dusk when PSOs can effectively monitor for the presence of marine mammals and when the entire shutdown zone and adjacent waters are visible (*e.g.,* monitoring effectiveness is not reduced due to rain, fog, snow, *etc.*). The 2023 Biological Opinion allows for pile driving to continue for up to 30 minutes after sunset during evening civil twilight, as necessary to secure a pile for safety prior to demobilization for the evening. PSOs will continue to observe shutdown and monitoring zones during this time. The length of the post-activity monitoring period may be reduced if darkness precludes visibility of the shutdown and monitoring zones.

Soft Start

Soft-start procedures provide additional protection to marine mammals by providing warning and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity. ADOT&PF must use soft start techniques when impact pile driving. Soft start requires contractors to provide an initial set of three strikes at reduced energy, followed by a 30-second waiting period, then two subsequent reduced-energy strike sets. A soft start must be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer.

Shutdown Zones

For all pile driving/removal and DTH activities, ADOT&PF will establish shutdown zones (Table 9). The purpose of a shutdown zone is generally to define an area within which shutdown of activity will occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). Shutdown zones vary based on the activity type and duration and marine mammal hearing group (Table 9). In most cases, shutdown zones are based on the estimated Level A harassment isopleth distances for each hearing group. However, in cases where ADOT&PF asserted that it would be impracticable to shut down at the Level A harassment isopleth due to excessive work stoppages, a smaller shutdown zone has been established (*e.g.,* for high-frequency cetaceans and phocids during DTH rock socketing of 24-inch piles). Note that some of the established shutdown zones differ from those proposed by the ADOT&PF in their application (see Table 6–5 of ADOT&PF's application) due to our incorporation of sound source levels and DTH TL coefficients from ADOT&PF's SSV report.

ADOT&PF anticipates that the maximum amount of activity within a given day may vary significantly (Table 6), with large differences in maximum zones sizes possible (Table 7). Given this uncertainty and concerns related to ESA-listed humpback whales and fin whales, and practicability concerns with shutting down, ADOT&PF plans a tiered system to identify and monitor the appropriate Level A harassment zones and shutdown zones for large frequency cetaceans and phocids. This tiered system is based on the maximum expected number of piles to be installed (impact or vibratory pile driving) or the maximum expected DTH duration in a given day. At the start of each work day, ADOT&PF will determine the maximum scenario possible for that day (according to the defined duration intervals in Tables 7 and 9), which will determine the appropriate Level A harassment isopleth and associated shutdown zone for that day. This Level A harassment zone (Table 7) and associated shutdown zone (Table 9) must be implemented for the entire work day.

The placement of PSOs during all pile installation and removal, and DTH activities (described in detail in the Monitoring and Reporting section) will ensure that the entire shutdown zones are visible during pile driving. If a marine mammal is observed entering or within the shutdown zones indicated in Table 9, pile driving must be delayed or halted. If pile driving is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone (Table 9) or 15 minutes (non-ESA-listed species) or 30 minutes (humpback whales and fin whales) have passed without re-detection of the animal. Further, pile driving activity must be halted upon observation of either a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met, entering or within the harassment zone.

ADOT&PF must also avoid direct physical interaction with marine

mammals during construction activity. If a marine mammal comes within 10 m of such activity, operations must cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions.

TABLE 9—SHUTDOWN ZONES AND LEVEL B HARASSMENT ZONES

Activity	Pile diameter(s) (inches)	Duration (min; vibratory/ DTH)/# of piles (impact)	Shutdown distances (m)					Level B harassment isopleth (m)
			LF	MF	HF	PW	OW	
Vibratory Installation or Removal, temporary and permanent.	30	≤360	50	10	80	30	10	11,659
	24 or 14	≤480	40	10	60	30	10	7,365
DTH (Rock Socket)	24	≤120	220	30	300	110	30	2,572
		121–180				220		
		181–480	350					
DTH (Tension Anchor)	8	≤480	170	10	140	70	10	1,274
Impact permanent	30	1	550	30	300	190	30	2,154
		2				300		
		3	720					
	24 or 14	1	140	10	300	80	20	1,000
		2	290			160		
		3						
Impact, temporary	24 or 14	1–3	120	10	140	60	10	1,000

Based on our evaluation of the applicant's planned measures, as well as other measures considered by NMFS, NMFS has determined that the required mitigation measures provide the means effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present while conducting the activities. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the activity; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and
- Mitigation and monitoring effectiveness.

Visual Monitoring

Monitoring must be conducted by qualified, NMFS-approved PSOs, who will be present during all pile installation and removal activities, including vibratory, impact, and DTH methods, in accordance with the following:

- PSOs must be independent (*i.e.,* not construction personnel) and have no other assigned tasks during monitoring periods;
- At least one PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued IHA;
- Other PSOs may substitute other relevant experience, education (degree in biological science or related field), or training for prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued IHA;
- Where a team of three or more PSOs is required, a lead observer or monitoring coordinator must be designated. The lead observer must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization; and
- PSOs must be approved by NMFS prior to beginning any activity subject to this IHA.

PSOs should have the following additional qualifications:

- Ability to conduct field observations and collect data according to assigned protocols;
- Experience or training in the field identification of marine mammals, including the identification of behaviors;
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
- Writing skills sufficient to prepare a report of observations including but not limited to the number of species of marine mammals observed; dates and times when in-water construction activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior; and
- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

A minimum of one PSO (the lead PSO) must be assigned to the active pile driving or DTH location to monitor the shutdown zones and as much of the harassment zones as possible. The observation points of the additional

PSOs may vary depending on the construction activity and location of the piles. During impact pile driving or DTH activities, the second PSO will select the best location to observe as much of the Level A harassment and Level B harassment zones as possible. To select the best observation locations during vibratory installation and removal, prior to start of construction, the lead PSO will stand at the construction site to monitor the shutdown zones while two or more PSOs travel in opposite directions from the project site along Tongass Narrows until they have reached the edge of the Level B harassment zone, where they will identify suitable observation points from which to observe. If visibility deteriorates so that the entire width of Tongass Narrows at the harassment zone boundary is not visible, additional PSOs may be positioned so that the entire width is visible, or work will be halted until the entire width is visible to ensure that any humpback whales or fin whales entering or within the harassment zone are detected by PSOs.

PSOs must record all observations of marine mammals, regardless of distance from the pile being driven. PSOs shall document any behavioral reactions in concert with distance from piles being driven or removed.

Reporting

A draft marine mammal monitoring report will be submitted to NMFS within 90 days after the completion of pile driving and removal activities, or 60 days prior to a requested date of issuance of any future IHAs for projects at the same location, whichever comes first. The report will include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets. Specifically, the report must include:

- Dates and times (begin and end) of all marine mammal monitoring;
- Construction activities occurring during each daily observation period, including the number and type of piles driven or removed and by what method (*i.e.,* impact, vibratory or DTH), the total equipment duration for vibratory installation/removal or DTH for each pile or hole and total number of strikes for each pile (impact driving);
- PSO locations during marine mammal monitoring;
- Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance;
- Upon observation of a marine mammal, the following information: Name of PSO who sighted the animal(s) and PSO location and activity at time of sighting; Time of sighting; Identification of the animal(s) (*e.g.,* genus/species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the composition of the group if there is a mix of species; Distance and bearing of each marine mammal observed relative to the pile being driven for each sighting (if pile driving was occurring at time of sighting); Estimated number of animals (min/max/best estimate); Estimated number of animals by cohort (adults, juveniles, neonates, group composition, sex class, *etc.*); Animal's closest point of approach and estimated time spent within the harassment zone; Description of any marine mammal behavioral observations (*e.g.,* observed behaviors such as feeding or traveling), including an assessment of behavioral responses thought to have resulted from the activity (*e.g.,* no response or changes in behavioral state such as ceasing feeding, changing direction, flushing, or breaching);
- Number of marine mammals detected within the harassment zones, by species;
- Detailed information about any implementation of any mitigation triggered (*e.g.,* shutdowns and delays), a description of specific actions that ensued, and resulting changes in behavior of the animal(s), if any.

ADOT&PF must also submit all PSO datasheets and/or raw sighting data with the draft report, as specified in condition 6(b) of this IHA.

If no comments are received from NMFS within 30 days, the draft report will constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments.

Reporting Injured or Dead Marine Mammals

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the IHA-holder must immediately cease the specified activities and report the incident to the Office of Protected Resources (OPR), NMFS and to the NMFS 24-hour Stranding Hotline as soon as feasible. If the death or injury was clearly caused by the specified activity, ADOT&PF must immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the IHA. The IHA-holder must not resume their activities until notified by NMFS. The report must include the following information:

- Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
- Species identification (if known) or description of the animal(s) involved;
- Condition of the animal(s) (including carcass condition if the animal is dead);
- Observed behaviors of the animal(s), if alive;
- If available, photographs or video footage of the animal(s); and
- General circumstances under which the animal was discovered.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any impacts or responses (*e.g.,* intensity, duration), the context of any impacts or responses (*e.g.,* critical reproductive time or location, foraging impacts affecting energetics), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338, September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, the majority of our analysis applies to all the species listed in Table 1, given that many of the

anticipated effects of this project on different marine mammal stocks are expected to be relatively similar in nature. Where there are meaningful differences between species or stocks, or groups of species, in anticipated individual responses to activities, impact of expected take on the population due to differences in population status, or impacts on habitat, NMFS has identified species-specific factors to inform the analysis.

Pile driving and DTH activities associated with the project, as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level B harassment and, for some species Level A harassment, from underwater sounds generated by pile driving and DTH. Potential takes could occur if marine mammals are present in zones ensonified above the thresholds for Level B harassment or Level A harassment, identified above, while activities are underway.

NMFS does not anticipate that serious injury or mortality will occur as a result of ADOT&PF's planned activity given the nature of the activity, even in the absence of required mitigation. Further, no take by Level A harassment is anticipated for Pacific white-sided dolphin, killer whale, humpback whale, gray whale, fin whale, or minke whale, due to the likelihood of occurrence and/or required mitigation measures. As stated in the mitigation section, ADOT&PF will implement shutdown zones that equal or exceed many of the Level A harassment isopleths shown in Table 9. Take by Level A harassment is authorized for some species (Steller sea lion, harbor seal, northern elephant seal, harbor porpoise, and Dall's porpoise) to account for the potential that an animal could enter and remain within the area between a Level A harassment zone and the shutdown zone for a duration long enough to be taken by Level A harassment, and in some cases, to account for the possibility that an animal could enter a shutdown zone without detection given the various obstructions along the shoreline, and remain in the Level A harassment zone for a duration long enough to be taken by Level A harassment before being observed and a shutdown occurring. Any take by Level A harassment is expected to arise from, at most, a small degree of PTS because animals would need to be exposed to higher levels and/or longer duration than are expected to occur here in order to incur any more than a small degree of PTS. Additionally, and as noted previously, some subset of the individuals that are behaviorally harassed could also simultaneously incur some small degree of TTS for a short duration of time. Because of the small degree anticipated, though, any PTS or TTS potentially incurred here is not expected to adversely impact individual fitness, let alone annual rates of recruitment or survival.

For all species and stocks, take is expected to occur within a limited, confined area (adjacent to the project site) of the stock's range. The intensity and duration of take by Level A harassment and Level B harassment will be minimized through use of mitigation measures described herein. Further the amount of take authorized is small when compared to stock abundance.

Behavioral responses of marine mammals to pile driving, pile removal, and DTH at the sites in Tongass Narrows are expected to be mild, short term, and temporary. Marine mammals within the Level B harassment zones may not show any visual cues they are disturbed by activities or they could become alert, avoid the area, leave the area, or display other mild responses that are not visually observable such as changes in vocalization patterns. Given that pile driving, pile removal, and DTH will occur for only a portion of the project's duration and often on nonconsecutive days, any harassment would be temporary. Additionally, many of the species present in Tongass Narrows would only be present temporarily based on seasonal patterns or during transit between other habitats. These species would be exposed to even shorter periods of noise-generating activity, further decreasing the impacts.

As previously described, a UME has been declared for gray whales. However, we do not expect the takes authorized herein to exacerbate the ongoing UME. No serious injury or mortality of gray whales is expected or authorized, and take by Level B harassment is limited (10 takes over the duration of the authorization). As such, the authorized take by Level B harassment of gray whale is not expected to exacerbate or compound upon the ongoing UME.

For all species except humpback whales, there are no known BIAs near the project zone that will be impacted by ADOT&PF's planned activities. For humpback whales, the inland waters of Southeast Alaska is a seasonal feeding BIA from May through September (Wild *et al.,* 2023), however, the mouth of Tongass Narrows is a small passageway and represents a very small portion of the total available habitat. Also, while southeast Alaska is considered an important area for feeding humpback whales during this time, it is not currently designated as critical habitat for humpback whales (86 FR 21082, April 21, 2021).

More generally, there are no known calving or rookery grounds within the project area, but anecdotal evidence from local experts shows that marine mammals are more prevalent in Tongass Narrows and Clarence Strait during spring and summer associated with feeding on aggregations of fish, meaning the area may play a role in foraging. Because ADOT&PF's activities could occur during any season, takes may occur during important feeding times. However, the project area represents a small portion of available foraging habitat and impacts on marine mammal feeding for all species, including humpback whales, should be minimal.

Any impacts on marine mammal prey that occur during ADOT&PF's planned activity are expected to have, at most, short-term effects on foraging of individual marine mammals, and likely no effect on the populations of marine mammals as a whole. Indirect effects on marine mammal prey during the construction are expected to be minor, and these effects are unlikely to cause substantial effects on marine mammals at the individual level, with no expected effect on annual rates of recruitment or survival.

In addition, it is unlikely that minor noise effects in a small, localized area of habitat will have any effect on the reproduction or survival of any individuals, much less the stocks' annual rates of recruitment or survival. In combination, we believe that these factors, as well as the available body of evidence from other similar activities, demonstrate that the potential effects of the specified activities will have only minor, short-term effects on individuals. The specified activities are not expected to impact rates of recruitment or survival and will, therefore, not result in population-level impacts.

In summary and as described above, the following factors primarily support our determination that the impacts resulting from this activity are not expected to adversely affect any of the species or stocks through effects on annual rates of recruitment or survival:

- No serious injury or mortality is anticipated or authorized;
- Take by Level A harassment of Pacific white-sided dolphin, killer whale, humpback whale, fin whale, gray whale, or minke whale is not anticipated or authorized;
- ADOT&PF will implement mitigation measures including soft-starts for impact pile driving and shutdown zones to minimize the numbers of marine mammals exposed to

injurious levels of sound, and to ensure that any take by Level A harassment is, at most, a small degree of PTS;

- The intensity of anticipated takes by Level B harassment is relatively low for all stocks and will not be of a duration or intensity expected to result in impacts on reproduction or survival;
- There are 10 known areas of specific biological importance, covering a broad area of southeast Alaska, for humpback whales. The project area overlaps a very small portion of one of these BIAs. No other known areas of particular biological importance to any of the affected species or stocks are impacted by the activity, including ESA-designated critical habitat;
- The project area represents a very small portion of the available foraging area for all potentially impacted marine mammal species and stocks and anticipated habitat impacts are minor; and
- Monitoring reports from similar work in Tongass Narrows have documented little to no effect on individuals of the same species impacted by the specified activities.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the monitoring and mitigation measures, NMFS finds that the total marine mammal take from the planned activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted previously, only take of small numbers of marine mammals may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The authorized number of instances of take is below one-third of the estimated stock abundance for all stocks (see Table 8). The number of animals authorized to be taken from these stocks would be considered small relative to the relevant stocks' abundances even if each estimated taking occurred to a new individual, which is an unlikely scenario. Some individuals may return multiple times in a day, but PSOs will count them as separate takes if they cannot be individually identified.

The Alaska stock of Dall's porpoise has no official NMFS abundance estimate, as the most recent estimate is greater than 8 years old. The most recent estimate was 13,110 animals for just a portion of the stock's range. Therefore, the 100 authorized takes of this stock clearly represent small numbers of this stock.

The Mexico—North Pacific stock of Humpback Whale has no official NMFS abundance estimate, as the most recent estimate is greater than 8 years old. The most recent estimate was 571 animals for just a portion of the stock's range (Revillagigedo Archipelago). Therefore, the three takes of this stock authorized clearly represent small numbers of this stock.

There is no current or historical estimate of the Alaska minke whale stock, but there are known to be over 1,000 minke whales in the Gulf of Alaska (Muto *et al.* 2018), so the 4 takes authorized is small relative to estimated survey abundance, even if each take occurred to a new individual. Additionally, the range of the Alaska stock of minke whales is extensive, stretching from the Canadian Pacific coast to the Chukchi Sea, and ADOT&PF's project area will impact a small portion of this range.

The best available abundance estimate for fin whale is not considered representative of the entire stock as surveys were limited to a small portion of the stock's range, but there are known to be over 2,500 fin whales in the northeast Pacific stock (Muto *et al.* 2021). As such, the two takes authorized is small relative to the estimated survey abundance, even if each take occurred to a new individual.

Based on the analysis contained herein of the planned activity (including the mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals are expected to be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

In order to issue an IHA, NMFS must find that the specified activity will not have an ''unmitigable adverse impact'' on the subsistence uses of the affected marine mammal species or stocks by Alaskan Natives. NMFS has defined ''unmitigable adverse impact'' in 50 CFR 216.103 as an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) Directly displacing subsistence users; or (iii) Placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

Harbor seals are the marine mammal species most regularly harvested for subsistence by households in Ketchikan and Saxman (a community a few miles south of Ketchikan, on the Tongass Narrows). Eighty harbor seals were harvested by Ketchikan residents in 2007, which ranked fourth among all communities in Alaska that year for harvest of harbor seals. Thirteen harbor seals were harvested by Saxman residents in 2007. In 2008, two Steller sea lions were harvested by Ketchikan-based subsistence hunters, but this is the only record of sea lion harvest by residents of either Ketchikan or Saxman. In 2012, the community of Ketchikan had an estimated subsistence take of 22 harbor seals and 0 Steller sea lion (Wolf *et al.* 2013). NMFS is not aware of more recent data. Hunting usually occurs in October and November (Alaska Department of Fish and Game (ADF&G) 2009), but there are also records of relatively high harvest in May (Wolfe *et al.* 2013). The ADF&G has not recorded harvest of cetaceans from Ketchikan or Saxman (ADF&G 2023).

All project activities are planned to take place within the industrial area of Tongass Narrows immediately adjacent to Ketchikan where subsistence activities do not generally occur. Both harbor seals and Steller sea lions may be temporarily displaced from the project area. The project will also not have an adverse impact on the availability of marine mammals for subsistence use at locations farther away where these construction activities are not expected to take place. Some minor, short-term harassment of the harbor seals could occur, but given the information above, we do not expect such harassment to have effects on subsistence hunting activities.

Based on the description of the specified activity, the measures described to minimize adverse effects on the availability of marine mammals for subsistence purposes, and the mitigation and monitoring measures,

NMFS has determined that there will not be an unmitigable adverse impact on subsistence uses from ADOT&PF's planned activities.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we plan to authorize take for endangered or threatened species, in this case with NMFS' Alaska Regional Office (AKRO).

NMFS is authorizing take of the Mexico—North Pacific stock of humpback whale, and fin whale, which are listed as threatened or endangered under the ESA. The NMFS AKRO issued a Biological Opinion under section 7 of the ESA on the issuance of an IHA to ADOT&PF under section 101(a)(5)(D) of the MMPA by NMFS OPR. The biological opinion concluded that the action is not likely to jeopardize the continued existence of the listed species.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review proposed actions (*i.e.,* the issuance of an IHA) with respect to potential impacts on the human environment. This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has determined that the issuance of the IHA qualifies to be categorically excluded from further NEPA review.

Authorization

NMFS has issued an IHA to ADOT&PF for the potential harassment of small numbers of 11 marine mammal species incidental to ferry berth construction in Tongass Narrows in Ketchikan, Alaska, that includes the previously explained mitigation, monitoring, and reporting requirements.

Dated: September 11, 2023.

Kimberly Damon-Randall,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023–19903 Filed 9–13–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD340]

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will hold a one-day meeting of its Reef Fish Advisory Panel (AP).

DATES: The meeting will be held Monday, October 2, 2023, from 8:30 a.m. to 5 p.m., EDT.

ADDRESSES: The in-person meeting will take place at the Gulf Council office.

Council address: Gulf of Mexico Fishery Management Council, 4107 W Spruce Street, Suite 200, Tampa, FL 33607; telephone: (813) 348–1630.

FOR FURTHER INFORMATION CONTACT: Mr. Ryan Rindone, Lead Fishery Biologist, Gulf of Mexico Fishery Management Council; *ryan.rindone@gulfcouncil.org,* telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION:

Monday, October 2, 2023; 8:30 a.m.–5:30 p.m., EST

The meeting will begin with Introductions of Members and Adoption of Agenda, Approval of Minutes from the October 11, 2022, meeting, election of the Chair and Vice Chair, review the Scope of Work, and Reef Fish and Individual Fishing Quota (IFQ) Program Landings.

The AP will then receive an update on the Marine Recreational Information Program—Fishing Effort Survey (MRIP–FES) Pilot Study and Proposed Next Steps, followed by a summary of the Gag Research Review from September 2023 Gulf Scientific and Statistical Committee (SSC) Meeting. The AP will then review the Gag Interim Analysis Health Check, followed by discussions on the Reef Fish Framework Action: Modifications to *Gag and Black Grouper* Recreational Retention Limits and Commercial Spawning Season Closure. The AP will receive a brief update on Draft Amendment 58: Modifications to Shallow-water Grouper Complex Management Measures; and will then review interim analyses for *Vermilion Snapper* and *Lane Snapper.*

Next, the AP will review Draft Snapper Grouper Amendment 44/Reef Fish Amendment 55: Catch Level Adjustments and Allocations for Southeastern U.S. *Yellowtail Snapper,* and then discuss the Draft Generic Amendment for Regulatory Streamlining; the AP will then receive Public Comment.

Lastly, the AP will discuss any Other Business items.

—Meeting Adjourns

The meeting will also be broadcast via webinar. You may register for the webinar by visiting *www.gulfcouncil.org* and clicking on the Advisory Panel meeting on the calendar. The Agenda is subject to change, and the latest version along with other meeting materials will be posted on *www.gulfcouncil.org* as they become available.

Although other non-emergency issues not on the agenda may come before the Advisory Panel for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions of the Advisory Panel will be restricted to those issues specifically identified in the agenda 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 Council's intent to take action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to Kathy Pereira, (813) 348–1630, at least 5 days prior to the meeting date.

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

Dated: September 11, 2023.

Diane M. DeJames-Daly,

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

[FR Doc. 2023–19930 Filed 9–13–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD341]

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will hold a half-day webinar meeting of its Standing, Reef Fish, Socioeconomic, and Ecosystem Scientific and Statistical Committees (SSC). See **SUPPLEMENTARY INFORMATION** for agenda.

DATES: The meeting will be held Wednesday, October 4, 2023, from 9 a.m. to 12 p.m., EDT.

ADDRESSES: The meeting will take place via webinar. Registration information will be available on the Council's website by visiting *www.gulfcouncil.org* and clicking on the ''meeting tab''.

Council address: Gulf of Mexico Fishery Management Council, 4107 W Spruce Street, Suite 200, Tampa, FL 33607; telephone: (813) 348–1630.

FOR FURTHER INFORMATION CONTACT: Mr. Ryan Rindone, Lead Fishery Biologist, Gulf of Mexico Fishery Management Council; *ryan.rindone@gulfcouncil.org,* telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION:

Wednesday, October 4, 2023; 9 a.m.–12 p.m., EDT

The meeting will begin with Introductions and Adoption of Agenda, and a review of the Scope of Work. The Committees will then review the Marine Recreational Information Program Fishing Effort Survey Pilot Study and Next Steps. Following, the Committees will receive an update on SEDAR 81 Sensitivity Runs with Respect to the MRIP–FES Pilot Study. SSC discussion will follow.

The Committees will receive public comment, if any, before addressing any items under Other Business.

—*Meeting Adjourns*

The meeting will be broadcast via webinar. You may register for the webinar by visiting *www.gulfcouncil.org* and clicking on the SSC meeting on the calendar.

The Agenda is subject to change, and the latest version along with other meeting materials will be posted on *www.gulfcouncil.org* as they become available.

Although other non-emergency issues not on the agenda may come before the Scientific and Statistical Committees for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions of the Scientific and Statistical Committee will be restricted to those issues specifically identified in the agenda 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 Council's intent to take action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to Kathy Pereira, (813) 348–1630, at least 5 days prior to the meeting date.

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

Dated: September 11, 2023.

Diane M. DeJames-Daly,

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

[FR Doc. 2023–19931 Filed 9–13–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD355]

Marine Mammals and Endangered Species

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

ACTION: Notice; issuance of permits, and permit modifications.

SUMMARY: Notice is hereby given that permits and permit modifications have been issued to the following entities under the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA), as applicable.

ADDRESSES: The permits and related documents are available for review upon written request via email to *NMFS.Pr1Comments@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Shasta McClenahan, Ph.D., (Permit Nos. 26939, 27038, and 27052), Malcolm Mohead (Permit Nos. 27294 and 24016–01), and Courtney Smith, Ph.D. (Permit No. 26623); at (301) 427–8401.

SUPPLEMENTARY INFORMATION: Notices were published in the **Federal Register** on the dates listed below that requests for a permit or permit modification had been submitted by the below-named applicants. To locate the **Federal Register** notice that announced our receipt of the application and a complete description of the activities, go to *https://www.federalregister.gov* and search on the permit number provided in Table 1 below.

TABLE 1—ISSUED PERMITS AND PERMIT MODIFICATIONS

Permit No.	RTID	Applicant	Previous **Federal Register** notice	Issuance date
26623	0648–XC926	Erin Ashe, Ph.D., Oceans Initiative, 117 East Louisa Street No. 135, Seattle, WA 98102.	88 FR 23645, April 18, 2023.	August 7, 2023.
26939	0648–XC969	NMFS Northeast Fisheries Science Center, 166 Water Street, Woods Hole, MA 02543 (Responsible Party: Jon Hare, Ph.D.).	88 FR 27451, May 2, 2023.	August 28, 2023.
27038	0648–XC735	Center for Whale Research, 355 Smuggler's Cove Road, Friday Harbor, WA 98250 (Responsible Party: Michael Weiss, Ph.D.).	88 FR 7078, February 2, 2023.	August 15, 2023.
27052	0648–XC804	NMFS Northwest Fisheries Science Center, 2725 Montlake Boulevard East, Seattle, WA 98112 (Responsible Party: M. Bradley Hanson, Ph.D.).	88 FR 13100, March 2, 2023.	August 25, 2023.

TABLE 1—ISSUED PERMITS AND PERMIT MODIFICATIONS—Continued

Permit No.	RTID	Applicant	Previous **Federal Register** notice	Issuance date
27294	0648–XC922	Nicole Phillips, Ph.D., The University of Southern Mississippi, 118 College Drive No. 5018, Hattiesburg, MS 39406.	88 FR 24597, April 21, 2023.	July 11, 2023.
24016–01	0648–XC967	Jason Kahn, Ph.D., National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910.	88 FR 26523, May 1, 2023.	August 17, 2023.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activities proposed are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

As required by the ESA, as applicable, issuance of these permit was based on a finding that such permits: (1) were applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) are consistent with the purposes and policies set forth in Section 2 of the ESA.

Authority: The requested permits have been issued under the MMPA of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the ESA of 1973, as amended (16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226), as applicable.

Dated: September 11, 2023.

Julia M. Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023–19876 Filed 9–13–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID: USA–2023–HQ–0012]

Proposed Collection; Comment Request

AGENCY: U.S. Army Corps of Engineers (USACE), Department of the Army, Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the U.S. Army Corps of Engineers announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: 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; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by November 13, 2023.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

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

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to U.S. Army Corps of Engineers, 441 G Street NW, Washington, DC 20314–1000, ATTN: Ms. Kathryn Nevins, or call 703–428–6440.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Parks and Recreation Comment System (PARCS); OMB Control Number 0710–PARC.

Needs and Uses: The Parks and Recreation Comment System (PARCS) is intended to be a supplemental instrument to the mandatory customer comment cards which can be utilized not only during the optional years but would be available anytime the public would like to submit comments, questions, or concerns about the conditions at the project. PARCS is an online tool unlike the current comment cards and would reduce the use of printed materials. Rather than seeking to gauge overall visitor satisfaction, this tool is intended to collect impromptu feedback from visitors with a limited scope. Each response is expected to relate to one specific issue, essentially supplementing other issue reporting methods such as phone calls and emails. In response to Executive Order 12862, Setting Customer Service Standards, issued on 11 September 1993, the Corps of Engineers initiated development of a comment card program for monitoring visitor satisfaction at Corps of Engineers lakes and projects. E.O. 12862 asks agencies to establish customer service standards and ''survey customers to determine . . . their level of satisfaction with existing services.'' This enterprise program allows for the uniform collection of customer feedback from visitors to USACE parks and visitor centers. In 2005, the program was expanded to obtain consistent information across water resources projects with public recreation areas requiring mandatory utilization by projects in a 3-year cycle beginning in 2010.

Affected Public: Individuals or Households.

Annual Burden Hours: 100.

Number of Respondents: 1,200.

Responses per Respondent: 1.

Annual Responses: 1,200.

Average Burden per Response: 5 minutes.

Frequency: On occasion.

Dated: September 5, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–19835 Filed 9–13–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2023–OS–0081]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness (OUSD(P&R)), Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Under Secretary of Defense for Personnel and Readiness announces the proposed public information collections and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collections of information are necessary for the proper performance of the functions of the agencies, including whether the information shall have practical utility; the accuracy of the agencies' estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by November 13, 2023.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

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

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on these proposed information collections or to obtain a copy of the proposal and associated collection instruments, please write to CNA Corporation, 3003 Washington Blvd., Arlington, VA, Ria Reynolds, MPH, *reynoldsr@cna.org,* 703–824–2765.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Assessing the Implementation and Effectiveness of DOD's Lethal Means Safety (LMS) Outreach Materials; OMB Control Number 0704–ALOM.

Needs and Uses: The Deputy Secretary of Defense recently directed implementation of Service/Component tailored lethal means safety (LMS) plans, which leverage the Defense Suicide Prevention Office's (DSPO's) LMS suite of evidence-informed tools. In accordance with guidance, and with recommendations from the Government Accountability Office to assess the efficacy of nonclinical suicide prevention efforts, DSPO aims to help the Services and Components conduct a thorough evaluation of their LMS outreach efforts.

DSPO has contracted with CNA to assist the Services and Components in meeting the requirements set forth in DOD Instruction 6490.16 that all suicide prevention activities are developed from a relevant evidence-base and have an evaluation capability prior to implementation. CNA, in conjunction with the participating Services and Components (*i.e.,* Air Force, Army, Navy, and SOCOM), propose the following information collections focused on specific to the needs of each respective Service/Component to assess the implementation, acceptability, and/or effect of their specific LMS activities and materials. Depending on the nature of the selected evaluation activities, study data will be collected via key informant (KI) interviews and/or a survey.

Air Force: The intent of the voluntary Air Force Time-Based Prevention (TBP) KI Interviews is to help the Air Force gain a better understanding of the implementation and utility of the Air Force's TBP communications and messaging, as well as barriers to implementation.

Army: The intent of voluntary Army LMS Toolkit Key Personnel Baseline and Follow-up Interviews is to consult with key Army personnel to gain a better understanding of the implementation and utility of the Army's new LMS Toolkit.

Navy: The intent of voluntary Navy Gun Lock Distribution KI interviews is to help the Navy evaluate their gun lock distribution efforts and learn how the Navy may improve its safe storage practice materials, outreach, and implementation efforts.

Navy: The intent of the voluntary Navy Community Lethal Means Safety Survey is to learn about the Navy community's awareness of current lethal means safety programs, preferences for safety devices and safe storage locations, and thoughts about the place of safety in Navy culture.

SOCOM: The intent of the voluntary SOCOM LMS Integrated Performance Plan (IPP) KI Interviews is to help SOCOM gain a better understanding of the implementation and utility of SOCOM's LMS IPP and learn how the SOCOM Suicide Prevention program may improve its LMS materials, outreach, and implementation efforts.

The Services and Components will use the results of their respective voluntary KI interviews and/or survey to tailor their LMS activities, materials, messaging, training, and outreach efforts to maximize their effectiveness with their Service members and communities.

Affected Public: Individuals or households.

Key Informant Interviews

Annual Burden Hours: 80.

Number of Respondents: 80.

Responses per Respondent: 1.

Annual Responses: 80.

Average Burden per Response: 1 hour.

Navy Community Lethal Means Safety Survey

Annual Burden Hours: 2,500.

Number of Respondents: 10,000.

Responses per Respondent: 1.

Annual Responses: 10,000.

Average Burden per Response: 15 minutes.

Total Burden

Annual Burden Hours: 2,580.

Number of Respondents: 10,080.

Annual Responses: 10,080.

Frequency: As required.

Dated: September 5, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–19838 Filed 9–13–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board; Notice of Federal Advisory Committee Meeting

AGENCY: Under Secretary of Defense for Research and Engineering, Defense Science Board, Department of Defense (DoD).

ACTION: Notice of Federal advisory committee meeting.

SUMMARY: The DoD is publishing this notice to announce that the following Federal Advisory Committee meeting of the Defense Science Board (DSB) will take place.

DATES: Closed to the public Thursday, September 28, 2023 from 10:00 a.m. to 3:45 p.m.

ADDRESSES: The address of the closed meeting is 4075 Wilson Blvd., Arlington, VA.

FOR FURTHER INFORMATION CONTACT: Mr. Kevin Doxey, Designated Federal Officer (DFO), (703) 571–0081 (Voice), (703) 697–1860 (Facsimile), *kevin.a.doxey.civ@mail.mil* (Email). Mailing address is Defense Science Board, 3140 Defense Pentagon, Room 3B888A, Washington, DC 20301–3140. Website: *http://www.acq.osd.mil/dsb/.* The most up-to-date changes to the meeting agenda can be found on the website.

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of chapter 10 of title 5, United States Code (U.S.C.) (commonly known as the ''Federal Advisory Committee Act'' or ''FACA''), 5 U.S.C. 552b (commonly known as the ''Government in the Sunshine Act''), and sections 102–3.140 and 102–3.150 of title 41, Code of Federal Regulations (CFR).

Purpose of the Meeting: The mission of the DSB is to provide independent advice and recommendations on matters relating to the DoD's scientific and technical enterprise. The objective of the meeting is to obtain, review, and evaluate classified information related to the DSB's mission. DSB membership will meet with DoD Leadership to discuss classified current and future national security challenges and priorities within the DoD.

Agenda: The meeting will begin on September 28, 2023 at 10:00 a.m. with administrative opening remarks from Mr. Kevin Doxey, the DFO, followed by classified opening remarks regarding ongoing studies and by Dr. Eric Evans, DSB Chair. Next, Dr. Katherine McGrady and Dr. Robert Wisnieff will provide a classified briefing on the Defense Science Board Task Force to Advise Implementation and Prioritization of National Security Innovation Activities' findings and recommendations followed by a DSB (''board'') vote. Following a break, Dr. Miriam John and Hon. Judith Miller will provide a classified briefing on the Defense Science Board Task Force on Department of Defense Dependencies on Critical Infrastructure's findings and recommendations followed by a board vote. After a break, Mr. Jim Shields and Dr. Daniel Hastings will provide a classified briefing on the Defense Science Board Task Force on Position Navigation & Timing Control's findings and recommendations followed by a board vote. This will be followed by Dr. Eric Evans, who will provide classified closing remarks regarding ongoing studies. The meeting will adjourn at 3:45 p.m.

Meeting Accessibility: In accordance with 5 U.S.C. 1009(d) and 41 CFR 102–3.155, the DoD has determined that the DSB meeting will be closed to the public. Specifically, the Under Secretary of Defense for Research and Engineering, in consultation with the DoD Office of the General Counsel, has determined in writing that the meeting will be closed to the public because it will consider matters covered by 5 U.S.C. 552b(c)(1). The determination is based on the consideration that it is expected that discussions throughout will involve classified matters of national security concern. Such classified material is so intertwined with the unclassified material that it cannot reasonably be segregated into separate discussions without defeating the effectiveness and meaning of the overall meeting. To permit the meeting to be open to the public would preclude discussion of such matters and would greatly diminish the ultimate utility of the DSB's findings and recommendations to the Secretary of Defense and to the Under Secretary of Defense for Research and Engineering.

Written Statements: In accordance with 5 U.S.C. 1009(a)(3) and 41 CFR 102–3.105(j) and 102–3.140, interested persons may submit a written statement for consideration by the DSB at any time regarding its mission or in response to the stated agenda of a planned meeting. Individuals submitting a written statement must submit their statement to the DSB DFO at the email address provided in the **FOR FURTHER INFORMATION CONTACT** section at any point; however, if a written statement is not received at least three calendar days prior to the meeting, which is the subject of this notice, then it may not be provided to or considered by the DSB until a later date.

Dated: September 7, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–19855 Filed 9–13–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2023–HA–0082]

Proposed Collection; Comment Request

AGENCY: The Office of the Assistant Secretary of Defense for Health Affairs (OASD(HA)), Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Defense Health Agency announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: 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; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by November 13, 2023.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

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

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public

viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Health Agency, 7700 Arlington Blvd., Falls Church, VA 22042, Terry McDavid, 703–681–3645.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: The Effect of Alcohol Intake on Resilience and Recovery Outcomes Using Alcohol Flush as an Instrumental Variable (Alcohol Flush); OMB Control Number 0720–FLSH.

Needs and Uses: The study's objective is to investigate causal models of alcohol use on resilience measures (*e.g.,* posttraumatic stress disorder [PTSD]). This research objective will be accomplished by (a) collecting a self-report survey and (b) conducting genotyping and sequencing of DNA (potentially up to whole genomic sequencing) from samples of Active Duty Service Members (ADSM; ≥21 years old, n=999.). The compelling need for administration of the survey component of the *Alcohol Flush Study* rests on these four methodological requirements:

- Concurrent collection of demographics, research health information (RHI), and self-reported alcohol consumption
- Avoid potential statistical confounding by implementing systematic data collection across all participants to address research questions and perform statistical modeling,
- Ability to link survey data to genotyping and sequencing data,
- Ability to re-contact participants for future research.

This research will deliver a knowledge product that will inform policy and practice in the Military Health System (MHS). We further expect to identify alcohol as a potential modifiable risk factor related to PTSD and other mental health conditions, which could go beyond the MHS into embedded mental health services for prevention and intervention for at-risk individuals. In the context of Precision Medicine, this survey establishes a cohort who may be contacted for participation in additional research, tailors medical care to optimize efficiency, effectiveness, safety, and patient-centeredness of therapeutic approaches using genetic profiling. The long-term impact of this study has the potential to lower inappropriate utilization, thus reducing costs while improving health-related quality of life and optimizing Readiness.

Information collected in this survey will be used for research purposes to fulfill the objectives of this grant-funded study which aligns to a requirement to ''better understand the impact of alcohol use on resiliency and recovery.'' The findings will be interpreted by a multidisciplinary team of physicians, scientists, behavioral psychologists, and healthcare services researchers to (a) inform policy and (b) make recommendations for practice in the contest of Precision Medicine.

Affected Public: Individuals and households.

Annual Burden Hours: 999.

Number of Respondents: 999.

Responses per Respondent: 1.

Annual Responses: 999.

Average Burden per Response: 1 Hour.

Frequency: On occasion.

Dated: September 5, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–19849 Filed 9–13–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Department of Defense Wage Committee (DoDWC); Notice of Federal Advisory Committee Meetings

AGENCY: Under Secretary of Defense for Personnel and Readiness, Department of Defense (DoD).

ACTION: Notice of closed Federal advisory committee meetings.

SUMMARY: The DoD is publishing this notice to announce that the following Federal Advisory Committee meetings of the DoDWC will take place.

DATES:

Tuesday, September 5, 2023, from 10:00 a.m. to 10:30 a.m. and will be closed to the public.

Tuesday, September 19, 2023, from 10:00 a.m. to 11:30 a.m. and will be closed to the public.

Tuesday, October 3, 2023, from 10:00 a.m. to 11:30 a.m. and will be closed to the public.

Tuesday, October 17, 2023, from 10:00 a.m. to 12:30 p.m. and will be closed to the public.

Tuesday, October 31, 2023, from 10:00 a.m. to 11:00 a.m. and will be closed to the public.

Tuesday, November 14, 2023, from 10:00 a.m. to 12:30 p.m. and will be closed to the public.

Tuesday, November 28, 2023 from 10:00 a.m. to 11:00 a.m. and will be closed to the public.

ADDRESSES: The closed meetings will be held by teleconference.

FOR FURTHER INFORMATION CONTACT: Mr. Karl Fendt, (571) 372–1618 (voice), *karl.h.fendt.civ@mail.mil* (email), 4800 Mark Center Drive, Suite 05G21, Alexandria, Virginia 22350 (mailing address). Any agenda updates can be found at the DoDWC's official website: *https://wageandsalary.dcpas.osd.mil/BWN/DODWC/.*

SUPPLEMENTARY INFORMATION: These meetings are being held under the provisions of chapter 10 of title 5, United States Code (U.S.C.) (commonly known as the ''Federal Advisory Committee Act'' or ''FACA''), 5 U.S.C. 552b (commonly known as the ''Government in the Sunshine Act''), and 41 CFR 102–3.140 and 102–3.150.

Due to circumstances beyond the control of the Department of Defense and the Designated Federal Officer, the Department of Defense Wage Committee was unable to provide public notification required by 41 CFR 102–3.150(a) concerning its September 5, 2023 meeting. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

Due to circumstances beyond the control of the Department of Defense and the Designated Federal Officer, the Department of Defense Wage Committee was unable to provide public notification required by 41 CFR 102–3.150(a) concerning its September 19, 2023 meeting. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

Purpose of the Meeting: The purpose of these meetings is to provide independent advice and recommendations on matters relating to the conduct of wage surveys and the establishment of wage schedules for all appropriated fund and non-appropriated fund areas of blue-collar employees within the DoD.

Agendas

September 5, 2023

Opening Remarks by Chair and Designated Federal Officer (DFO).

Reviewing survey results and/or survey specifications for the following Appropriated Fund areas:

1. Any items needing further clarification or action from the previous agenda.
2. Wage Schedule (Full Scale) for the Boise, Idaho wage area (AC–045).
3. Any items needing further clarification from this agenda may be discussed during future scheduled meetings.

Closing Remarks by Chair.

September 19, 2023

Opening Remarks by Chair and DFO.

Reviewing survey results and/or survey specifications for the following Nonappropriated Fund areas:

1. Any items needing further clarification or action from the previous agenda.
2. Wage Schedule (Full Scale) for the Burlington, New Jersey wage area (AC–071).
3. Wage Schedule (Full Scale) for the Kent, Delaware wage area (AC–076).
4. Wage Schedule (Full Scale) for the Richmond-Chesterfield, Virginia wage area (AC–082).
5. Wage Schedule (Full Scale) for the Morris, New Jersey wage area (AC–090).
6. Wage Schedule (Wage Change) for the Frederick, Maryland wage area (AC–088).
7. Wage Schedule (Wage Change) for the Washington, District of Columbia wage area (AC–124).
8. Wage Schedule (Wage Change) for the Alexandria-Arlington-Fairfax, Virginia wage area (AC–125).
9. Wage Schedule (Wage Change) for the Prince William, Virginia wage area (AC–126).
10. Wage Schedule (Wage Change) for the Prince George's-Montgomery, Maryland wage area (AC–127).
11. Wage Schedule (Wage Change) for the Charles-St. Mary's, Maryland wage area (AC–128).
12. Wage Schedule (Wage Change) for the Anne Arundel, Maryland wage area (AC–147).

Reviewing survey results and/or survey specifications for the following Appropriated Fund areas:

13. Wage Schedule (Full Scale) for the Utah wage area (AC–139).
14. Wage Schedule (Full Scale) for the Spokane, Washington wage area (AC–145).
15. Wage Schedule (Full Scale) for the Puerto Rico wage area (AC–151).
16. Wage Schedule (Wage Change) for the Alaska wage area (AC–007).
17. Wage Schedule (Wage Change) for the Montana wage area (AC–083).
18. Wage Schedule (Wage Change) for the Charleston, South Carolina wage area (AC–119).
19. Special Pay—Puerto Rico Special Rates.
20. Any items needing further clarification from this agenda may be discussed during future scheduled meetings.

Closing Remarks by Chair.

October 3, 2023

Opening Remarks by Chair and DFO.

Reviewing survey results and/or survey specifications for the following Nonappropriated Fund areas:

1. Any items needing further clarification or action from the previous agenda.
2. Survey Specifications for the Onslow, North Carolina wage area (AC–097).
3. Survey Specifications for the Shelby, Tennessee wage area (AC–098).
4. Survey Specifications for the Christian, Kentucky/Montgomery Tennessee wage area (AC–099).
5. Survey Specifications for the Charleston, South Carolina wage area (AC–120).
6. Survey Specifications for the San Juan-Guaynabo, Puerto Rico wage area (AC–155).

Reviewing survey results and/or survey specifications for the following Appropriated Fund areas:

7. Wage Schedule (Full Scale) for the Dothan, Alabama wage area (AC–003).
8. Wage Schedule (Full Scale) for the Washington, District of Columbia wage area (AC–027).
9. Wage Schedule (Full Scale) for the Columbus, Georgia wage area (AC–040).
10. Wage Schedule (Full Scale) for the Charlotte, North Carolina wage area (AC–100).
11. Wage Schedule (Full Scale) for the Oklahoma City, Oklahoma wage area (AC–109).
12. Wage Schedule (Full Scale) for the Pittsburgh, Pennsylvania wage area (AC–116).
13. Wage Schedule (Wage Change) for the Cedar Rapids-Iowa City, Iowa wage area (AC–052).
14. Wage Schedule (Wage Change) for the Portland, Oregon wage area (AC–112).
15. Wage Schedule (Wage Change) for the Wichita Falls, Texas-Southwestern Oklahoma wage area (AC–138).
16. Wage Schedule (Wage Change) for the Madison, Wisconsin wage area (AC–147).
17. Special Pay—Portland, Oregon Special Rates.
18. Special Pay—Missouri River Power Rate (D800).
19. Any items needing further clarification from this agenda may be discussed during future scheduled meetings.

Closing Remarks by Chair.

October 17, 2023

Opening Remarks by Chair and DFO.

Reviewing survey results and/or survey specifications for the following Nonappropriated Fund areas:

1. Any items needing further clarification or action from the previous agenda.
2. Wage Schedule (Full Scale) for the Monterey, California wage area (AC–003).
3. Wage Schedule (Full Scale) for the Kern, California wage area (AC–010).
4. Wage Schedule (Full Scale) for the San Diego, California wage area (AC–054).
5. Wage Schedule (Full Scale) for the Solano, California wage area (AC–059).
6. Wage Schedule (Wage Change) for the Los Angeles, California wage area (AC–130).
7. Wage Schedule (Wage Change) for the Orange, California wage area (AC–131).
8. Wage Schedule (Wage Change) for the Ventura, California wage area (AC–132).
9. Wage Schedule (Wage Change) for the Riverside, California wage area (AC–133).
10. Wage Schedule (Wage Change) for the San Bernardino, California wage area (AC–134).
11. Wage Schedule (Wage Change) for the Santa Barbara, California wage area (AC–135).
12. Wage Schedule (Wage Change) for the Guam wage area (AC–150).

Reviewing survey results and/or survey specifications for the following Appropriated Fund areas:

13. Wage Schedule (Full Scale) for the Albany, Georgia wage area (AC–036).
14. Wage Schedule (Full Scale) for the Northwestern Michigan wage area (AC–071).
15. Wage Schedule (Full Scale) for the Tulsa, Oklahoma wage area (AC–111).
16. Wage Schedule (Full Scale) for the Scranton-Wilkes Barre, Pennsylvania wage area (AC–117).
17. Wage Schedule (Wage Change) for the Little Rock, Arkansas wage area (AC–011).
18. Wage Schedule (Wage Change) for the Boston, Massachusetts wage area (AC–068).
19. Survey Specifications for the Birmingham, Alabama wage area (AC–002).
20. Survey Specifications for the Southern Colorado wage area (AC–023).
21. Survey Specifications for the Hagerstown-Martinsburg-Chambersburg, Maryland wage area (AC–067).
22. Survey Specifications for the Dayton, Ohio wage area (AC–107).

23. Survey Specifications for the Harrisburg, Pennsylvania wage area (AC–114).
24. Survey Specifications for the Wyoming wage area (AC–150).
25. Special Pay—Boston, Massachusetts Special Rates.
26. Special Pay—Little Rock, Arkansas Special Rates.
27. Any items needing further clarification from this agenda may be discussed during future scheduled meetings.
Closing Remarks by Chair.

October 31, 2023

Opening Remarks by Chair and DFO.
Reviewing survey results and/or survey specifications for the following Nonappropriated Fund areas:
1. Any items needing further clarification or action from the previous agenda.
2. Survey Specifications for the Oklahoma, Oklahoma wage area (AC–052).
3. Survey Specifications for the Harrison, Mississippi wage area (AC–070).
4. Survey Specifications for the Hardin-Jefferson, Kentucky wage area (AC–096).
5. Survey Specifications for the Wayne, North Carolina wage area (AC–107).
6. Survey Specifications for the Cumberland, North Carolina wage area (AC–108).
7. Survey Specifications for the Richland, South Carolina wage area (AC–110).
8. Survey Specifications for the Wichita, Texas wage area (AC–122).
9. Survey Specifications for the Comanche, Oklahoma wage area (AC–123).
10. Survey Specifications for the Craven, North Carolina wage area (AC–164).
Reviewing survey results and/or survey specifications for the following Appropriated Fund areas:
11. Survey Specifications for the New York, New York wage area (AC–094).
12. Any items needing further clarification from this agenda may be discussed during future scheduled meetings.
Closing Remarks by Chair.

November 14, 2023

Opening Remarks by Chair and DFO.
Reviewing survey results and/or survey specifications for the following Appropriated Fund areas:
1. Any items needing further clarification or action from the previous agenda.
2. Wage Schedule (Full Scale) for the San Diego, California wage area (AC–017).
3. Wage Schedule (Full Scale) for the San Francisco, California wage area (AC–018).
4. Wage Schedule (Full Scale) for the Pensacola, Florida wage area (AC–034).
5. Wage Schedule (Full Scale) for the Central Illinois wage area (AC–046).
6. Wage Schedule (Full Scale) for the Des Moines, Iowa wage area (AC–054).
7. Wage Schedule (Full Scale) for the Baltimore, Maryland wage area (AC–066).
8. Wage Schedule (Full Scale) for the Buffalo, New York wage area (AC–092).
9. Wage Schedule (Wage Change) for the Los Angeles, California wage area (AC–013).
10. Wage Schedule (Wage Change) for the San Bernardino-Riverside-Ontario, California wage area (AC–016).
11. Wage Schedule (Wage Change) for the Santa Barbara, California wage area (AC–019).
12. Wage Schedule (Wage Change) for the New London, Connecticut wage area (AC–025).
13. Wage Schedule (Wage Change) for the Panama City, Florida wage area (AC–033).
14. Wage Schedule (Wage Change) for the Chicago, Illinois wage area (AC–047).
15. Wage Schedule (Wage Change) for the Las Vegas, Nevada wage area (AC–085).
16. Wage Schedule (Wage Change) for the Portsmouth, New Hampshire wage area (AC–087).
17. Wage Schedule (Wage Change) for the Seattle-Everett-Tacoma, Washington wage area (AC–143).
18. Survey Specifications for the Salinas-Monterey, California wage area (AC–015).
19. Survey Specifications for the Rochester, New York wage area (AC–096).
20. Special Pay—San Diego, California Special Rates.
21. Special Pay—Los Angeles, California Special Rates.
22. Special Pay—New London, Connecticut Special Rates.
23. Special Pay—Southwest Power Rate.
24. Special Pay—North Central Power Rate.
25. Any items needing further clarification from this agenda may be discussed during future scheduled meetings.
Closing Remarks by Chair.

November 28, 2023

Opening Remarks by Chair and DFO.
Reviewing survey results and/or survey specifications for the following Nonappropriated Fund areas:
1. Any items needing further clarification or action from the previous agenda.
2. Wage Schedule (Full Scale) for the Hampden, Massachusetts wage area (AC–039).
3. Wage Schedule (Full Scale) for the Middlesex, Massachusetts wage area (AC–138).
4. Wage Schedule (Full Scale) for the York, Maine wage area (AC–139).
5. Wage Schedule (Wage Change) for the Maricopa, Arizona wage area (AC–012).
6. Wage Schedule (Wage Change) for the Pima, Arizona wage area (AC–013).
7. Wage Schedule (Wage Change) for the Yuma, Arizona wage area (AC–055).
8. Wage Schedule (Wage Change) for the Kings-Queens, New York wage area (AC–091).
Reviewing survey results and/or survey specifications for the following Appropriated Fund areas:
9. Survey Specifications for the Lexington, Kentucky wage area (AC–058).
10. Survey Specifications for the Northern Mississippi wage area (AC–077).
11. Survey Specifications for the Memphis, Tennessee wage area (AC–124).
12. Survey Specifications for the Nashville, Tennessee wage area (AC–125).
13. Any items needing further clarification from this agenda may be discussed during future scheduled meetings.
Closing Remarks by Chair.

Meeting Accessibility: Pursuant to 5 U.S.C. 552b(c)(4), the DoD has determined that the meetings shall be closed to the public. The Under Secretary of Defense for Personnel and Readiness, in consultation with the DoD Office of General Counsel, has determined in writing that each of these meetings is likely to disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential.

Written Statements: Pursuant to 5 U.S.C. 1009(a)(3) and 41 CFR 102–3.140, interested persons may submit written statements to the DFO for the DoDWC at any time. Written statements should be submitted to the DFO at the email or mailing address listed in the **FOR FURTHER INFORMATION CONTACT** section. If statements pertain to a specific topic being discussed at a planned meeting, then these statements must be submitted no later than five (5) business days prior to the meeting in question. Written

statements received after this date may not be provided to or considered by the DoDWC until its next meeting. The DFO will review all timely submitted written statements and provide copies to all the committee members before the meeting that is the subject of this notice.

Dated: September 6, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–19856 Filed 9–13–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID: USN–2023–HQ–0017]

Proposed Collection; Comment Request

AGENCY: Department of the Navy, Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Naval Air Warfare Center Aircraft Division announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: 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; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by November 13, 2023.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

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

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Naval Air Warfare Center Aircraft Division, 22347 Cedar Point Road, Building 2185, Patuxent River, MD 20670; ATTN: Ms. Crystal Krater, or call 301–757–6690.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: NAWCAD Strategic Education Office STEM Outreach Programs; NAWCAD Forms 5726/1, 5726/2, and 5726/4; OMB Control Number 0703–SEOP.

Needs and Uses: The mission of the Naval Air Warfare Center Aircraft Division's (NAWCAD) Strategic Education Office (SEO) is to provide meaningful opportunities for students in the areas of Science, Technology, Engineering, and Mathematics (STEM) through outreach activities to middle school and high school students. The purpose of the STEM programs is to provide interactive learning experiences for middle school and high school students to create awareness of the additional internship opportunities and naval careers encouraging students to pursue STEM education and career fields. Through the Southern Maryland region partnership agreements between federal agencies and educational institutions providing support and services to public and private school students, the NAWCAD SEO assists in orchestrating of variety of engagement activities to include NAWCAD hosted annual STEM centric summer camp programs, classroom speaking and demonstrations, school field trips, mentorships, and the organizing of volunteer support for all activities. To facilitate annual events, information must be collected from local area educational institutions, community groups, and/or students via three forms: NAWCAD 5726/1, ''NAWCAD SEO Program Request''; NAWCAD 5726/2, ''NAWCAD SEO Science Fair Mentor Program Student Application''; and NAWCAD 5726/4, ''NAWCAD SEO Program Registration.''

Affected Public: Individuals or households; State, Local or Tribal Government.

NAWCAD SEO Program Request

Annual Burden Hours: 7.
Number of Respondents: 40.
Responses per Respondent: 1.
Annual Responses: 40.
Average Burden per Response: 10 minutes.

NAWCAD SEO Science Fair Mentor Program Student Application

Annual Burden Hours: 6.
Number of Respondents: 24.
Responses per Respondent: 1.
Annual Responses: 24.
Average Burden per Response: 15 minutes.

NAWCAD SEO Program Registration

Annual Burden Hours: 22.
Number of Respondents: 132.
Responses per Respondent: 1.
Annual Responses: 132.
Average Burden per Response: 10 minutes.

Total Burden

Annual Burden Hours: 35.
Number of Respondents: 196.
Annual Responses: 196.
Frequency: On occasion.

Dated: September 5, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–19834 Filed 9–13–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0162]

Agency Information Collection Activities; Comment Request; Reporting Additional Direct Assessment Programs

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before November 13, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2023–SCC–0162. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://*

www.regulations.gov by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, the Department will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Reporting Additional Direct Assessment Programs.

OMB Control Number: 1845–0162.

Type of Review: A revision of a currently approved ICR.

Respondents/Affected Public: Private sector; State, local, and Tribal governments.

Total Estimated Number of Annual Responses: 36.

Total Estimated Number of Annual Burden Hours: 18.

Abstract: 34 CFR 600.21, Updating application information, requires the institution to only report the addition of a second or subsequent direct assessment program without the review and approval of the Department when it previously been awarded such approval. The regulations also require an institution to report the establishment of a written arrangement between the eligible institution and an ineligible institution or organization in which the ineligible institution or organization would provide more than 25 percent of a program.

Dated: September 11, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–19885 Filed 9–13–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0161]

Agency Information Collection Activities; Comment Request; Evaluation of the REL Appalachia Teaching Math to Young Children Toolkit

AGENCY: Institute of Education Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a new information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before November 13, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2023–SCC–0161. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, the Department will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 4C210, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Amy Johnson, 202–453–5974.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Evaluation of the REL Appalachia Teaching Math to Young Children Toolkit.

OMB Control Number: 1850–NEW.

Type of Review: A new ICR.

Respondents/Affected Public: Individuals and households.

Total Estimated Number of Annual Responses: 320.

Total Estimated Number of Annual Burden Hours: 95.

Abstract: Mathematics knowledge acquired in early childhood provides a

critical foundation for long-term student success in math as well as reading (Duncan et al., 2007; Watts et al., 2014), but the professional development (PD) and curricular support for preschool teachers often lack specific content and training on high-quality math instruction delivered by math content experts. To address this problem, the REL Appalachia toolkit development team is developing a toolkit to provide preschool teachers with support in implementing core teaching practices essential to promoting early math skills and knowledge in children. The toolkit is based on the Teaching Math to Young Children IES practice guide (Frye et al., 2013) and is being developed in collaboration with state and district partners in Virginia.

IES requests clearance for activities to support the recruitment of schools and districts to participate in an efficacy study of the toolkit as part of the REL Appalachia contract. A second OMB package, which will be submitted later this year, will request clearance for data collection instruments and the collection of district administrative data.

The study will assess the efficacy of the professional development resources included in the toolkit. The evaluation will also assess how teachers implement the toolkit to provide context for the efficacy findings and guidance to improve the toolkit and its future use.

The evaluation will take place in 50 schools across approximately 10 school divisions in Virginia and focus on mathematics teaching practices and student mathematics knowledge and skills in preschool classrooms. The purpose of this study will be to measure the efficacy and implementation of the REL AP-developed toolkit designed to improve teacher practice and preschool students' math learning outcomes. The toolkit evaluation will produce a report for district and school leaders who are considering strategies to improve math learning in preschool. The report will be designed to help them decide whether and how to use the toolkit to help them implement the practice guide recommendations.

Dated: September 11, 2023.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–19879 Filed 9–13–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0163]

Agency Information Collection Activities; Comment Request; Annual Performance Report for Titles III, V, and VII Grants

AGENCY: Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before November 13, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2023–SCC–0163. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, the Department will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted.

Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Jason Cottrell, 202–453–7530.

SUPPLEMENTARY INFORMATION: The Department, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Department is soliciting comments on the proposed information collection request (ICR) that is described below. The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Annual Performance Report for Titles III, V, and VII Grants.

OMB Control Number: 1840–0766.

Type of Review: A revision of a currently approved ICR.

Respondents/Affected Public: Private Sector; State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 1,400.

Total Estimated Number of Annual Burden Hours: 28,000.

Abstract: Titles III, V, and VII of the Higher Education Act of 1965, as amended (HEA), provide discretionary and formula grant programs that make competitive awards to eligible institutions of higher education and organizations (Title III, Part E) to assist these institutions with expanding their capacity to serve minority and low-income students. Grantees annually submit a performance report to demonstrate that substantial progress is being made towards meeting the objectives of their project. A Final Performance Report will be completed after the grantee completes their final performance period.

Dated: September 11, 2023.

Kun Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–19894 Filed 9–13–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[EERE–2013–BT–NOC–0005]

Appliance Standards and Rulemaking Federal Advisory Committee: Notice of Public Meeting

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

ACTION: Notice of open meeting and webinar.

SUMMARY: This notice announces a public meeting of the Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC). The Federal Advisory Committee Act (FACA), requires that agencies publish notice of an advisory committee meeting in the **Federal Register**.

DATES: October 17, 2023 from 11 a.m. to 4 p.m., in Washington, DC.

ADDRESSES: The public meeting will be held at the National Renewable Energy Laboratory, 901 D Street SW, Suite 930, Washington, DC 20024. The meeting will also be broadcast as a webinar. See the Public Participation section of this notice for webinar registration information, participant instructions, and information about the capabilities available to webinar participants.

FOR FURTHER INFORMATION CONTACT: Mr. Lucas Adin, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–5904. Email *ApplianceStandardsQuestions@ee.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of Committee: The Committee provides advice and recommendations related to the development of minimum efficiency standards for residential appliances and commercial equipment; the development of product test procedures; the certification and enforcement of standards; the labeling for various residential products and commercial equipment; and specific issues of concern to DOE as requested by the Secretary of Energy, the Assistant Secretary for Energy Efficiency and Renewable Energy (EERE), and the Building Technologies Office (BTO) Director.

Tentative Agenda: DOE plans to hold this meeting virtually via webinar to gather advice and recommendations to the Department on the development of standards and test procedures for residential appliances and commercial equipment with the primary focus being the discussion and prioritization of topic areas that ASRAC can assist the Appliance and Equipment Standards Program with, particularly relating to rulemakings that could be subject to negotiation through ASRAC. (The final agenda will be available for public viewing at *https://www.regulations.gov/docket?D=EERE-2013-BT-NOC-0005.*)

Public Participation: The time, date and location of the public meeting are listed in the **DATES** and **ADDRESSES** sections at the beginning of this document. If you plan to attend the public meeting, please notify the ASRAC staff at *asrac@ee.doe.gov.*

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

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

The webinar will held using the Webex software platform and participants are responsible for ensuring their systems are compatible with the webinar software. If you plan to attend the webinar, please notify the ASRAC staff at *asrac@ee.doe.gov.*

Conduct of Public Meeting: ASRAC's Designated Federal Officer will preside at the public meeting and may also use a professional facilitator to aid discussion. The meeting will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with section 336 of EPCA (42 U.S.C. 6306).

Meeting Minutes: A transcript of the webinar will be included in the ASRAC docket: *https://www.regulations.gov/docket?D=EERE-2013-BT-NOC-0005.*

Signing Authority

This document of the Department of Energy was signed on September 8, 2023, by Francisco Alejandro Moreno, Acting Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on September 11, 2023.

Treena V. Garrett,

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

[FR Doc. 2023–19910 Filed 9–13–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Energy Employees Occupational Illness Compensation Program Act of 2000; Revision to the List of Covered Facilities

AGENCY: Office of Environment, Health, Safety and Security, U.S. Department of Energy.

ACTION: Notice of revision of listing of covered facilities.

SUMMARY: The U.S. Department of Energy (DOE or Department) has periodically published in the **Federal Register** a list of facilities covered under the Energy Employees Occupational Illness Compensation Program Act of 2000, as amended (EEOICPA or Act). This Notice is being published to reflect the fact that the Beryllium Mill in Delta, Utah (''Beryllium Mill in Delta'') is a covered beryllium vendor facility under EEOICPA.

DATES: September 14, 2023.

FOR FURTHER INFORMATION CONTACT: Mr. Kevin Dressman, Director, Office of Health and Safety (EHSS–10), 1000 Independence Avenue SW, Washington, DC 20585; (301) 903–2473; or by email at *kevin.dressman@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: This Notice is being published to reflect the fact that the Beryllium Mill in Delta is a covered beryllium vendor facility under EEOICPA. Previous lists or revisions were published by DOE on August 3, 2022 (87 FR 47399); February 17, 2016 (81 FR 8060); July 16, 2015 (80 FR 42094); February 11, 2013 (78 FR 9678); February 6, 2012 (77 FR 5781); May 26, 2011 (76 FR 30695); August 3, 2010 (75 FR 45608); April 9, 2009 (74 FR 16191); June 28, 2007 (72 FR 35448); November 30, 2005 (70 FR 71815); August 23, 2004 (69 FR 51825); July 21, 2003 (68 FR 43095); December 27, 2002

(67 FR 79068); June 11, 2001 (66 FR 31218); and January 17, 2001 (66 FR 4003).

Purpose

EEOICPA established a program to provide compensation to individuals who developed illnesses because of their employment in nuclear weapons production-related activities of DOE or its predecessor agencies. Covered employees include current or former employees of a ''beryllium vendor'' as defined by the Act. On December 7, 2000, the President issued Executive Order 13179, ''Providing Compensation to America's Nuclear Weapons Workers,'' which directed the Secretary of Energy to, among other things, publish in the **Federal Register** a ''list of facilities owned and operated by a beryllium vendor, within the meaning of section 3621(6)'' (42 U.S.C. 7384l(6)) of the Act. The Department's initial listing was published on January 17, 2001 (66 FR 4003), and DOE has periodically updated the listing as new information has become available. In addition, DOE maintains a database of covered facilities online at *https://ehss.energy.gov/search/facility/index.*

Section 3621(6) of the Act (42 U.S.C. 7384l(6)) defines ''beryllium vendor'' as any of the following: ''(A) Atomics International; (B) Brush Wellman, Incorporated, and its predecessor, Brush Beryllium Company; (C) General Atomics; (D) General Electric Company; (E) NGK Metals Corporation and its predecessors, Kawecki-Berylco, Cabot Corporation, BerylCo, and Beryllium Corporation of America; (F) Nuclear Materials and Equipment Corporation; (G) StarMet Corporation and its predecessor, Nuclear Metals, Incorporated; (H) Wyman Gordan, Incorporated; (I) Any other vendor, processor, or producer of beryllium or related products designated as a beryllium vendor for purposes of the compensation program under section 3622 [42 U.S.C. 7384m].'' The beryllium vendors listed in Section 3621(6) of the Act (42 U.S.C. 7384l(6)), are sometimes referred to as ''statutory beryllium vendors'' because they are specifically identified by name in the statute.

In 1969, the Brush Beryllium Company opened the Beryllium Mill in Delta and since then, the facility has processed two types of ore to extract beryllium—locally mined bertrandite ore and beryl ore imported from various suppliers. From the Beryllium Mill in Delta, beryllium products are shipped to another Materion Brush, Inc. beryllium vendor facility in Elmore, Ohio to produce metallic beryllium, beryllium alloys, and beryllia ceramic feedstock.

The Beryllium Mill in Delta was operated by Brush Beryllium Company from 1969–1971, Brush Wellman, Inc. from 1971-January 23, 2001, Brush Resources, Inc. from January 23, 2001-March 8, 2011, and Materion Natural Resources, Inc. from March 8, 2011–Present. For purposes of coverage under EEOICPA, all references to ''Brush Wellman Incorporated'' or ''Brush Wellman, Inc.'' include its predecessor and successor entities, including the aforementioned entities.

Due to Brush Wellman, Inc.'s status as a statutory beryllium vendor, all employees of Brush Wellman, Inc. in the U.S., regardless of location, are covered for the entire period for which Brush Wellman, Inc., its predecessors, and successor entities have supplied beryllium to DOE or its predecessor agencies. That period is defined as August 13, 1943, and continuing. While DOE is publishing this Notice to update its list of covered facilities to reflect the fact that the Beryllium Mill in Delta is owned by a successor to Brush Wellman, Inc., and therefore, is a covered beryllium vendor facility under EEOICPA, DOE notes that the beryllium facilities operated by Brush Wellman, Inc., its predecessors, and successor entities are covered beryllium facilities under EEOICPA because they are facilities of a statutory beryllium vendor, regardless of whether the facility is listed by DOE in a **Federal Register** notice. DOE will maintain and continually update its database of covered facilities online at *https://ehss.energy.gov/search/facility/index.*

Signing Authority

This document of the Department of Energy was signed on September 11, 2023, by Todd N. Lapointe, Director, Office of Environment, Health, Safety and Security, 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 September 11, 2023.

Treena V. Garrett,

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

[FR Doc. 2023–19919 Filed 9–13–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

President's Council of Advisors on Science and Technology (PCAST)

AGENCY: Office of Science, Department of Energy.

ACTION: Notice of closed meeting.

SUMMARY: This notice announces a closed meeting of the President's Council of Advisors on Science and Technology (PCAST). The Federal Advisory Committee Act (FACA) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Thursday, September 14, 2023; 3:00 p.m. ET.

ADDRESSES: The White House, 1600 Pennsylvania Avenue NW, Washington, DC 20500.

FOR FURTHER INFORMATION CONTACT: Dr. Reba Bandyopadhyay, Designated Federal Officer, PCAST, email: *PCAST@ostp.eop.gov;* telephone: (202) 881–7163.

SUPPLEMENTARY INFORMATION: PCAST is an advisory group of the nation's leading scientists and engineers, appointed by the President to augment the science and technology advice available to him from the White House, cabinet departments, and other Federal agencies. See the Executive Order at *whitehouse.gov.* PCAST is consulted on and provides analyses and recommendations concerning a wide range of issues where understanding of science, technology, and innovation may bear on the policy choices before the President. The Designated Federal Officer is Dr. Reba Bandyopadhyay. Information about PCAST can be found at: *www.whitehouse.gov/PCAST.*

Tentative Agenda

Closed portion of the meeting: PCAST may hold a closed meeting of approximately one hour with the President on September 14, 2023, or September 15, 2023, which must take place in the White House for scheduling convenience and to maintain Secret Service protection. This meeting will be closed to the public because a portion of the meeting is likely to disclose matters that are to be kept secret in the interest of national defense or foreign policy under 5 U.S.C. 552b(c)(1).

This notice is being published less than 15 days prior to the meeting due to scheduling difficulties.

PCAST operates under the provisions of FACA, all public comments and/or presentations will be treated as public documents and will be made available for public inspection, including being posted on the PCAST website at: *www.whitehouse.gov/PCAST/meetings.*

Minutes: Minutes will be available within 45 days at: *www.whitehouse.gov/PCAST/meetings.*

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

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2023–19872 Filed 9–13–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Notice of Intent and Request for Information Regarding Launching a Responsible Carbon Management Initiative; Reopening of Comment Period

AGENCY: Office of Fossil Energy and Carbon Management, Department of Energy.

ACTION: Reopening of public comment period.

SUMMARY: The U.S. Department of Energy (DOE) is reopening the public comment period for its Notice of Intent (NOI) and Request for Information (RFI) regarding launching a Responsible Carbon Management Initiative which was published in the **Federal Register** on August 11, 2023. The published NOI and RFI established a 30-day public comment period that ended on September 11, 2023. DOE received requests to extend the comment period. DOE reviewed the requests and announced on the Office of Fossil Energy and Carbon Management (FECM) website on September 6, 2023, that it would extend the comment period until September 30, 2023. Accordingly, DOE is reopening the public comment period to allow comments to be submitted until September 30, 2023.

DATES: The comment period for the NOI and RFI published on August 11, 2023 (88 FR 54608), and closed on September 11, 2023, is reopened until September 30, 2023. DOE will accept comments regarding this NOI and RFI received on and before September 30, 2023.

ADDRESSES: Interested parties may submit comments electronically to *responsiblecarbonmanagementinitiative@hq.doe.gov* and include ''Responsible Carbon Management Initiative'' in the subject line of the email. Responses must be provided as attachments to an email. Only electronic responses will be accepted.

FOR FURTHER INFORMATION CONTACT: Kelli Roemer, email: *responsiblecarbonmanagementinitiative@hq.doe.gov* or phone: (240) 309–9639.

SUPPLEMENTARY INFORMATION: On August 11, 2023, DOE published a NOI and RFI in the **Federal Register** soliciting public input on its intent to launch a Responsible Carbon Management Initiative to recognize and encourage project developers and others in industry to pursue the highest levels of safety, environmental stewardship, accountability, community engagement, and societal benefits in carbon management projects. DOE stated it would accept written comments through September 11, 2023. DOE received requests to extend the public comment period. DOE has reviewed these requests and considered the benefit to stakeholders in providing additional time to review the NOI and RFI and provide information that DOE is seeking. DOE announced on the FECM website on September 6, 2023, that it would extend the comment period until September 30, 2023.[1] Accordingly, DOE is reopening the comment period and will accept comments on and before September 30, 2023.

Signing Authority

This document of the Department of Energy was signed on September 8, 2023, by Brad Crabtree, Assistant Secretary, Office of Fossil Energy and Carbon Management, 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 September 11, 2023.

Treena V. Garrett,

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

[FR Doc. 2023–19877 Filed 9–13–23; 8:45 am]

BILLING CODE 6450–01–P

[1] Notice of Intent and Request for Information: Responsible Carbon Management Initiative, *https://www.energy.gov/fecm/notice-intent-and-request-information-responsible-carbon-management-initiative.*

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board Chairs

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an in-person meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB) Chairs. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES:

Wednesday, October 4, 2023; 9:00 a.m.–5:00 p.m. EST

Thursday, October 5, 2023; 8:30 a.m.–12:15 p.m. EST

ADDRESSES: DoubleTree Hotel, 215 S Illinois Avenue, Oak Ridge, TN 37830.

FOR FURTHER INFORMATION CONTACT: Kelly Snyder, EM SSAB Designated Federal Officer. Phone: (702) 918–6715; Email: *kelly.snyder@em.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda Topics:

Wednesday, October 4, 2023

- Public Comment
- Presentations by DOE
- Board Business/Open Discussion

Thursday, October 5, 2023

- Public Comment
- Board Business/Open Discussion

Public Participation: DOE welcomes the attendance of the public at their advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Kelly Snyder at least seven days in advance of the meeting at the phone number or email listed above. Written public comment statements may be filed either before or after the meeting with the Designated Federal Officer, Kelly Snyder, at the phone number or email listed above. Individuals who wish to make oral public comment should also contact Kelly Snyder. Requests must be received five days prior to the meeting. Individuals wishing to make public comment will be provided a maximum of five minutes to present their comments. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business.

Minutes: Minutes will be available at the following website: *https://energy.gov/em/listings/chairs-meetings*.

Signed in Washington, DC on September 8, 2023.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2023–19871 Filed 9–13–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Energy Information Administration

Agency Information Collection Proposed 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 three-year extension, with changes, to the Natural Gas Data Collection Program, OMB Control Number 1905–0175, as required under the Paperwork Reduction Act of 1995. The surveys covered by this request include; Form EIA–176, *Annual Report of Natural and Supplemental Gas Supply and Disposition;* Form EIA–191, *Monthly Underground Natural Gas Storage Report;* Form EIA–191L, *Monthly Liquefied Natural Gas Storage Report;* Form EIA–757, *Natural Gas Processing Plant Survey;* Form EIA–857, *Monthly Report of Natural Gas Purchases and Deliveries to Consumers;* Form EIA–910, *Monthly Natural Gas Marketer Survey;* and Form EIA–912, *Weekly Natural Gas Storage Report.* The Natural Gas Data Collection Program provides information on natural gas storage, supply, processing, distribution, consumption, and prices, by sector, within the United States.

DATES: EIA must receive all comments on this proposed information collection no later than November 13, 2023. If you anticipate any difficulties in submitting your comments by the deadline, contact the email address listed in the **ADDRESSES** section of this notice as soon as possible.

ADDRESSES: Written comments may be sent to: *OOG.Surveys@eia.gov* with the subject line ''Regarding EIA's Natural Gas Data Collection Package 60-Day FRN.''

FOR FURTHER INFORMATION CONTACT: If you need additional information, contact Michael Kopalek, U.S. Energy Information Administration, telephone (202) 586–4001, or by email at *Michael.Kopalek@eia.gov.* The forms and instructions are available on EIA's website at *www.eia.gov/survey/.*

SUPPLEMENTARY INFORMATION: This information collection request contains:

(1) *OMB No.:* 1905–0175.

(2) *Information Collection Request Title:* Natural Gas Data Collection Program.

(3) *Type of Request:* Three-year extension with changes.

(4) *Purpose:* The surveys included in the Natural Gas Data Collection Program collect information on natural gas underground storage, supply, processing, transmission, distribution, consumption by sector, and consumer prices. The data collected supports public policy analyses and produces estimates of the natural gas industry. The statistics generated from these surveys are published on EIA's website, *https://www.eia.gov,* and are used in various EIA information products, including the *Weekly Natural Gas Storage Report* (WNGSR), *Natural Gas Monthly* (NGM), *Natural Gas Annual* (NGA), *Monthly Energy Review* (MER), *Short-Term Energy Outlook* (STEO), and *Annual Energy Outlook* (AEO).

(4a) *Proposed Changes to Information Collection:*

Form EIA–176, Annual Report of Natural and Supplemental Gas Supply and Disposition

Form EIA–176 collects data on natural, synthetic, and other supplemental gas supplies, their disposition, and certain revenues by state. During the previous collection package, EIA modified the survey instructions to include Renewable Natural Gas (RNG) producers who inject high-Btu RNG into an interstate pipeline, intra-state pipeline, or natural gas distribution company system. As such, EIA requests an increase in respondent count and burden to accommodate additions of new respondents to the survey frame.

Form EIA–757, Natural Gas Processing Plant Survey

Form EIA–757 collects information on the capacity, status, and operations of natural gas processing plants, and monitors their constraints to natural gas supplies during catastrophic events, such as hurricanes. Schedule A of Form EIA–757 collects baseline operating and capacity information from all respondents on a triennial basis or less frequently. Schedule B is used on an emergency standby basis and is activated during natural disasters or other energy disruptive events. Schedule B collects data from a sample of respondents in the affected areas.

EIA proposes to discontinue collection of Form EIA–757 Schedule A, and burden hours have been adjusted downward accordingly. As part of the Terms of Clearance of the package prior to this, EIA has investigated potential consolidation of the EIA–757 Schedule A survey with another, more frequent natural gas processing plant survey, the EIA–64A Survey (OMB number 1905–0057). As a result of this research, EIA proposes that the EIA–64A Survey will absorb several key data items from the EIA–757 Schedule A Survey in order to reduce overall respondent burden and eliminate duplicative data collection efforts. This resolves the prior Terms of Clearance.

EIA–757 Schedule B, which is a standby survey, is active in instances of a natural disaster or incident resulting in widespread closures of natural gas processing plants. However, since the agency has not elected to activate the survey at any point in the last six years (two clearance cycles), EIA is reducing the requested burden hours by 50% to allow an activation once every three years, rather than twice every three years.

Form EIA–857, Monthly Report of Natural Gas Purchases and Deliveries to Consumers

Form EIA–857 collects data on the quantity and cost of natural gas delivered to distribution systems and the quantity and revenue of natural gas delivered to consumers by end-use sector, on a monthly basis by state. EIA is increasing the requested burden to accommodate increased sample coverage, parallel to the increased scope of the EIA–176, the universe from which this survey's sample is drawn.

Form EIA–912, Weekly Natural Gas Storage Report

Form EIA–912 collects information on weekly inventories of natural gas in underground storage facilities. EIA is slightly decreasing the requested burden to more accurately reflect demonstrated sample sizes over the past six years.

Forms EIA–191, Monthly Underground Natural Gas Storage Report, EIA–191L, Monthly Underground Natural Gas Storage Report, and EIA–910, Monthly Natural Gas Marketer Survey, Have No Changes

(5) *Annual Estimated Number of Respondents:* 3,045;

(6) *Annual Estimated Number of Total Responses:* 15,993;

(7) *Annual Estimated Number of Burden Hours:* 56,776;

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* $4,959,951

(56,776 burden hours times $87.36 per hour.)

EIA 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.

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 September 11, 2023.

Samson A. Adeshiyan,

Director, Office of Statistical Methods and Research, U.S. Energy Information Administration.

[FR Doc. 2023–19929 Filed 9–13–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

National Nuclear Security Administration

Amended Record of Decision for the Production of Tritium in Commercial Light Water Reactors

AGENCY: National Nuclear Security Administration, Department of Energy.

ACTION: Amended record of decision.

SUMMARY: The National Nuclear Security Administration (NNSA), a semi-autonomous agency within the Department of Energy (DOE), is announcing this amendment to the June 22, 2016, Record of Decision (ROD) for the Final Supplemental Environmental Impact Statement for the Production of Tritium in a Commercial Light Water Reactor (CLWR SEIS) (DOE/EIS–0288–S1). NNSA is amending the 2016 decision in partnership with the Tennessee Valley Authority (TVA). TVA is considering increasing the number of TPBARs irradiated in their reactors at Watts Bar Nuclear Plant (WBN) using tritium-producing burnable absorber rods (TPBARs). NNSA initially decided to implement the CLWR SEIS Preferred Alternative, Alternative 6, which allows for the irradiation of up to a total of 5,000 TPBARs every 18 months using TVA reactors at both the Watts Bar and Sequoyah sites. Subsequent to the CLWR SEIS, WBN Unit 1 increased tritium production under Unit 1 License Amendment #107 (July 2016) and Unit 2 tritium production was authorized under Unit 2 License Amendment #27 (May 2019). Hence, TVA and NNSA are now opting to choose the previously analyzed CLWR SEIS Alternative 4, which allows for the irradiation of up to a total of 5,000 TPBARs every 18 months at the Watts Bar site using Watts Bar Units 1 and 2.

FOR FURTHER INFORMATION CONTACT: For information on NNSA's NEPA process, please contact Mr. James Sanderson, NEPA Compliance Officer, National Nuclear Security Administration, Office of General Counsel, Telephone (202) 586–1402; or by email to *jim.sanderson@nnsa.doe.gov.* This Amended Record of Decision is available on the internet at *https://energy.gov/nepa.* The 2016 ROD, the CLWR SEIS, and related NEPA documents are available on the DOE NEPA website at *https://www.energy.gov/nepa/doe-environmental-impact-statements.*

SUPPLEMENTARY INFORMATION: NNSA is the lead Federal agency responsible for maintaining and enhancing the safety, security, reliability, and performance of the United States (U.S.) nuclear weapons stockpile. Tritium, a radioactive isotope of hydrogen, is an essential component of every weapon in the U.S. nuclear weapons stockpile and must be replenished periodically due to its short half-life. In March 1999, DOE published the 1999 EIS, which addressed the production of tritium in the TVA's Watts Bar and Sequoyah nuclear reactors using TPBARs. The 1999 EIS assessed the potential environmental impacts of irradiating up to 3,400 TPBARs per reactor per fuel cycle (a fuel cycle lasts about 18 months). On May 14, 1999, DOE published the ROD for the 1999 EIS (64 FR 26369) in which it announced its decision to enter into an agreement with TVA to irradiate TPBARs in the Watts Bar Unit 1 reactor (Watts Bar 1) in Rhea County, Tennessee, near Spring City; and Sequoyah Units 1 and 2 reactors (Sequoyah 1 and 2) in Hamilton County, Tennessee, near Soddy-Daisy. In 2002, TVA received license amendments from the U.S. Nuclear Regulatory Commission (NRC) to irradiate TPBARs in those reactors. (However, TVA's license for the Sequoyah reactors no longer allows for the irradiation of TPBARs.) Since 2003, TVA has been irradiating TPBARs for NNSA by irradiating TPBARs only in Watts Bar 1. (In 2020, TVA began irradiating TPBARs in Watts Bar 2.) After irradiation, NNSA transports the TPBARs to the Tritium Extraction Facility at the DOE Savannah River Site in South Carolina. NNSA's Interagency Agreement with TVA to irradiate TPBARs is in effect until the earlier of either (a) November 30, 2035, or (b) the date TVA no longer has a pressurized water reactor in operation.

NNSA prepared the 2016 CLWR SEIS to update the environmental analyses in the 1999 Final Environmental Impact Statement for the Production of Tritium in a Commercial Light Water Reactor (DOE/EIS–0288; the 1999 EIS). The 2016 CLWR SEIS provides analysis of the potential environmental impacts from TPBAR irradiation based on a conservative estimate of the tritium permeation rate through the TPBAR cladding, NNSA's revised estimate of the maximum number of TPBARs necessary to support the current and projected future tritium supply requirements, and a maximum production scenario of irradiating no more than a total of 5,000 TPBARs every 18 months. NNSA initially decided to implement the Preferred Alternative, Alternative 6, which allows for the irradiation of up to a total of 5,000 TPBARs every 18 months using TVA reactors at both the Watts Bar and Sequoyah sites. Although near-term tritium requirements could likely be met with the irradiation of 2,500 TPBARs every 18 months, at the time, this decision provided the greatest flexibility to meet potential future needs that could arise from various plausible but unexpected events. Subsequent to the 2016 SEIS, WBN Unit 1 increased the irradiation of TPBARs under Unit 1 License Amendment #107 (July 2016) and Unit 2 TPBAR irradiation was authorized under Unit 2 License Amendment #27 (May 2019). Hence, TVA and NNSA are now opting to choose the previously analyzed CLWR SEIS Alternative 4, which allows for the irradiation of up to a total of 5,000 TPBARs every 18 months at the Watts Bar site using Watts Bar 1 and 2. TVA noted new information or circumstances relevant to environmental concerns that could potentially have a bearing on the current proposal or its impacts. This new information was analyzed in a February 6, 2023 TVA memorandum, ''Determination of NEPA Adequacy, Production of Tritium in a Commercial Light Water Nuclear Reactor (Watts Bar Nuclear Plant), Tennessee Valley Authority.'' In this memo, TVA addressed their recent review of the

2016 CLWR SEIS to determine if additional environmental review under NEPA was needed, consistent with CEQ regulations at 40 CFR 1502.9(d). The analysis demonstrated that the current proposal does not represent a substantive change to operations, activities, and associated impacts assessed in existing NEPA documentation. Both the TVA analysis and the CLWR SEIS analysis indicate that there would not be any significant increase in radiation exposure associated with TPBAR irradiation for facility workers or the public. For all analyzed alternatives (including both Alternatives 4 and 6), estimated radiation exposures would remain well below regulatory limits. The calculated estimated exposures for normal reactor operations with even the maximum number of TPBARs are comparable to those for normal reactor operation without TPBARs.

Amended Decision

NNSA is amending its previous decision (81 FR 40685), which was to choose the 2016 CLWR SEIS's Alternative 6 that assumes TVA would irradiate up to a total of 5,000 TPBARs every 18 months using both the Watts Bar and Sequoyah sites. Because TVA would irradiate a maximum of 2,500 TPBARs in any one reactor, this could involve the use of one or both reactors at each of the sites. Instead, NNSA's new decision is to choose the 2016 CLWR SEIS's Alternative 4 that assumes TVA would irradiate up to a total of 5,000 TPBARs every 18 months at the Watts Bar site using Watts Bar 1 and 2 reactors. Since TVA would irradiate a maximum of 2,500 TPBARs in any one reactor, this would involve use of both Watts Bar reactors. Under this decision, TVA will not irradiate TPBARs for tritium production at the Sequoyah site.

Basis for Decision

The environmental impacts of this proposed action have been addressed in previous environmental impact statements, *i.e.,* the 1999 Final EIS for the Production of Tritium in a Commercial Light Water Reactor (DOE/EIS–0288) and the 2016 CLWR SEIS. However, TVA staff reviewed new information or circumstances relevant to environmental concerns that could potentially have a bearing on the current proposal or its impacts. This new information was analyzed in a February 6, 2023 TVA memorandum, *i.e.,* ''Determination of NEPA Adequacy, Production of Tritium in a Commercial Light Water Nuclear Reactor (Watts Bar Nuclear Plant), Tennessee Valley Authority.'' In this memo, TVA addresses their recent review of the 2016 CLWR SEIS to determine if additional environmental review under NEPA was needed, consistent with CEQ regulations at 40 CFR 1502.9(d). During an interagency teleconference held in May 2021, NNSA requested information from TVA to help NNSA in its determination of the adequacy of the 2016 SEIS as far as TVA's updated proposal. Additional information given to NNSA addresses anticipated effects on the amount of spent fuel to be generated at Watts Bar, the fuel cycle there, and the amount of tritiated wastewater estimated to be generated from TPBAR irradiation. In terms of the amount of spent fuel to be generated at Watts Bar, TVA's current proposal would result in 36 additional fuel assemblies every 18 months. The SEIS assumed up to 41 additional fuel assemblies, so it provides a conservative bounding analysis of the approximately 2500 TPBAR equilibrium core designs. There would be additional spent fuel generated with the new proposal. However, TVA has assured NNSA that it has infrastructure in place to manage the increased volume of spent nuclear fuel assemblies. Regarding the new proposal's effects on the fuel cycle, the cycle length is only mentioned in the SEIS twice, and only in the context of being a ''potential uncertainty'' in determining if it was necessary to assume in the SEIS a higher, more conservative tritium permeation rate. TVA does not consider the operating cycle length to be uncertain, and it also does not anticipate that irradiation of up to 2500 TPBARs at each reactor would affect the typical fuel cycle. Therefore, the issue has no bearing on the review for adequacy of the SEIS for any future TVA action to irradiate up to 5000 TPBARs at Watts Bar. Lastly, the estimated amount of tritiated wastewater (due to permeation from the TPBARs into the cooling water) was not identified in the SEIS, as it is difficult to separate this out from other releases from such things as turbine building sumps, floor drain collector sumps, groundwater sumps, etc. However, to keep maximum tritium concentrations low, TVA will use a ''feed and bleed'' technique, which will require additional cooling water per fuel cycle in order to ensure that TVA discharges are within regulatory limits. TVA estimates that using this technique will increase water usage by approximately 25% but is not expected to affect environmental impacts. The current proposal does not represent a substantive change to operations, activities, and associated impacts assessed in existing NEPA documentation. Therefore, the decision to choose the previously analyzed 2016 CLWR SEIS Alternative 4, along with the updated analysis provided by TVA (summarized previously) and confirmed by NNSA, is reasonable, and accordingly, no further NEPA analysis of this TVA proposal is required.

Signing Authority

This document of the Department of Energy was signed on June 29, 2023, by Jill Hruby, Under Secretary for Nuclear Security and Administrator, NNSA, 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 September 11, 2023.

Treena V. Garrett,

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

[FR Doc. 2023–19909 Filed 9–13–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP23–82–000]

Columbia Gas Transmission, LLC; Notice of Availability of the Environmental Assessment for the Proposed Lucas and Pavonia Wells Abandonment Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) for the Lucas and Pavonia Wells Abandonment Project, proposed by Columbia Gas Transmission, LLC (Columbia) in the above-referenced docket. Columbia requests authorization to abandon 37 injection/withdrawal wells and associated pipelines and appurtenances at its existing certificated Lucas and Pavonia Storage Fields in Ashland and Richland Counties, Ohio.

The EA assesses the potential environmental effects of the construction and operation of the Lucas and Pavonia Wells Abandonment Project in accordance with the

requirements of the National Environmental Policy Act (NEPA). The FERC staff concludes that approval of the proposed project, with appropriate mitigating measures, would not constitute a major Federal action significantly affecting the quality of the human environment.

The proposed Lucas and Pavonia Wells Abandonment Project includes the following facilities and activities:

- abandonment of 37 injection/withdrawal wells at the Lucas and Pavonia Storage Fields by permanently plugging and abandoning the wells in place;
- abandonment of approximately 41,423 feet of associated 3- to 6-inch-diameter pipeline, of which 39,402 feet would be capped and abandoned in place and 2,021 feet would be abandoned by removal; and
- abandonment by removal of all associated aboveground appurtenances, including, but not limited to, tie-in valves, pipeline markers, cathodic protection test stations, rectifiers, casing vents, and above-ground pipeline blowdown vents.

The Commission mailed a copy of the *Notice of Availability* of the EA to Federal, State, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; potentially affected landowners and other interested individuals and groups; and newspapers and libraries in the project area. The EA is only available in electronic format. It may be viewed and downloaded from the FERC's website (*www.ferc.gov*), on the natural gas environmental documents page (*https://www.ferc.gov/industries-data/natural-gas/environment/environmental-documents*). In addition, the EA may be accessed by using the eLibrary link on the FERC's website. Click on the eLibrary link (*https://elibrary.ferc.gov/eLibrary/search*), select ''General Search'' and enter the docket number in the ''Docket Number'' field, excluding the last three digits (*i.e.* CP23–82). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

The EA is not a decision document. It presents Commission staff's independent analysis of the environmental issues for the Commission to consider when addressing the merits of all issues in this proceeding. Any person wishing to comment on the EA may do so. Your comments should focus on the EA's disclosure and discussion of potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that the Commission has the opportunity to consider your comments prior to making its decision on this project, it is important that we receive your comments in Washington, DC on or before 5:00 p.m. Eastern Time on October 10, 2023.

For your convenience, there are three methods you can use to file your comments to the Commission. The Commission encourages electronic filing of comments and has staff available to assist you at (866) 208–3676 or *FercOnlineSupport@ferc.gov.* Please carefully follow these instructions so that your comments are properly recorded.

(1) You can file your comments electronically using the *eComment* feature on the Commission's website (*www.ferc.gov*) under the link to *FERC Online.* This is an easy method for submitting brief, text-only comments on a project;

(2) You can also file your comments electronically using the *eFiling* feature on the Commission's website (*www.ferc.gov*) under the link to *FERC Online.* With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''*eRegister.*'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the Commission. Be sure to reference the project docket number (CP23–82–000) on your letter. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Filing environmental comments will not give you intervenor status, but you do not need intervenor status to have your comments considered. Only intervenors have the right to seek rehearing or judicial review of the Commission's decision. At this point in this proceeding, the timeframe for filing timely intervention requests has expired. Any person seeking to become a party to the proceeding must file a motion to intervene out-of-time pursuant to Rule 214(b)(3) and (d) of the Commission's Rules of Practice and Procedures (18 CFR 385.214(b)(3) and (d)) and show good cause why the time limitation should be waived. Motions to intervene are more fully described at *https://www.ferc.gov/how-intervene.*

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website (*www.ferc.gov*) using the *eLibrary* link. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202)502–6595 or *OPP@ferc.gov.*

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *https://www.ferc.gov/ferc-online/overview* to register for eSubscription.

Dated: September 8, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–19881 Filed 9–13–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice Announcing New Freedom of Information Act and Critical Energy Infrastructure Information Email Addresses

On October 8, 2023, the Commission will discontinue utilization and access of the Commission's email address, for Freedom of Information Act (FOIA) requests and Critical Energy Infrastructure Information (CEII) requests, *foia-ceii@ferc.gov.* As of

October 8, 2023, requesters should use the following email addresses:

1. *foia@ferc.gov* for FOIA requests; and

2. *ceii@ferc.gov* for CEII requests.

The Commission's FOIA and CEII web pages will be updated to reflect these changes.

In addition, the Department of Justice's Office of Information Policy, which is responsible for overseeing FOIA compliance, will be timely notified of these programmatic changes.

Please direct questions to Carolyn Templeton, Director—Strategic Operations and Special Projects; Office of External Affairs, at *carolyn.templeton@ferc.gov* or at 202–502–8785.

Dated: September 8, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–19882 Filed 9–13–23; 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 and Oil Pipeline Rate and Refund Report filings:

Filings in Existing Proceedings

Docket Numbers: RP23–917–002.
Applicants: Viking Gas Transmission Company.
Description: Compliance filing: Compliance Filing—Native File Format to be effective N/A.
Filed Date: 9/8/23.
Accession Number: 20230908–5083.
Comment Date: 5 p.m. ET 9/20/23.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date. The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number. eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–19884 Filed 9–13–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG23–277–000.
Applicants: River Ferry Solar I LLC.
Description: River Ferry Solar I LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.
Filed Date: 9/6/23.
Accession Number: 20230906–5171.
Comment Date: 5 p.m. ET 9/27/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER23–1407–002.
Applicants: Transource Pennsylvania, LLC.
Description: Compliance filing: American Electric Power Service Corporation submits tariff filing per 35: Transource Compliance Filing regarding Transmission Rates in ER23–1407 to be effective 8/12/2023.
Filed Date: 9/8/23.
Accession Number: 20230908–5061.
Comment Date: 5 p.m. ET 9/29/23.

Docket Numbers: ER23–2779–000.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Amendment: Notice of Cancellation of ISA, SA No. 5990; Queue No. AF2–265 Re: Breach to be effective 11/6/2023.
Filed Date: 9/7/23.
Accession Number: 20230907–5119.
Comment Date: 5 p.m. ET 9/28/23.

Docket Numbers: ER23–2780–000.
Applicants: Public Service Company of Colorado.
Description: Tariff Amendment: 2023–09–07—GI–2016–15 E&P-Agrmt—556—NOC to be effective 11/6/2023.
Filed Date: 9/7/23.
Accession Number: 20230907–5130.
Comment Date: 5 p.m. ET 9/28/23.

Docket Numbers: ER23–2781–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: Attachment AA to Add the Winter Season Resource Adequacy Requirement to be effective 12/1/2023.
Filed Date: 9/8/23.
Accession Number: 20230908–5016.
Comment Date: 5 p.m. ET 9/29/23.

Docket Numbers: ER23–2782–000.
Applicants: Algodon Solar Energy LLC.
Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff Filing to be effective 11/8/2023.
Filed Date: 9/8/23.
Accession Number: 20230908–5026.
Comment Date: 5 p.m. ET 9/29/23.

Docket Numbers: ER23–2783–000.
Applicants: Algodon Solar Energy Holdings LLC.
Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff Filing to be effective 11/8/2023.
Filed Date: 9/8/23.
Accession Number: 20230908–5027.
Comment Date: 5 p.m. ET 9/29/23.

Docket Numbers: ER23–2784–000.
Applicants: Chisholm Trail Solar Energy LLC.
Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff Filing to be effective 11/8/2023.
Filed Date: 9/8/23.
Accession Number: 20230908–5036.
Comment Date: 5 p.m. ET 9/29/23.

Docket Numbers: ER23–2785–000.
Applicants: Chisholm Trail Solar Energy Holdings LLC.
Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff Filing to be effective 11/8/2023.
Filed Date: 9/8/23.
Accession Number: 20230908–5038.
Comment Date: 5 p.m. ET 9/29/23.

Docket Numbers: ER23–2786–000.
Applicants: Flat Ridge 4 Wind, LLC.
Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff Filing to be effective 11/8/2023.
Filed Date: 9/8/23.
Accession Number: 20230908–5046.
Comment Date: 5 p.m. ET 9/29/23.

Docket Numbers: ER23–2787–000.
Applicants: Flat Ridge 4 Wind Holdings LLC.
Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff Filing to be effective 11/8/2023.
Filed Date: 9/8/23.
Accession Number: 20230908–5050.
Comment Date: 5 p.m. ET 9/29/23.

Docket Numbers: ER23–2788–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 7069; Queue No. AF1–064 to be effective 8/7/2023.

Filed Date: 9/8/23.

Accession Number: 20230908–5054.

Comment Date: 5 p.m. ET 9/29/23.

Docket Numbers: ER23–2789–000.

Applicants: Flat Ridge 5 Wind Energy LLC.

Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff Filing to be effective 11/8/2023.

Filed Date: 9/8/23.

Accession Number: 20230908–5063.

Comment Date: 5 p.m. ET 9/29/23.

Docket Numbers: ER23–2790–000.

Applicants: Flat Ridge 5 Wind Energy Holdings LLC.

Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff Filing to be effective 11/8/2023.

Filed Date: 9/8/23.

Accession Number: 20230908–5064.

Comment Date: 5 p.m. ET 9/29/23.

Docket Numbers: ER23–2791–000.

Applicants: Midcontinent Independent System Operator, Inc., Michigan Electric Transmission Company, LLC.

Description: § 205(d) Rate Filing: Midcontinent Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 2023–09–08_METC Abandonment Incentive Application-Hiple/Helix to be effective 11/8/2023.

Filed Date: 9/8/23.

Accession Number: 20230908–5075.

Comment Date: 5 p.m. ET 9/29/23.

Docket Numbers: ER23–2792–000.

Applicants: Lazbuddie Wind Energy LLC.

Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff Filing to be effective 11/8/2023.

Filed Date: 9/8/23.

Accession Number: 20230908–5099.

Comment Date: 5 p.m. ET 9/29/23.

Docket Numbers: ER23–2793–000.

Applicants: Lazbuddie Wind Energy Holdings LLC.

Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff Filing to be effective 11/8/2023.

Filed Date: 9/8/23.

Accession Number: 20230908–5100.

Comment Date: 5 p.m. ET 9/29/23.

Docket Numbers: ER23–2794–000.

Applicants: Pixley Solar Energy LLC.

Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff Filing to be effective 11/8/2023.

Filed Date: 9/8/23.

Accession Number: 20230908–5103.

Comment Date: 5 p.m. ET 9/29/23.

Docket Numbers: ER23–2795–000.

Applicants: Pixley Solar Energy Holdings LLC.

Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff Filing to be effective 11/8/2023.

Filed Date: 9/8/23.

Accession Number: 20230908–5105.

Comment Date: 5 p.m. ET 9/29/23.

Docket Numbers: ER23–2796–000.

Applicants: AEP Texas Inc.

Description: § 205(d) Rate Filing: AEPTX–LCRA TSC (B&B Gravel) Facilities Development Agreement to be effective 8/23/2023.

Filed Date: 9/8/23.

Accession Number: 20230908–5122.

Comment Date: 5 p.m. ET 9/29/23.

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, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) 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.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: September 8, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–19880 Filed 9–13–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2023–0098; FRL–10582–04–OCSPP]

Certain New Chemicals or Significant New Uses; Statements of Findings for June and July 2023

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Toxic Substances Control Act (TSCA) requires EPA to publish in the **Federal Register** a statement of its findings after its review of certain TSCA submissions when EPA makes a finding that a new chemical substance or significant new use is not likely to present an unreasonable risk of injury to health or the environment. Such statements apply to premanufacture notices (PMNs), microbial commercial activity notices (MCANs), and significant new use notices (SNUNs) submitted to EPA under TSCA. This document presents statements of findings made by EPA on such submissions during the period from June 1, 2023, to July 31, 2023.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPPT–2023–0098, is available online at *https://www.regulations.gov* or in-person at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. For the latest status information on EPA/DC services and docket access, visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Rebecca Edelstein, New Chemical Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–1667 email address: *edelstein.rebecca@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

This action provides information that is directed to the public in general.

B. What action is the Agency taking?

This document lists the statements of findings made by EPA after review of submissions under TSCA section 5(a) that certain new chemical substances or significant new uses are not likely to present an unreasonable risk of injury to health or the environment. This document presents statements of findings made by EPA during the reporting period.

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

TSCA section 5(a)(3) requires EPA to review a submission under TSCA section 5(a) and make one of several specific findings pertaining to whether the substance may present unreasonable risk of injury to health or the environment. Among those potential findings is that the chemical substance or significant new use is not likely to present an unreasonable risk of injury to health or the environment per TSCA section 5(a)(3)(C).

TSCA section 5(g) requires EPA to publish in the **Federal Register** a statement of its findings after its review of a submission under TSCA section 5(a) when EPA makes a finding that a new chemical substance or significant new use is not likely to present an unreasonable risk of injury to health or the environment. Such statements apply to PMNs, MCANs, and SNUNs submitted to EPA under TSCA section 5.

Anyone who plans to manufacture (which includes import) a new chemical substance for a non-exempt commercial purpose and any manufacturer or processor wishing to engage in a use of a chemical substance designated by EPA as a significant new use must submit a notice to EPA at least 90 days before commencing manufacture of the new chemical substance or before engaging in the significant new use.

The submitter of a notice to EPA for which EPA has made a finding of ''not likely to present an unreasonable risk of injury to health or the environment'' may commence manufacture of the chemical substance or manufacture or processing for the significant new use notwithstanding any remaining portion of the applicable review period.

D. Does this action have any incremental economic impacts or paperwork burdens?

No.

II. Statements of Findings Under TSCA Section 5(a)(3)(C)

In this unit, EPA provides the following information (to the extent that such information is not claimed as Confidential Business Information (CBI)) on the PMNs, MCANs and SNUNs for which, during this period, EPA has made findings under TSCA section 5(a)(3)(C) that the new chemical substances or significant new uses are not likely to present an unreasonable risk of injury to health or the environment:

The following list provides the EPA case number assigned to the TSCA section 5(a) submission and the chemical identity (generic name if the specific name is claimed as CBI).

- P–19–0095, Poly hydroxy alkanoate (Generic Name).

To access EPA's decision document describing the basis of the ''not likely to present an unreasonable risk'' finding made by EPA under TSCA section 5(a)(3)(C), look up the specific case number at *https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/chemicals-determined-not-likely.*

Authority: 15 U.S.C. 2601 *et seq.*

Dated: September 8, 2023.

Shari Z. Barash,

Acting Director, New Chemicals Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2023–19895 Filed 9–13–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[FR ID: 171126]

Privacy Act of 1974; Matching Program

AGENCY: Federal Communications Commission.

ACTION: Notice of a new matching program.

SUMMARY: In accordance with the Privacy Act of 1974, as amended (''Privacy Act''), this document announces a new computer matching program the Federal Communications Commission (''FCC'' or ''Commission'' or ''Agency'') and the Universal Service Administrative Company (USAC) will conduct with the Puerto Rico Department of the Family. The purpose of this matching program is to verify the eligibility of applicants to and subscribers of Lifeline, and the Affordable Connectivity Program (ACP), both of which are administered by USAC under the direction of the FCC. More information about these programs is provided in the **SUPPLEMENTARY INFORMATION** section below.

DATES: Written comments are due on or before October 16, 2023. This computer matching program will commence on October 16, 2023, and will conclude 18 months after the effective date.

ADDRESSES: Send comments to Elliot S. Tarloff, FCC, 45 L Street NE, Washington, DC 20554, or to *Privacy@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Elliot S. Tarloff at 202–418–0886 or *Privacy@fcc.gov.*

SUPPLEMENTARY INFORMATION: The Lifeline program provides support for discounted broadband and voice services to low-income consumers. Lifeline is administered by the Universal Service Administrative Company (USAC) under FCC direction. Consumers qualify for Lifeline through proof of income or participation in a qualifying program, such as Medicaid, the Supplemental Nutritional Assistance Program (SNAP), Federal Public Housing Assistance, Supplemental Security Income (SSI), Veterans and Survivors Pension Benefit, or various Tribal-specific federal assistance programs.

In the Consolidated Appropriations Act, 2021, Public Law 116–260, 134 Stat. 1182, 2129–36 (2020), Congress created the Emergency Broadband Benefit Program, and directed use of the National Verifier to determine eligibility based on various criteria, including the qualifications for Lifeline (Medicaid, SNAP, etc.). EBBP provided $3.2 billion in monthly consumer discounts for broadband service and one-time provider reimbursement for a connected device (laptop, desktop computer or tablet). In the Infrastructure Investment and Jobs Act, Public Law 117–58, 135 Stat. 429, 1238–44 (2021) (codified at 47 U.S.C. 1751–52), Congress modified and extended EBBP, provided an additional $14.2 billion, and renamed it the Affordable Connectivity Program (ACP). A household may qualify for the ACP benefit under various criteria, including an individual qualifying for the FCC's Lifeline program.

In a Report and Order adopted on March 31, 2016, (81 FR 33026, May 24, 2016) (*2016 Lifeline Modernization Order*), the Commission ordered USAC to create a National Lifeline Eligibility Verifier (''National Verifier''), including the National Lifeline Eligibility Database (LED), that would match data about Lifeline applicants and subscribers with other data sources to verify the eligibility of an applicant or subscriber. The Commission found that the National Verifier would reduce

compliance costs for Lifeline service providers, improve service for Lifeline subscribers, and reduce waste, fraud, and abuse in the program.

The Consolidated Appropriations Act of 2021 directs the FCC to leverage the National Verifier to verify applicants' eligibility for ACP. The purpose of this matching program is to verify the eligibility of Lifeline and ACP applicants and subscribers by determining whether they receive PAN benefits administered by the Puerto Rico Department of the Family.

Participating Agencies

Puerto Rico Department of the Family; Federal Communications Commission.

Authority for Conducting the Matching Program

The authority for the FCC's ACP is Infrastructure Investment and Jobs Act, Public Law 117–58, 135 Stat. 429, 1238–44 (2021) (codified at 47 U.S.C. 1751–52); 47 CFR part 54. The authority for the FCC's Lifeline program is 47 U.S.C. 254; 47 CFR 54.400 through 54.423; Lifeline and Link Up Reform and Modernization, *et al.,* Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962, 4006–21, paras. 126–66 (2016) (*2016 Lifeline Modernization Order*).

Purpose(s)

The purpose of this modified matching agreement is to verify the eligibility of applicants and subscribers to Lifeline, as well as to ACP and other Federal programs that use qualification for Lifeline as an eligibility criterion. This new agreement will permit eligibility verification for the Lifeline program and ACP by checking an applicant's/subscriber's participation in PAN in Puerto Rico. Under FCC rules, consumers receiving these benefits qualify for Lifeline discounts and also for ACP benefits.

Categories of Individuals

The categories of individuals whose information is involved in the matching program include, but are not limited to, those individuals who have applied for Lifeline and/or ACP benefits; are currently receiving Lifeline and/or ACP benefits; are individuals who enable another individual in their household to qualify for Lifeline and/or ACP benefits; are minors whose status qualifies a parent or guardian for Lifeline and/or ACP benefits; or are individuals who have received Lifeline and/or ACP benefits.

Categories of Records

The categories of records involved in the matching program include, but are not limited to, the last four digits of the applicant's Social Security Number, date of birth, and first name. The National Verifier will transfer these data elements to the Puerto Rico Department of the Family, which will respond either ''yes'' or ''no'' that the individual is enrolled in a qualifying assistance program: PAN administered by the Puerto Rico Department of the Family.

System(s) of Records

The records shared as part of this matching program reside in the Lifeline system of records, FCC/WCB–1, Lifeline, which was published in the **Federal Register** at 86 FR 11526 (Feb. 25, 2021).

The records shared as part of this matching program reside in the ACP system of records, FCC/WCB–3, Affordable Connectivity Program, which was published in the **Federal Register** at 86 FR 71494 (Dec. 16, 2021).

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer.

[FR Doc. 2023–19821 Filed 9–13–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[FR ID: 171125]

Privacy Act of 1974; Matching Program

AGENCY: Federal Communications Commission.

ACTION: Notice of a new matching program.

SUMMARY: In accordance with the Privacy Act of 1974, as amended (''Privacy Act''), this document announces a new computer matching program the Federal Communications Commission (''FCC'' or ''Commission'' or ''Agency'') and the Universal Service Administrative Company (USAC) will conduct with the Wisconsin Department of Health Services and the Wisconsin Department of Revenue. The purpose of this matching program is to verify the eligibility of applicants to and subscribers of Lifeline, and the Affordable Connectivity Program (ACP), both of which are administered by USAC under the direction of the FCC. More information about these programs is provided in the **SUPPLEMENTARY INFORMATION** section below.

DATES: Written comments are due on or before October 16, 2023. This computer matching program will commence on October 16, 2023, and will conclude 18 months after the effective date.

ADDRESSES: Send comments to Elliot S. Tarloff, FCC, 45 L Street NE, Washington, DC 20554, or to *Privacy@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: Elliot S. Tarloff at 202–418–0886 or *Privacy@fcc.gov*.

SUPPLEMENTARY INFORMATION: The Lifeline program provides support for discounted broadband and voice services to low-income consumers. Lifeline is administered by the Universal Service Administrative Company (USAC) under FCC direction. Consumers qualify for Lifeline through proof of income or participation in a qualifying program, such as Medicaid, the Supplemental Nutritional Assistance Program (SNAP), Federal Public Housing Assistance, Supplemental Security Income (SSI), Veterans and Survivors Pension Benefit, or various Tribal-specific federal assistance programs.

In the Consolidated Appropriations Act, 2021, Public Law 116–260, 134 Stat. 1182, 2129–36 (2020), Congress created the Emergency Broadband Benefit Program, and directed use of the National Verifier to determine eligibility based on various criteria, including the qualifications for Lifeline (Medicaid, SNAP, etc.). EBBP provided $3.2 billion in monthly consumer discounts for broadband service and one-time provider reimbursement for a connected device (laptop, desktop computer or tablet). In the Infrastructure Investment and Jobs Act, Public Law 117–58, 135 Stat. 429, 1238–44 (2021) (codified at 47 U.S.C. 1751–52), Congress modified and extended EBBP, provided an additional $14.2 billion, and renamed it the Affordable Connectivity Program (ACP). A household may qualify for the ACP benefit under various criteria, including an individual qualifying for the FCC's Lifeline program.

In a Report and Order adopted on March 31, 2016, (81 FR 33026, May 24, 2016) (*2016 Lifeline Modernization Order*), the Commission ordered USAC to create a National Lifeline Eligibility Verifier (''National Verifier''), including the National Lifeline Eligibility Database (LED), that would match data about Lifeline applicants and subscribers with other data sources to verify the eligibility of an applicant or subscriber. The Commission found that the National Verifier would reduce compliance costs for Lifeline service providers, improve service for Lifeline subscribers, and reduce waste, fraud, and abuse in the program.

The Consolidated Appropriations Act of 2021 directs the FCC to leverage the National Verifier to verify applicants' eligibility for ACP. The purpose of this matching program is to verify the eligibility of Lifeline and ACP applicants and subscribers by determining whether they receive SNAP, SSI, Medicaid, and Income Verification benefits administered by the Wisconsin Department of Health Services and the Wisconsin Department of Revenue.

Participating Agencies

Wisconsin Department of Health Services; Wisconsin Department of Revenue; Federal Communications Commission

Authority for Conducting the Matching Program

The authority for the FCC's ACP is Infrastructure Investment and Jobs Act, Public Law 117–58, 135 Stat. 429, 1238–44 (2021) (codified at 47 U.S.C. 1751–52); 47 CFR part 54. The authority for the FCC's Lifeline program is 47 U.S.C. 254; 47 CFR 54.400 through 54.423; Lifeline and Link Up Reform and Modernization, *et al.,* Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962, 4006–21, paras. 126–66 (2016) (*2016 Lifeline Modernization Order*).

Purpose(s)

The purpose of this modified matching agreement is to verify the eligibility of applicants and subscribers to Lifeline, as well as to ACP and other Federal programs that use qualification for Lifeline as an eligibility criterion. This new agreement will permit eligibility verification for the Lifeline program and ACP by checking an applicant's/subscriber's participation in SNAP, SSI, Medicaid, and Income Verification in Wisconsin. Under FCC rules, consumers receiving these benefits qualify for Lifeline discounts and also for ACP benefits.

Categories of Individuals

The categories of individuals whose information is involved in the matching program include, but are not limited to, those individuals who have applied for Lifeline and/or ACP benefits; are currently receiving Lifeline and/or ACP benefits; are individuals who enable another individual in their household to qualify for Lifeline and/or ACP benefits; are minors whose status qualifies a parent or guardian for Lifeline and/or ACP benefits; or are individuals who have received Lifeline and/or ACP benefits.

Categories of Records

The categories of records involved in the matching program include, but are not limited to, the last four digits of the applicant's Social Security Number, and first and last name. The National Verifier will transfer these data elements to the Wisconsin Department of Health Services, Wisconsin Department of Revenue, which will respond either "yes" or "no" that the individual is enrolled in a qualifying assistance program: SNAP, SSI, Medicaid, and Income Verification administered by the Wisconsin Department of Health Services and the Wisconsin Department of Revenue.

System(s) of Records

The records shared as part of this matching program reside in the Lifeline system of records, FCC/WCB–1, Lifeline, which was published in the **Federal Register** at 86 FR 11526 (Feb. 25, 2021).

The records shared as part of this matching program reside in the ACP system of records, FCC/WCB–3, Affordable Connectivity Program, which was published in the **Federal Register** at 86 FR 71494 (Dec. 16, 2021).

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer.

[FR Doc. 2023–19818 Filed 9–13–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

[Docket No. AS23–13]

Appraisal Subcommittee Notice of Meeting

AGENCY: Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

ACTION: Notice of special closed meeting.

Description: In accordance with section 1104(b) of title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, notice is hereby given that the Appraisal Subcommittee (ASC) met for a Special Closed Meeting on this date.

Location: Virtual meeting via Webex.

Date: September 6, 2023.

Time: 11:15 a.m. ET.

Action and Discussion Item

Personnel Matter

The ASC convened a Special Closed Meeting to discuss a personnel matter. No action was taken by the ASC.

James R. Park,

Executive Director.

[FR Doc. 2023–19874 Filed 9–13–23; 8:45 am]

BILLING CODE 6700–01–P

FEDERAL RESERVE SYSTEM

Privacy Act of 1974; System of Records

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice of a modified system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, notice is given that the Board of Governors of the Federal Reserve System (Board) proposes to modify an existing system of records, entitled BGFRS–24, "FRB—EEO General Files." BGFRS–24 presently includes self-identification reports of current and former employees regarding race, national origin, sex, and disability and identification by Board staff regarding the race, national origin, and sex for those current and former employees who decline to voluntarily provide the information.

DATES: Comments must be received on or before October 16, 2023. This new system of records will become effective October 16, 2023, without further notice, unless comments dictate otherwise.

The Office of Management and Budget (OMB), which has oversight responsibility under the Privacy Act, requires a 30-day period prior to publication in the **Federal Register** in which to review the system and to provide any comments to the agency. The public is then given a 30-day period in which to comment, in accordance with 5 U.S.C. 552a(e)(4) and (11).

ADDRESSES: You may submit comments, identified by *BGFRS–24 "FRB—EEO General Files,"* by any of the following methods:

- *Agency Website: https://www.federalreserve.gov.* Follow the instructions for submitting comments at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx.*
- *Email: regs.comments@federalreserve.gov.* Include SORN name and number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and

Constitution Avenue NW, Washington, DC 20551.

In general, all public comments will be made available on the Board's website at *https://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, and will not be modified to remove confidential, contact or any identifiable information. Public comments may also be viewed electronically or in paper in Room M–4365A, 2001 C St. NW, Washington, DC 20551, between 9:00 a.m. and 5:00 p.m. during federal business weekdays.

FOR FURTHER INFORMATION CONTACT: David B. Husband, Senior Counsel, (202) 530–6270, or *david.b.husband@frb.gov;* Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551. For users of telephone systems via text telephone (TTY) or any TTY-based Telecommunications Relay Services, please call 711 from any telephone anywhere in the United States.

SUPPLEMENTARY INFORMATION: The Board is in the process of replacing its current enterprise resource planning (ERP) system which will result in changes to the information collected and retained for Board employees. Accordingly, the Board is making minor modifications to the EEO General Files system to reflect such changes. Principally, to better reflect the many dimensions within its workforce, beyond the customary demographics of race/ethnicity, disability, and gender, the Board is broadening its demographic data collection to encompass voluntary disclosure of gender identity and preferred personal pronouns. These new fields will help Board employees personalize their self-identification. The Board is therefore amending the category of records to reflect the inclusion of this information. The Board is removing from the category of records the reference to EEO-related training records which are no longer retained as part of the system of records and the reference to identification by Board staff of disability status for employees who decline to voluntarily provide such information, as disability status would not be inferred via visual observation. The Board will also collect information from applicants, such as self-identification reports, and therefore the Board is amending the category of individuals to include applicants and the category of records to refer to applicants in addition to current and former employees.

The Board is also taking the opportunity to update the system manager, the system location, the authority for the system, the record source categories, and the practices for retention and disposal of records. The Board is also taking the opportunity to update the ''Routine Uses'' section to incorporate a link to the Board's general routine uses and is amending the system-specific routine use to refer to ''workforce'' instead of the more archaic term ''manpower.'' The Board otherwise is not amending or establishing any new routine uses.

The Board is also making technical changes to BGFRS–24 consistent with the template laid out in OMB Circular No. A–108. Accordingly, the Board has made technical corrections and non-substantive language revisions to the following categories: ''Policies and Practices for Storage of Records,'' ''Policies and Practices for Retrieval of Records,'' ''Policies and Practices for Retention and Disposal of Records,'' ''Administrative, Technical and Physical Safeguards,'' ''Record Access Procedures,'' ''Contesting Record Procedures,'' and ''Notification Procedures.'' The Board has also created the following new fields: ''Security Classification'' and ''History.''

SYSTEM NAME AND NUMBER:

BGFRS–24 ''FRB—EEO General Files''.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551. Records are also stored by the Federal Reserve Bank of Minneapolis, located at 90 Hennepin Ave., Minneapolis, MN 55401 and by the Board's contractor, Workday, Inc., located at 6110 Stoneridge Mall Road, Pleasanton, CA 94588.

SYSTEM MANAGER(S):

Sheila Clark, Chief Diversity Officer—Office of Diversity, Equity, and Inclusion (ODE&I), Office of the Chief Operating Officer, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551, (202) 452–2883, or *sheila.clark@frb.gov.*

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Rehabilitation Act of 1973 (29 U.S.C. 791); Title VII of the Civil Rights Act (42 U.S.C. 2000e *et seq.*); Equal Pay Act of 1963 (29 U.S.C. 206); Age Discrimination in Employment Act of 1967 (29 U.S.C. 621); Genetic Information Nondiscrimination Act of 2008 (Pub. L. 110–233); sections 10 and 11 of the Federal Reserve Act (12 U.S.C. 244 and 248); and the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 as amended (5 U.S.C. 2301, note).

PURPOSE(S) OF THE SYSTEM:

These records are collected and maintained to assist the Board in carrying out its responsibilities consistent with the Rehabilitation Act of 1973, Title VII of the Civil Rights Act, and other nondiscrimination statutes.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Applicants for Board employment and current and former Board employees.

CATEGORIES OF RECORDS IN THE SYSTEM:

Self-identification reports of applicants and current and former employees regarding demographics including race, national origin, sex, personal pronouns, gender identity, and disability; per EEOC guidance identification by Board staff regarding the race, national origin, and sex for those current and former employees who decline to voluntarily provide such information.

RECORD SOURCE CATEGORIES:

The information is provided by the individual to whom the record pertains and employees responsible for administering the Board's EEO program or human resource function.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

General routine uses A, B, C, D, F, G, I, and J apply to this system. These general routine uses are located at *https://www.federalreserve.gov/files/SORN-page-general-routine-uses-of-board-systems-of-records.pdf* and are published in the **Federal Register** at 83 FR 43872 at 43873–74 (August 28, 2018). Records may also be used to disclose information to management as a data source for production of summary descriptive statistics and analytical studies in support of the function for which the records are collected and maintained, or for related personnel management functions or workforce studies and may also be utilized to respond to investigative or legal requests for statistical information (without personal identification of individuals).

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Paper records in this system are stored in locked file cabinets with access limited to staff with a need to know. Electronic records are stored on

a secure server with access limited to staff with a need to know.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records can be retrieved by the individual's name.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All records are retained for three years.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Paper records are secured by lock and key and electronic files are stored on secure servers. The system has the ability to track individual user actions within the system. The audit and accountability controls are based on NIST and Board standards which, in turn, are based on applicable laws and regulations. The controls assist in detecting security violations and performance or other issues in the system. Access to the system is restricted to authorized users within the Board who require access for official business purposes. Users are classified into different roles and common access and usage rights are established for each role. User roles are used to delineate between the different types of access requirements such that users are restricted to data that is required in the performance of their duties. Periodic assessments and reviews are conducted to determine whether users still require access, have the appropriate role, and whether there have been any unauthorized changes.

RECORD ACCESS PROCEDURES:

The Privacy Act allows individuals the right to access records maintained about them in a Board system of records. Your request for access must: (1) contain a statement that the request is made pursuant to the Privacy Act of 1974; (2) provide either the name of the Board system of records expected to contain the record requested or a concise description of the system of records; (3) provide the information necessary to verify your identity; and (4) provide any other information that may assist in the rapid identification of the record you seek.

Current or former Board employees may make a request for access by contacting the Board office that maintains the record. The Board handles all Privacy Act requests as both a Privacy Act request and as a Freedom of Information Act request. The Board does not charge fees to a requestor seeking to access or amend his/her Privacy Act records.

You may submit your Privacy Act request to the—Secretary of the Board, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

You may also submit your Privacy Act request electronically by filling out the required information at: *https://foia.federalreserve.gov/.*

CONTESTING RECORD PROCEDURES:

The Privacy Act allows individuals to seek amendment of information that is erroneous, irrelevant, untimely, or incomplete and is maintained in a system of records that pertains to them. To request an amendment to your record, you should clearly mark the request as a ''Privacy Act Amendment Request.'' You have the burden of proof for demonstrating the appropriateness of the requested amendment and you must provide relevant and convincing evidence in support of your request.

Your request for amendment must: (1) provide the name of the specific Board system of records containing the record you seek to amend; (2) identify the specific portion of the record you seek to amend; (3) describe the nature of and reasons for each requested amendment; (4) explain why you believe the record is not accurate, relevant, timely, or complete; and (5) unless you have already done so in a related Privacy Act request for access or amendment, provide the necessary information to verify your identity.

NOTIFICATION PROCEDURES:

Same as ''Access procedures'' above. You may also follow this procedure in order to request an accounting of previous disclosures of records pertaining to you as provided for by 5 U.S.C. 552a(c).

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

This SORN was previously published in the **Federal Register** at 73 FR 24984 at 25003 (May 6, 2008). The SORN was also amended to incorporate two new routine uses required by OMB at 83 FR 43872 (August 28, 2018).

Board of Governors of the Federal Reserve System.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2023–19823 Filed 9–13–23; 8:45 am]

BILLING CODE 6210–01–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 October 16, 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. *Bank Forward Employee Stock Ownership Plan and Trust, Fargo, North Dakota;* to acquire up to 41.02 percent of the voting shares of Security State Bank Holding Company, and thereby indirectly acquire voting shares of Bank Forward, both of Fargo, North Dakota.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–19912 Filed 9–13–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Temporary Assistance for Needy Families Expenditure Report, Form ACF–196R

AGENCY: Office of Family Assistance, Administration for Children and Families, United States Department of Health and Human Services.

ACTION: Request for public comments.

SUMMARY: The Administration for Children and Families (ACF) Office of Family Assistance (OFA) is requesting a 3-year extension of the Temporary Assistance for Needy Families (TANF) Expenditure Report, Form ACF–196R (Office of Management and Budget #0970–0446 expires February 29, 2024). ACF is proposing minor updates to the form to update references to lapsed timeframes, demonstrative tables that aid in a recipient's comprehension of reporting requirements and minor edits to the instructions and formatting to improve presentation.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: You can obtain copies of the proposed collection of information and submit comments by emailing *infocollection@acf.hhs.gov.* Identify all requests by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: Form ACF–196R is used by states administering the TANF program to report quarterly expenditure data and to request quarterly grant funds. Failure to collect the data would seriously compromise OFA's and ACF ability to monitor TANF expenditures and compliance with statutory requirements. These data are also needed to estimate outlays and to prepare reports and budget submissions for Congress.

Respondents: State agencies administering the TANF program (50 States and the District of Columbia)

ANNUAL BURDEN ESTIMATES

Instrument	Total number of respondents	Annual number of responses per respondent	Average burden hours per response	Annual burden hours
Form ACF–196R	51	4	14	2,856

Comments: The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Authority: Social Security Act, Section 409; 45 CFR 265.3–265.9.

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2023–19817 Filed 9–13–23; 8:45 am]

BILLING CODE 4184–36–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children & Families

Privacy Act of 1974; System of Records

AGENCY: Office of Human Services Emergency Preparedness and Response (OHSEPR), Administration for Children & Families (ACF), Department of Health and Human Services (HHS).

ACTION: Notice of a modified system of records.

SUMMARY: The Department of Health and Human Services (HHS) is modifying a system of records maintained by the Administration for Children & Families (ACF), 09–80–0327 ORR Repatriation Program Records, to reflect the change ownership of the repatriation program that was transferred to ACF's Office of Human Services Emergency Preparedness and Response (OHSEPR), and to broaden the scope of the system of records to include functionally similar records that OHSEPR uses to identify, assess, and address immediate unmet human services (*i.e.,* social services) needs of survivors of federally-declared disasters in the United States. To reflect the transfer and broadened scope, HHS is changing the name of the system of records to OHSEPR Repatriation and Disaster Human Services Case Management Records.

DATES: This modified system of records is applicable September 14, 2023, subject to a 30-day period to comment on the new and revised routine uses. Submit any comments by October 16, 2023. The new and revised routine uses will become effective on October 16, 2023 unless the Department receives comments that would persuade us to modify the notice.

ADDRESSES: The public should address written comments on the proposed system of records to Anita Alford, Senior Official for Privacy, Administration for Children & Families by email, to *Anita.Alford@acf.hhs.gov.*

FOR FURTHER INFORMATION CONTACT: General questions about the system of records may be submitted to the OHSEPR Deputy Director, Byron R. Mason, by telephone at (202) 365–8110 or by email to *Byron.Mason@acf.hhs.gov.*

SUPPLEMENTARY INFORMATION: HHS established system of records 09–80–0327 in 2016 to cover records about temporary assistance provided to repatriated U.S. citizens and their dependents under ACF's repatriation program, to meet the individuals' human service's needs. At that time, the repatriation program was administered by ACF's Office of Refugee Resettlement (ORR). In 2018, ACF transferred responsibility for the repatriation program to ACF's Office of Human Services Emergency Preparedness and Response (OHSEPR) that also administers ACF's disaster assistance program. Because the records used for both programs are functionally similar (*i.e.,* they are case files documenting services provided to meet the individuals' human service's needs), HHS is broadening the scope of system of records 09–80–0327 to include

disaster assistance program records. The modifications include:

- Changing the name of the system of records to refer to OHSEPR instead of ORR and to reflect the expanded scope of the system of records.
- Updating the System Location and System Manager(s) sections to provide address and contact information for OHSEPR instead of ORR, and to add service provider and contractor locations to the System Location section.
- Revising the Authorities section to add authorities for the disaster assistance program, and to add a Social Security Number (SSN) collection authority that applies to the repatriation program only.
- Adding descriptions of disaster assistance program records throughout the SORN.
- Revising the Purpose(s) section to describe the primary purpose for repatriation program records used as ''making eligibility determinations before temporary assistance is provided;'' to add, as an additional secondary purpose for the use of repatriation program records, ''providing training and technical assistance to State human services departments and local services providers;'' to add purposes for disaster program records use; and to add a note at the end of the section stating that records of repatriation assistance to particular individuals are referred from this system of records to a separate system of records for debt management and collection purposes.
- Revising the Categories of Records section to describe the categories of records maintained for the repatriation program as case files containing correspondence, and to summarize the data elements contained in those records instead of listing them; to add categories of records maintained for the disaster assistance program; and to include a note explaining that records OHSEPR maintains as a result of providing disaster assistance services on behalf of another HHS component or another agency are not covered by this SORN.
- Specifying, in the Record Source Categories section the sources that apply to the repatriation program or both programs.
- Adding and revising routine uses, and removing unnecessary routine uses, as follows. A note has been added, stating that a routine use applies to both the repatriation program and the disaster assistance programs unless worded to apply to only one of those programs.

Revised routine uses:

- ○ Routine use 1, *Disclosure to Contractors, Grantees, and Other Agents* (4 in the existing SORN), has been revised to add ''(including another federal agency acting as a service provider),'' ''other agencies,'' and ''OHSEPR'' and will now apply to the disaster assistance program too.
- ○ Routine use 2, *Disclosure to Department of State* (1 in the existing SORN), has been revised to add ''to repatriates'' to correct a typographical error.
- ○ Routine use 4, *Disclosure to Service Provider* (3 in the existing SORN), has been revised to add ''for eligible repatriates'' and to change ''services'' to ''assistance.''
- ○ Routine use 5 (4 in the existing SORN), is now titled *Disclosure to Agency for Temporary Assistance* (instead of *Disclosure to Agency for Temporary Services*), and the word ''services'' in the text of the routine use has been changed to ''assistance.''
- ○ Routine use 6, *Disclosure for Law Enforcement Purposes* (5 in the existing SORN), will now apply to the disaster assistance program too.
- ○ Routine use 7, *Disclosure for Administrative Claim, Complaint, and Appeal* (13 in the existing SORN), has been revised to add ''about a repatriation assistance recipient.''
- ○ Routine use 8 (15 in the existing SORN), is now titled *Disclosure in Connection with Settlement Discussions* (instead of *Disclosure in Connection with Litigation*), and it has been revised to be limited to settlement discussions to avoid duplicating a litigation-related routine use and to add ''about a repatriation assistance recipient.''
- ○ Routine use 12, *Disclosure for Private Relief Legislation* (8 in the existing SORN), has been revised to add ''about a repatriation assistance recipient.''
- ○ Routine use 13, *Disclosure to Congressional Office* (9 in the existing SORN), will now apply to the disaster assistance program too.
- ○ Routine use 14, *Disclosure to Department of Justice or in Proceedings* (10 in the existing SORN), has been revised to omit redundant wording that repeated part of the definition of a routine use (*i.e.,* ''provided that the disclosure is compatible with the purpose for which the records were collected''), and will now apply to the disaster assistance program too.
- ○ Routine use 15, *Disclosure to the National Archives and Records Administration* (11 in the existing SORN), has been revised to add ''conducted pursuant to 44 U.S.C. 2904 and 2906'' and will now apply to the disaster assistance program too.
- ○ Routine uses 16 and 17, *Disclosure in the Event of a Security Breach Experienced by HHS,* and *Disclosure to Assist Another Agency Experiencing a Breach* (16 and 18 in the existing SORN), which were added to the SORN in February 2018, will now apply to the disaster assistance program too.
- ○ Routine use 18, *Disclosure for Cybersecurity Monitoring Purposes* (17 in the existing SORN), will now apply to the disaster assistance program too.

New routine uses:

- ○ Routine uses 9 and 10, *Disclosure to Ensure Continuity of Disaster Assistance Services* and *Disclosure to Locate Missing Children or Reunite Families,* have been added for the disaster assistance program.
- ○ Routine use 11, *Disclosure to Combat Fraud, Waste, and Abuse,* has been added for both the repatriation program and the disaster assistance program.

Deleted routine uses:

- ○ Routine uses formerly numbered as 6, 7, and 14, *Disclosure Incident to Requesting Information; Disclosure for Employee Retention, Security, Contract, or Other Benefit;* and *Disclosure to the Office of Personnel Management,* were determined to be unnecessary and are now omitted, because such disclosures are not made from this system of records.

- Removing the section titled Disclosure to Consumer Reporting Agencies, because such disclosures are not made by ACF/OHSEPR from this system of records. Such disclosures are made by HHS' Program Support Center from the system of records that covers records used for debt management and collection purposes.
- Revising the Storage section to describe the storage media as hard copy files, electronic storage media, and cloud/network storage, instead of stating that the records are stored on a grantee's computer network and safe/file cabinet.
- Revising the Retrieval section to add that disaster assistance case records are retrieved by the individual's name or case file number.
- Revising the Retention section to cite the disposition schedule and retention periods applicable to records about disaster survivors.
- Revising the Safeguards section to describe the particular administrative, technical, and physical safeguards used to prevent unauthorized access to the records, instead of simply stating that safeguards conform to the HHS Information Security Program; and to mention ''grantees'' in addition to contractors.
- Updating the procedures for making access, correction, and notification

requests no longer require requests to include the subject individual's social security number, and to now state that requests should identify either the repatriation program or the applicable disaster, to assist OHSEPR in locating the records.

Because this modification includes significant changes, HHS provided advance notice of the modified system of records to the Office of Management and Budget and Congress as required by 5 U.S.C. 552a(r) and OMB Circular A–108.

Natalie N. Grant,

Director, Office of Human Services Emergency Preparedness and Response.

SYSTEM NAME AND NUMBER:

OHSEPR Repatriation and Disaster Human Services Case Management Records, 09–80–0389.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

The address of the agency component responsible for this system of records is Administration for Children & Families (ACF), Office of Human Services Emergency Preparedness and Response (OHSEPR), 330 C Street SW—4th Floor, Washington, DC 20201.

On behalf of ACF, a grantee located in Baltimore MD stores ACF's repatriation program records in a cloud-based system. A contractor and subcontractor located in Washington, DC manage ACF's disaster assistance database housed on an ACF server.

SYSTEM MANAGER(S):

The System Manager is: OHSEPR Repatriation Specialist, HHS, ACF, Office of Human Services Emergency Preparedness and Response (OHSEPR), 330 C Street SW—4th Floor, Washington, DC 20201; *OHSEPR@acf.hhs.gov.*

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Authority to maintain repatriation assistance records: 42 U.S.C. 1313 (Assistance for United States citizens returned from foreign countries) and 24 U.S.C. 321–329 (Hospitalization of mentally ill nationals returned from foreign countries).

Authority to collect Social Security Number (SSN) (applicable to the repatriation program only): 31 U.S.C. 7701(c) requires an agency to collect the taxpayer identifying number of individuals ''doing business with a federal agency,'' one example of which is being ''in a relationship with the agency that may give rise to a receivable due to that agency.'' Receiving temporary assistance—which is defined in 42 U.S.C. 1313(c) as money payments, medical care, temporary lodging, transportation, and other goods and services necessary for the health or welfare of individuals—and is provided to repatriates in the form of a service loan repayable to the U.S. Government, fits that example and therefore qualifies as ''doing business with a Federal agency.'' For purposes of 31 U.S.C. 7701(c), the taxpayer identifying number is the individual's social security number (SSN).

Authority to maintain disaster assistance records: Statement of Organization, Functions, and Delegations of Authority, 71 FR 71549 (Dec. 11, 2006); E.O. 12656, 53 FR 47491 (Nov. 18, 1988), *reprinted in* 42 U.S.C. 5195.

PURPOSE(S) OF THE SYSTEM:

The purpose of the system of records is to enable OHSEPR to provide assistance in an efficient and expeditious manner to repatriated U.S. citizens and their dependents and to disaster survivors. Specifically:

- Records for the repatriation program are used by OHSEPR for the primary purposes of making eligibility determinations before temporary assistance is provided to U.S. citizens and their dependents who are without available resources in the U.S. upon their arrival from abroad and for up to 90 days after their arrival, not exceeding 90 days as may be provided in regulations of the Secretary of HHS and supporting repayment of assistance allocable to individual recipients. Temporary assistance may include money payments, medical care, temporary billeting, transportation, and other goods and services necessary for the health or welfare of individuals (including guidance, counseling, and other welfare services). All temporary assistance provided under the repatriation program and allocable to individual recipients is repayable to the Federal Government. OHSEPR may use the records for the secondary purpose of providing training and technical assistance to State human services departments and local services providers, in addition to creating aggregate datasets to use in monitoring and assessing the effectiveness of the repatriation program.
- Records for the disaster assistance program are used by OHSEPR for the primary purpose of identifying, assessing, and addressing immediate, unmet disaster-caused human services needs of survivors of federally declared disasters. Disaster assistance may include conducting intake assessments and referrals, providing outreach and triage, developing a Disaster Survivor Recovery Plan, and connecting the disaster survivor to resources that are locally available. OHSEPR may use the records for the secondary purposes of creating aggregate datasets to use in providing financial assistance to State or local government agencies or qualified private organizations assisting survivors, building local disaster case management capacity through the provision of training and technical assistance to States, Tribes, Territories, and local governments, and monitoring and assessing the effectiveness of the disaster assistance program.

Note: OHSEPR will refer records from this system of records about temporary assistance allocable to individuals receiving repatriation assistance that is repayable to the Federal Government, to the Program Support Center within the Office of the Assistant Secretary for Administration for debt management and collection purposes. Records used for debt management and collection purposes are maintained under SORN 09–40–0012, Debt Management and Collection Records, and may be used and disclosed for the purposes described in that SORN.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The categories of individuals covered by this system are:

- U.S. citizens and their dependents who are receiving temporary assistance and are identified by the Department of State as having returned or been brought from a foreign country to the U.S. because of destitution, illness, war, threat of war, or a similar crisis.
- Survivors of disasters who reside within a jurisdiction included in federally declared disaster or emergency and apply for disaster assistance under an HHS authority (*e.g.,* not under a Federal Emergency Management Agency (FEMA) authority).

CATEGORIES OF RECORDS IN THE SYSTEM:

The categories of records are:

- Case files containing correspondence about repatriated U.S. citizens and their dependents receiving temporary assistance. Information about a repatriate may include full name, current mailing address, social security number, passport number, date and place of birth, dependents, and information about any medical care, temporary billeting, transportation, or other goods and services (*e.g.,* food, clothing) necessary for the health or welfare of the individual (including guidance, counseling, and other welfare services) that was furnished to the individual.
- Case files about disaster survivors who apply for disaster assistance under

an HHS (*e.g.,* not FEMA) authority. (Note that these files are separate and apart from those maintained in performing Immediate Disaster Case Management (IDCM) pursuant to a Mission Assignment agreement with FEMA.) The files include intake assessment records, resource referral lists, case notes, status reports, and recovery plans. Information about a disaster survivor may include disaster number, full name, current mailing address, date of birth, transitional housing location type, transitional housing mailing address, damaged dwelling mailing address, damaged county, location at time of registration, phone numbers, email addresses, homeowners insurance coverage details (including flood coverage), details on health care coverage, household size, household composition and member ages, details on damage to real and personal property, degree of total damage incurred, self-reported income, assistance sought, assistance received, source of assistance, persons residing in a dwelling, Federal disaster assistance referral status, and status of access and functional, and/or emergency needs.

Note that this system of records does *not* include the following records:

• Records of immediate disaster case management services that OHSEPR provides on behalf of another component of HHS or another agency. For example, pursuant to an interagency agreement, OHSEPR provides immediate disaster case management (IDCM) services on behalf of the Department of Homeland Security, FEMA (DHS/FEMA), under mission assignments from DHS/FEMA. Records of those services are covered under a FEMA SORN; currently, DHS/FEMA–008 Disaster Recovery Assistance Files System of Records.

• Disaster response records maintained by another component of HHS, such as the records maintained by the Office of the Assistant Secretary for Preparedness and Response (ASPR) under SORNs 09–90–0039 National Disaster Claims Processing System, and 09–90–0040 National Disaster Medical System (NDMS) Disaster Medical Information Suite (DMIS).

RECORD SOURCE CATEGORIES:

Information in repatriation program records is received directly from the subject individual (*i.e.,* client) or from a member of the client's or client's family or household, or a relative or representative of the client, or may be provided by other governmental entities (*e.g.,* Federal, State, local, or Tribal agencies) and local service providers, international agencies, foreign governments, employers, health care institutions, and public information sources.

Information in disaster assistance program records is received directly from the subject individual (*i.e.,* client) or from a member of the client's or client's family or household, or a relative or representative of the client, or may be provided by other governmental entities (*e.g.,* Federal, State, local, or Tribal agencies) and social service organizations.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to other disclosures permitted under 5 U.S.C. 552a(b)(1) and (2) and (4) through (11), OHSEPR may disclose a record about an individual from this system of records to parties outside HHS as provided in these routine uses, which are published pursuant to 5 U.S.C. 552a(b)(3). A routine use applies to both the repatriation program and the disaster assistance program, unless worded to apply to only one of those programs. Each proposed disclosure of information under these routine uses will be evaluated to ensure that the disclosure is legally permissible, including but not limited to ensuring that the purpose of the disclosure is compatible with the purpose for which the information was collected.

1. *Disclosure to Contractors, Grantees, and Other Agents.* Records may be disclosed to contractors (including another Federal agency acting as a service provider), grantees, consultants, volunteers, or other agents of OHSEPR who are assisting OHSEPR with the accomplishment of an OHSEPR function relating to the purposes of this system of records and need to have access to the records in order to provide the assistance.

2. *Disclosure to Department of State.* Records about a repatriation assistance applicant may be disclosed to the Department of State in connection with determinations of eligibility, referral, planning, and provision of temporary assistance of or to repatriates in cases referred to HHS.

3. *Disclosure to States.* Records about a repatriation assistance applicant may be disclosed to the States in connection with coordination and/or provision of temporary services for eligible repatriates.

4. *Disclosure to Service Provider.* Records about a repatriation assistance applicant may be disclosed to providers of services (*e.g.,* community-based organizations, hospitals) and to local State institutions (*e.g.,* courts and social service agencies) that assist in coordination and/or the provision of temporary assistance for eligible repatriates.

5. *Disclosure to Agency for Temporary Assistance.* Records about a repatriation assistance applicant may be disclosed to other Federal agencies and nongovernmental agencies for planning or provision of temporary assistance to eligible repatriates. Federal agencies include but are not limited to Department of State, Department of Defense, Department of Justice, Department of Homeland Security, Department of Housing and Urban Development, Federal Emergency Management Agency, Department of Agriculture, and United States Department of Transportation. Nongovernmental agencies include but are not limited to American Red Cross and Salvation Army.

6. *Disclosure for Law Enforcement Purposes.* Records may be disclosed to the appropriate Federal, State, local, Tribal, or foreign agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, if the information is relevant to a violation or potential violation of civil or criminal law or regulation within the jurisdiction of the receiving entity.

7. *Disclosure for Administrative Claim, Complaint, and Appeal.* Records about a repatriation assistance recipient may be disclosed to an authorized appeal grievance examiner, formal complaints examiner, equal employment opportunity investigator, arbitrator or other person properly engaged in investigation or settlement of an administrative grievance, complaint, claim, or appeal filed by an employee, but only to the extent that the information is relevant and necessary to the proceeding. Agencies that may obtain information under this routine use include, but are not limited to, the Office of Personnel Management, Office of Special Counsel, Merit Systems Protection Board, Federal Labor Relations Authority, Equal Employment Opportunity Commission, and Office of Government Ethics.

8. *Disclosure in Connection with Settlement Discussions.* Records about a repatriation assistance recipient may be disclosed in connection with settlement discussions regarding claims by or against HHS, including public filing with a court, to the extent that disclosure of the information is relevant and necessary to the litigation or discussions.

9. *Disclosure to Ensure Continuity of Disaster Assistance Services.* Records about a disaster assistance applicant

may be disclosed to DHS/FEMA pursuant to an interagency sharing and access agreement and to the State, local, Tribal, or Territorial departments of human services to ensure continuity of services for each disaster survivor.

10. *Disclosure to Locate Missing Children or Reunite Families.* Records about a disaster assistance applicant may be disclosed to a Federal or State law enforcement authority, Federal or State agency, or private organization authorized to investigate, coordinate, or locate missing children and/or reunite families.

11. *Disclosure to Combat Fraud, Waste, and Abuse.* Records may be disclosed to another Federal agency, or instrumentality of any governmental jurisdiction, within or under the control of the United States (including the-State or local governmental agency) that administers or has the authority to investigate potential fraud, waste, or abuse in federally funded programs when reasonably necessary by HHS to prevent, deter, discover, detect, investigate, or sue with respect to defend against, correct, remedy, or otherwise combat fraud, waste or abuse in such programs.

12. *Disclosure for Private Relief Legislation.* Records about a repatriation assistance recipient may be disclosed to the Office of Management and Budget at any stage in the legislative coordination and clearance process in connection with private relief legislation as set forth in OMB Circular A–19.

13. *Disclosure to Congressional Office.* Records may be disclosed to a congressional office from the record of an individual in response to a written inquiry from the congressional office made at the written request of the individual.

14. *Disclosure to Department of Justice or in Proceedings.* Records may be disclosed to the Department of Justice (DOJ), or in a proceeding before a court, adjudicative body, or other administrative body before which HHS is authorized to appear, when:

- HHS, or any component thereof; or
- Any employee of HHS in his or her official capacity; or
- Any employee of HHS in his or her individual capacity where DOJ or HHS has agreed to represent the employee; or
- The United States, if HHS determines that the litigation is likely to affect HHS or any of its components,

is a party to the litigation or has an interest in the litigation and the use of the records by DOJ or HHS is deemed by HHS to be relevant and necessary to the litigation.

15. *Disclosure to the National Archives and Records Administration.* Records may be disclosed to representatives of the National Archives and Records Administration (NARA) in records management inspections conducted pursuant to 44 U.S.C. 2904 and 2906.

16. *Disclosure in the Event of a Security Breach Experienced by HHS.* Records may be disclosed to appropriate agencies, entities, and persons when (1) HHS suspects or has confirmed that there has been a breach of the system of records; (2) HHS has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the agency (including its information systems, programs and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with HHS' efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

17. *Disclosure to Assist Another Agency Experiencing a Breach.* Records may be disclosed to another Federal agency or Federal entity, when HHS determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

18. *Disclosure for Cybersecurity Monitoring Purposes.* Records may be disclosed to the DHS if captured in an intrusion detection system used by HHS and DHS pursuant to a DHS cybersecurity program that monitors internet traffic to and from Federal Government computer networks to prevent a variety of types of cybersecurity incidents.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are stored in hard copy files, electronic storage media, and cloud/network storage.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Disaster assistance case records are retrieved by the individual's name or case file number. Repatriate case records are retrieved by the individual's name, case file number, or social security number.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records about individuals receiving repatriation assistance are retained and disposed of in accordance with NARA-approved disposition schedule N1–292–93–1, as follows:

- Files are transferred to a Federal records center one year after termination of collection efforts and are destroyed five years after termination of collection efforts.

Records about disaster survivors are disposed of in accordance with NARA-approved disposition schedule DAA–0292–2019–0001, as follows:

- Database intake assessment records: Cut off at the end of the calendar year, following the end of a disaster mission; Destroy 10 years after cutoff.
- Resource referral list: Cut off at the end of the calendar year, following the end of a disaster mission; Destroy 10 years after cutoff.
- Disaster Survivor Recovery Plans: Cut off at the end of the calendar year, following the end of a disaster mission; Destroy 3 years after cutoff.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Safeguards conform to the HHS Information Security and Privacy Program, *https://www.hhs.gov/ocio/securityprivacy/index.html.* Information is safeguarded in accordance with applicable laws, rules and policies, including the HHS Information Technology Security Program Handbook, the E-Government Act of 2002 that includes the Federal Information Security Management Act of 2002 (FISMA), 44 U.S.C. 3541–3549, as amended by the Federal Information Security Modernization act of 2014, 44 U.S.C. 3551–3558, all pertinent National Institutes of Standards and Technology (NIST) publications; and OMB Circular A–130, Managing Information as a Strategic Resource. Records are protected from unauthorized access through appropriate administrative, physical, and technical safeguards. These safeguards include requiring contractors and grantees to maintain confidentiality throughout the case management process by assuring that client records are kept in a safe, secure environment within contractor or grantee facilities. All direct contractor or grantee staff are required to sign a confidentiality agreement and to receive training on security, privacy, and confidentiality policies and procedures, including methods of protecting client confidentiality. Client records are filed according to OHSEPR protocols and access to records is controlled through

log-in/out processes for both computer and paper files.

Case managers, should they need to use paper records into the field, will take only those records needed to complete field activities, and all paper files will be kept in a locking file box while in transport and kept in a controlled facility when not being directly used for case management functions. Records in electronic format are accessible only to authorized users using two-factor authentication and password protection through a secured system protected by encryption, firewalls, and intrusion detection systems that require additional encryption for records stored on removable media. Records that become eligible for destruction are disposed of in alignment with the destruction methods prescribed by the NIST Special Publication (SP) 800–88. The associated information technology (IT) system(s) receive Authority to Operate (ATO) under the guidance of NIST SP 800–37.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about them in this system of records must submit a written access request to the System Manager identified in the ''System Manager(s)'' section of this SORN, in accordance with the Department's Privacy Act implementation regulations in 45 CFR. The request must contain the requester's full name, address, telephone number and/or email address, date and place of birth, and signature, and should identify the repatriation program or the applicable disaster, or otherwise provide enough information to enable OHSEPR to locate the requested records.

So that HHS may verify the requester's identity, the requester's signature must be notarized or the request must include the requester's written certification that the requester is the individual who the requester claims to be and that the requester understands that the knowing and willful request for or acquisition of a record pertaining to an individual under false pretenses is a criminal offense subject to a fine of up to $5,000.

You may request that a copy of the record be sent to you, or you may request an appointment to review the record in person (including with a person of your choosing, if you provide written authorization for agency personnel to discuss the record in that person's presence). You may also request an accounting of disclosures that have been made of the record, if any.

CONTESTING RECORDS PROCEDURES:

Individuals seeking to amend records about them in this system of records must submit a written amendment request to the System Manager identified in the ''System Manager(s)'' section of this SORN, in accordance with the Department's Privacy Act implementation regulations in 45 CFR. The request must contain the same information required for an access request. The request must include verification of the requester's identity in the same manner required for an access request; must reasonably identify the record and specify the information contested, the corrective action sought, and the reasons for requesting the correction; and should include supporting information to show how the record is factually inaccurate, incomplete, untimely, or irrelevant.

NOTIFICATION PROCEDURES:

Individuals who wish to know if this system contains records about them should submit a written notification request to the System Manager identified in the ''System Manager(s)'' section of this SORN, in accordance with the Department's Privacy Act implementation regulations in 45 CFR. The request must contain the same information required for an access request and must include verification of the requester's identity in the same manner required for an access request.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

81 FR 46687 (July 18, 2016), 83 FR 6591 (Feb. 14, 2018).

[FR Doc. 2023–19875 Filed 9–13–23; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–0438]

Agency Information Collection Request; 30-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment.

DATES: Comments on the ICR must be received on or before October 16, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: When submitting comments or requesting information, please include the document identifier 0990–0438–30D and project title for reference, to Sherrette A. Funn, email: *Sherrette.Funn@hhs.gov, PRA@HHS.GOV* or call (202) 264–0041 the Reports Clearance Officer.

SUPPLEMENTARY INFORMATION: Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (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.

Title of the Collection:

Type of Collection: Extension.

OMB No.: 0990–0438.

Abstract: The Office of Population Affairs (OPA), in the Office of the Assistant Secretary for Health (OASH), U.S. Department of Health and Human Services (HHS), requests clearance for the collection of performance measures specifically for FY2020 Teen Pregnancy Prevention (TPP) Program grantees. Collection of performance measures is a requirement of all TPP awards and is included in the NOFOs. The data collection will allow OPA to comply with federal accountability and performance requirements, inform stakeholders of grantee progress in meeting TPP program goals, provide OPA with metrics for monitoring TPP grantees, and facilitate individual grantees' continuous quality improvement efforts within their projects. OPA requests clearance for one year to cover reporting during the no-cost extension period of the awards.

ESTIMATED ANNUALIZED BURDEN TABLE

Form	Type of respondent	Number of respondents	Number responses per respondent	Average burden per response (in hours)	Total burden hours
Partners and sustainability	All TPP grantees	90	2	15/60	45
Training	All TPP Grantees	90	2	15/60	45
Dissemination	All TPP Grantees	90	2	30/60	90
Stakeholder Engagement	All TPP Grantees	90	2	15/60	45
Reach and Demographics	Tier 1 and Tier 2 Phase II Grantees	64	2	3	384
Dosage	Tier 1 and Tier 2 Phase II Grantees	64	2	2	256
Fidelity and Quality	Tier 1 and Tier 2 Phase II Grantees	64	2	2	256
Tier 2 Innovation Network	Tier 2 Innovation Network Grantees	14	2	15/60	7
Supportive Services (Tier 1)	Tier 1 Grantees	54	2	15/60	27
Total			2		1,155

Sherrette A. Funn,

Paperwork Reduction Act Reports Clearance Officer, Office of the Secretary.

[FR Doc. 2023–19848 Filed 9–13–23; 8:45 am]

BILLING CODE 4168–11–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Heart, Lung, and Blood Initial Review Group; NHLBI Mentored Patient-Oriented Research Study Section.

Date: October 26–27, 2023.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge I, 6705 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Fungai Chanetsa, Ph.D., MPH, Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 206–B, Bethesda, MD 20817, (301) 402–9394. *fungai.chanetsa@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–19907 Filed 9–13–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Heart, Lung, and Blood Initial Review Group; Clinical Trials Review Study Section.

Date: October 23, 2023.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: North Bethesda Marriott Hotel & Conference Center, Montgomery County Conference Center Facility, 5701 Marinelli Road, North Bethesda, MD 20852.

Contact Person: Keary A Cope, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 209–A, Bethesda, MD 20892–7924, (301) 827–7912, *copeka@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: September 11, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–19905 Filed 9–13–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Heart, Lung, and Blood Initial Review Group; NHLBI Single-Site and Pilot Clinical Trials Study Section.

Date: October 25–26, 2023.

Time: 8:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW, Washington, DC 20015.

Contact Person: YingYing Li-Smerin, MD, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6705 Rockledge Drive, Room 207–P, Bethesda, MD 20892–7924, 301–827–7942, *lismerin@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: September 11, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–19902 Filed 9–13–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Heart, Lung, and Blood Advisory Council.

The meeting will be a hybrid meeting held in-person and virtually and will be open to the public as indicated below. Individuals who plan to attend in-person or view the virtual meeting and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The meeting can be accessed from the NIH Videocast at the following links: *http://videocast.nih.gov/* or *https://www.nhlbi.nih.gov/about/advisory-and-peer-review-committees/advisory-council.*

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Advisory Council.

Date: October 24, 2023.

Closed: 9:00 a.m. to 10:00 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge I, 6705 Rockledge Drive, Bethesda, MD 20892 (Hybrid Meeting).

Open: 10:00 a.m. to 5:00 p.m.

Agenda: To discuss program policies and issues.

Place: National Institutes of Health, Rockledge I, 6705 Rockledge Drive, Bethesda, MD 20892 (Hybrid Meeting).

*Virtual Access: http://videocast.nih.gov/*or *https://www.nhlbi.nih.gov/about/advisory-and-peer-review-committees/advisory-council.* Please note, the link to the videocast meeting will be posted within a week of the meeting date.

Contact Person: Laura K. Moen, Ph.D., Director, Division of Extramural Research Activities, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 206–Q, Bethesda, MD 20892, 301–827–5517, *moenl@mail.nih.gov.*

Any member of the public interested in presenting oral comments to the committee may notify the Contact Person listed on this notice at least 10 days in advance of the meeting. Interested individuals and representatives of organizations may submit a letter of intent, a brief description of the organization represented, and a short description of the oral presentation. Only one representative of an organization may be allowed to present oral comments and if accepted by the committee, presentations may be limited to five minutes. Both printed and electronic copies are requested for the record. In addition, any interested person may file written comments with the committee by forwarding their statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has procedures at *https://www.nih.gov/about-nih/visitor-information/campus-access-security* for entrance into on-campus and off-campus facilities. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors attending a meeting on campus or at an off-campus federal facility will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *www.nhlbi.nih.gov/meetings/nhlbac/index.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: September 11, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–19906 Filed 9–13–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2023–0002; Internal Agency Docket No. FEMA–B–2369]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: Comments are to be submitted on or before December 13, 2023.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–2369, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and

Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *https://www.floodsrp.org/pdfs/srp_overview.pdf.*

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Merrimack County, New Hampshire (All Jurisdictions) Project: 15–01–0632S Preliminary Date: October 12, 2022	
City of Concord	Engineering Department, 41 Green Street, Concord, NH 03301.
City of Franklin	City Hall, 316 Central Street, Franklin, NH 03235.
Town of Allenstown	Assessing Department, 16 School Street, Allenstown, NH 03275.
Town of Boscawen	Town Office, 116 North Main Street, Boscawen, NH 03303.
Town of Bow	Town Hall, 10 Grandview Road, Bow, NH 03304.
Town of Canterbury	Sam Lake House, 10 Hackleboro Road, Canterbury, NH 03224.
Town of Chichester	Town Hall, 54 Main Street, Chichester, NH 03258.
Town of Dunbarton	Town Hall, 1011 School Street, Dunbarton, NH 03046.
Town of Epsom	Town Office, 27 Black Hall Road, Epsom, NH 03234.
Town of Hooksett	Municipal Building, 16 Main Street, Hooksett, NH 03106.
Town of Hopkinton	Town Office, 330 Main Street, Hopkinton, NH 03229.
Town of Loudon	Town Office, 55 South Village Road, Loudon, NH 03307.
Town of Northfield	Town Office, 21 Summer Street, Northfield, NH 03276.
Town of Pembroke	Town Office, 311 Pembroke Street, Pembroke, NH 03275.
Town of Pittsfield	Town Office, 85 Main Street, Pittsfield, NH 03263.
Town of Salisbury	Academy Hall, 9 Old Coach Road, Salisbury, NH 03268.
Warren County, Ohio and Incorporated Areas Project: 14–05–4456S Preliminary Dates: February 03, 2021 and March 31, 2023 and May 19, 2023	
City of Carlisle	Town Hall, 760 Central Avenue, Carlisle, OH 45005.
City of Franklin	City Administration Building, 1 Benjamin Franklin Way, Franklin, OH 45005.
City of Mason	Mason Municipal Center, 6000 Mason-Montgomery Road, Mason, OH 45040.
City of South Lebanon	Municipal Building, 10 North High Street, South Lebanon, OH 45065.
City of Springboro	Municipal Building, 320 West Central Avenue, Springboro, OH 45066.
Unincorporated Areas of Warren County	Warren County Administration Building, 406 Justice Drive, Room 167, Lebanon, OH 45036.
Fluvanna County, Virginia (All Jurisdictions) Project: 20–03–0031S Preliminary Date: November 30, 2022	
Unincorporated Areas of Fluvanna County	Fluvanna County Administrative Building, Planning Department, 132 Main Street, Palymyra, VA 22963.

[FR Doc. 2023–19886 Filed 9–13–23; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2023–0002; Internal Agency Docket No. FEMA–B–2366]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: Comments are to be submitted on or before December 13, 2023.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–2366, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *https://www.floodsrp.org/pdfs/srp_overview.pdf.*

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Harper County, Kansas and Incorporated Areas **Project: 23–07–0011S Preliminary Date: June 23, 2023**	
City of Anthony	Harper County Courthouse, 201 North Jennings Avenue, Anthony, KS 67003.
City of Bluff City	Harper County Courthouse, 201 North Jennings Avenue, Anthony, KS 67003.
City of Harper	Harper County Courthouse, 201 North Jennings Avenue, Anthony, KS 67003.
City of Waldron	Harper County Courthouse, 201 North Jennings Avenue, Anthony, KS 67003.
Unincorporated Areas of Harper County	Harper County Courthouse, 201 North Jennings Avenue, Anthony, KS 67003.
Harrison County, Kentucky and Incorporated Areas **Project: 18–04–0022S Preliminary Date: October 13, 2022**	
City of Berry	Harrison County Courthouse, 111 South Main Street, Cynthiana, KY 41031.

Community	Community map repository address
City of Cynthiana	Harrison County Courthouse, 111 South Main Street, Cynthiana, KY 41031.
Unincorporated Areas of Harrison County	Harrison County Courthouse, 111 South Main Street, Cynthiana, KY 41031.
Williamson County, Tennessee and Incorporated Areas Project: 19–04–0010S Preliminary Date: December 8, 2022	
City of Brentwood	City Hall, 5211 Maryland Way, Brentwood, TN 37027.
City of Franklin	City Hall, 109 3rd Avenue South, Suite 110, Franklin, TN 37064.
Town of Thompson's Station	Town Hall, 1550 Thompson's Station Road West, Thompson's Station, TN 37179.
Unincorporated Areas of Williamson County	Williamson County Administrative Complex, 1320 West Main Street, Suite 400, Franklin, TN 37064.

[FR Doc. 2023–19890 Filed 9–13–23; 8:45 am]
BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2023–0002]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: New or modified Base (1-percent annual chance) Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, and/or regulatory floodways (hereinafter referred to as flood hazard determinations) as shown on the indicated Letter of Map Revision (LOMR) for each of the communities listed in the table below are finalized. Each LOMR revises the Flood Insurance Rate Maps (FIRMs), and in some cases the Flood Insurance Study (FIS) reports, currently in effect for the listed communities.

DATES: Each LOMR was finalized as in the table below.

ADDRESSES: Each LOMR is available for inspection at both the respective Community Map Repository address listed in the table below and online through the FEMA Map Service Center at *https://msc.fema.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final flood hazard determinations as shown in the LOMRs for each community listed in the table below. Notice of these modified flood hazard determinations has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

The modified flood hazard determinations are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65. The currently effective community number is shown and must be used for all new policies and renewals.

The new or modified flood hazard information is the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to remain qualified for participation in the National Flood Insurance Program (NFIP).

This new or modified flood hazard information, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities.

This new or modified flood hazard determinations are used to meet the floodplain management requirements of the NFIP. The changes in flood hazard determinations are in accordance with 44 CFR 65.4.

Interested lessees and owners of real property are encouraged to review the final flood hazard information available at the address cited below for each community or online through the FEMA Map Service Center at *https://msc.fema.gov.*

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Connecticut: Fairfield (FEMA Docket No.: B–2348).	Town of Greenwich (23–01–0011P).	Fred Camillo, First Selectman, Town of Greenwich Board of Selectmen, 101 Field Point Road, Greenwich, CT 06830.	Planning and Zoning Department, 101 Field Point Road, Greenwich, CT 06830.	Aug. 11, 2023	090008
Delaware: New Castle (FEMA Docket No.: B–2341).	Unincorporated areas of New Castle County (22–03–0971P).	The Honorable Matthew Meyer, New Castle County Executive, 87 Read's Way, New Castle, DE 19720.	New Castle County Government Center, 87 Read's Way, New Castle, DE 19720.	Aug. 10, 2023	105085
Florida:					
Alachua (FEMA Docket No.: B–2348).	City of Gainesville (22–04–5738P).	The Honorable Harvey Ward, Mayor, City of Gainesville, 200 East University Avenue, Gainesville, FL 32601.	Public Works Department, 405 Northwest 39th Avenue, Gainesville, FL 32609.	Aug. 16, 2023	125107

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Alachua (FEMA Docket No.: B–2348).	Unincorporated areas of Alachua County (22–04–5738P).	Michele L. Lieberman, Alachua County Manager, 12 Southeast 1st Street, Gainesville, FL 32601.	Alachua County Public Works Department, 5620 Northwest 120th Lane, Gainesville, FL 32653.	Aug. 16, 2023	120001
Bay (FEMA Docket No.: B–2348).	Unincorporated areas of Bay County (22–04–5121P).	The Honorable Tommy Hamm, Chair, Bay County Board of Commissioners, 840 West 11th Street, Panama City, FL 32401.	Bay County Planning and Zoning Division, 840 West 11th Street, Panama City, FL 32401.	Aug. 16, 2023	120004
Charlotte (FEMA Docket No.: B–2341).	City of Punta Gorda (22–04–4836P).	The Honorable Lynne Matthews, Mayor, City of Punta Gorda, 326 West Marion Avenue, Punta Gorda, FL 33950.	Building Department, 326 West Marion Avenue, Punta Gorda, FL 33950.	Jul. 11, 2023	120062
Charlotte (FEMA Docket No.: B–2341).	Unincorporated areas of Charlotte County (22–04–4836P).	Bill Truex, Chair, Charlotte County Board of Commissioners, 18500 Murdock Circle, Suite 536, Port Charlotte, FL 33948.	Charlotte County E.J. Carlson Community Development Building, 18400 Murdock Circle, Port Charlotte, FL 33948.	Jul. 11, 2023	120061
Orange (FEMA Docket No.: B–2348).	City of Orlando (22–04–5073P).	The Honorable Buddy Dyer, Mayor, City of Orlando, 400 South Orange Avenue, Orlando, FL 32801.	Public Works Department, Engineering Division, 400 South Orange Avenue, Orlando, FL 32801.	Aug. 18, 2023	120186
Orange (FEMA Docket No.: B–2348).	Unincorporated areas of Orange County (22–04–5073P).	The Honorable Jerry L. Demings Mayor, Orange County, 201 South Rosalind Avenue, 5th Floor, Orlando, FL 32801.	Orange County Public Works Department, Stormwater Management Division, 4200 South John Young Parkway, Orlando, FL 32839.	Aug. 18, 2023	120179
Sarasota FEMA Docket No.: B–2348).	City of Sarasota (22–04–4970P).	The Honorable Kyle Battie, Mayor, City of Sarasota, 1565 1st Street, Room 101, Sarasota, FL 34236.	Development Services Department, 1565 1st Street, Sarasota, FL 34236.	Aug. 16, 2023	125150
Kentucky: Jefferson (FEMA Docket No.: B–2341).	Metropolitan Government of Louisville and Jefferson County (23–04–2013P).	The Honorable Craig Greenberg, Mayor, Metropolitan Government of Louisville and Jefferson County, 527 West Jefferson Street, Louisville, KY 40202.	Louisville/Jefferson County Metropolitan Sewer District, 700 West Liberty Street, Louisville, KY 40203.	Aug. 10, 2023	210120
Massachusetts: Plymouth (FEMA Docket No.: B–2341).	Town of Marshfield (22–01–0998P).	The Honorable Stephen Darcy, Chair, Town of Marshfield Select Board, 870 Moraine Street, Marshfield, MA 02050.	Building Department, 870 Moraine Street, Marshfield, MA 02050.	Aug. 9, 2023	250273
New Mexico: Dona Ana (FEMA Docket No.: B–2341).	City of Las Cruces (22–06–0707P).	Ifo Pili, Manager, City of Las Cruces, 700 North Main Street, Suite 3600, Las Cruces, NM 88001.	City Hall, 700 North Main Street, Suite 1100, Las Cruces, NM 88001.	Aug. 14, 2023	355332
Pennsylvania:					
Blair (FEMA Docket No.: B–2348).	Borough of Williamsburg (23–03–0119P).	The Honorable Theodore Hyle, Mayor, Borough of Williamsburg, 305 East 2nd Street, Williamsburg, PA 16693.	Borough Hall, 305 East 2nd Street, Williamsburg, PA 16693.	Aug. 8, 2023	420165
Blair (FEMA Docket No.: B–2348).	Township of Catharine (23–03–0119P).	The Honorable Heather Flaig, Supervisor, Township of Catharine, 229 Recreation Drive, Williamsburg, PA 16693.	Township Hall, 1229 Recreation Drive, Williamsburg, PA 16693.	Aug. 8, 2023	420962
Blair (FEMA Docket No.: B–2348).	Township of Woodbury (23–03–0119P).	The Honorable Joseph Lansberry, Chair, Township of Woodbury Board of Supervisors, 6385 Clover Creek Road, Williamsburg, PA 16693.	Township Hall, 6385 Clover Creek Road, Williamsburg, PA 16693.	Aug. 8, 2023	420963
Cumberland (FEMA Docket No.: B–2348).	Township of Upper Allen (22–03–0959P).	The Honorable Kenneth M. Martin, President, Township of Upper Allen Board of Commissioners, 100 Gettysburg Pike, Mechanicsburg, PA 17055.	Township Hall, 100 Gettysburg Pike, Mechanicsburg, PA 17055.	Aug. 18, 2023	420372
Delaware (FEMA Docket No.: B–2348).	Township of Darby (23–03–0224P).	The Honorable John Lacey, President, Township of Darby Board of Commissioners, 21 Bartram Avenue, Glenolden, PA 19036.	Township Hall, 21 Bartram Avenue, Glenolden, PA 19036.	Aug. 14, 2023	421603
Philadelphia (FEMA Docket No.: B–2348).	City of Philadelphia (23–03–0224P).	The Honorable James Kenney, Mayor, City of Philadelphia, 1 South Penn Square, Suite 215, Philadelphia, PA 19102.	Department of Licenses and Inspections, 1401 John F. Kennedy Boulevard, 11th Floor, Philadelphia, PA 19102.	Aug. 14, 2023	420757
Texas:					
Bexar (FEMA Docket No.: B–2348). .	City of San Antonio (22–06–1878P).	The Honorable Ron Nirenberg, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283.	Transportation and Capital Improvements Department, Storm Water Division, 1901 South Alamo Street, 2nd Floor, San Antonio, TX 78204.	Aug. 14, 2023	480045
Collin (FEMA Docket No.: B–2341).	City of Josephine (23–06–0194P).	The Honorable Jason Turney, Mayor, City of Josephine, P.O. Box 99, Josephine, TX 75164.	City Hall, 201 South Main Street, Josephine, TX 75173.	Aug. 18, 2023	480756
Collin (FEMA Docket No.: B–2341).	Unincorporated areas of Collin County (23–06–0194P).	The Honorable Chris Hill, Collin County Judge, 2300 Bloomdale Road, Suite 4192, McKinney, TX 75071.	Collin County Engineering Department, 4690 Community Avenue, Suite 200, McKinney, TX 75071.	Aug. 18, 2023	480130
Dallas (FEMA Docket No.: B–2348).	City of Garland (22–06–2058P).	The Honorable Scott LeMay, Mayor, City of Garland, 200 North 5th Street, Garland, TX 75040.	City Hall, 200 North 5th Street, Garland, TX 75040.	Aug. 14, 2023	485471
Dallas (FEMA Docket No.: B–2348).	City of Sachse (22–06–2058P).	The Honorable Jeff Bickerstaff, Mayor, City of Sachse, 3815 Sachse Road, Sachse, TX 75048.	Engineering Department, 3815 Sachse Road, Sachse, TX 75048.	Aug. 14, 2023	480186
Denton (FEMA Docket No.: B–2348).	City of Fort Worth 22–06–2050P).	The Honorable Mattie Parker, Mayor, City of Fort Worth, 200 Texas Street, Fort Worth, TX 76102.	Transportation and Public Works Department, Engineering Vault, 200 Texas Street, Fort Worth, TX 76102.	Aug. 21, 2023	480596

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Starr (FEMA Docket No.: B–2335).	City of Rio Grande City (22–06–2596P).	The Honorable Joel Villarreal, Mayor, City of Rio Grande City, 5332 East Highway 83, Rio Grande City, TX 78582.	City Hall, 101 South Washington Street, Rio Grande City, TX 78582.	Aug. 14, 2023	481678
Starr (FEMA Docket No.: B–2335).	Unincorporated areas of Starr County, (22–06–2596P).	The Honorable Eloy Vera, Starr County Judge, 100 North F.M. 3167, Rio Grande City, TX 78582.	Starr County Courthouse Annex, 100 North F.M. 3167, Rio Grande City, TX 78582.	Aug. 14, 2023	480575
Tarrant (FEMA Docket No.: B–2352).	City of Grand Prairie (22–06–2829P).	The Honorable Ron Jensen, Mayor, City of Grand Prairie, P.O. Box 534045, Grand Prairie, TX 75053.	City Hall, 300 West Main Street, Grand Prairie, TX 75050.	Aug. 10, 2023	485472
Taylor (FEMA Docket No.: B–2341).	City of Abilene, (22–06–3030P).	The Honorable Anthony Williams, Mayor, City of Abilene, P.O. Box 60, Abilene, TX 79604.	City Hall, 555 Walnut Street, Abilene, TX 79601.	Aug. 11, 2023	485450
Virginia:					
Washington (FEMA Docket No.: B–2348).	City of Bristol (22–03–1191P).	Randy Eads, City of Bristol Manager, 300 Lee Street, Bristol, VA 24201.	Community Development and Planning Department, 300 Lee Street, Bristol, VA 24201.	Aug. 10, 2023	510022
Washington (FEMA Docket No.: B–2348).	Unincorporated areas of Washington County 22–03–1191P).	Saul A. Hernandez, Chair, Washington County Board of Supervisors, 5411 Dishner Valley Road, Bristol, VA 24202.	Washington County Department of Zoning Administration, 1 Government Center Place, Suite A, Abingdon, VA 24210.	Aug. 10, 2023	510168

[FR Doc. 2023–19892 Filed 9–13–23; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2023–0002; Internal Agency Docket No. FEMA–B–2357]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency; Department of Homeland Security.

ACTION: Notice; correction.

SUMMARY: On July 31, 2023, FEMA published in the **Federal Register** a proposed flood hazard determination notice that contained an erroneous table. This notice provides corrections to those tables to be used in lieu of the erroneous information. The tables provided here represent the proposed flood hazard determinations and communities affected for Essex County, Massachusetts (All Jurisdictions), Middlesex County, Massachusetts (All Jurisdictions), Norfolk County, Massachusetts (All Jurisdictions), and Worcester County, Massachusetts (All Jurisdictions).

DATES: Comments are to be submitted on or before December 13, 2023.

ADDRESSES: The Preliminary Flood Insurance Rate Map (FIRM), and where applicable, the Flood Insurance Study (FIS) report for each community are available for inspection at both the online location and the respective Community Map Repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–2357, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed in the table below, in accordance with Section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own, or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP may only be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *https://floodsrp.org/pdfs/srp_fact_sheet.pdf.*

The communities affected by the flood hazard determinations are provided in the table below. Any request for reconsideration of the revised flood hazard determinations shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations will also be considered before the FIRM and FIS report are made final.

Correction

In the **Federal Register** of July 31, 2023, in FR Doc. 2023–16142, starting on page 49480, correct the Community and Community map repository address tables to read:

Community	Community map repository address
Essex County, Massachusetts (All Jurisdictions) Project: 15–01–0633S Preliminary Dates: February 20, 2023 and May 26, 2023	
City of Amesbury	Town Hall, 62 Friend Street, Amesbury, MA 01913.
City of Beverly	City Hall, 191 Cabot Street, Beverly, MA 01915.
City of Gloucester	City Hall, 9 Dale Avenue, Gloucester, MA 01930.
City of Haverhill	City Hall, 4 Summer Street, Haverhill, MA 01830.
City of Lawrence	City Hall, 200 Common Street, Lawrence, MA 01840.
City of Lynn	City Hall, 3 City Hall Square, Lynn, MA 01901.
City of Methuen	Searles Building, 41 Pleasant Street, Methuen, MA 01844.
City of Newburyport	City Hall, 60 Pleasant Street, Newburyport, MA 01950.
City of Peabody	City Hall, 24 Lowell Street, Peabody, MA 01960.
City of Salem	City Hall, 93 Washington Street, Salem, MA 01970.
Town of Andover	Town Hall, 36 Bartlet Street, Andover, MA 01810.
Town of Boxford	Town Hall, 7A Spofford Road, Boxford, MA 01921.
Town of Danvers	Town Hall, 1 Sylvan Street, Danvers, MA 01923.
Town of Essex	Town Hall, 30 Martin Street, Essex, MA 01929.
Town of Georgetown	Town Hall, 1 Library Street, Georgetown, MA 01833.
Town of Groveland	Town Hall, 183 Main Street, Groveland, MA 01834.
Town of Hamilton	Town Hall, 577 Bay Road, Hamilton, MA 01936.
Town of Ipswich	Town Hall, 25 Green Street, Ipswich, MA 01938.
Town of Lynnfield	Town Hall, 55 Summer Street, Lynnfield, MA 01940.
Town of Manchester-by-the-Sea	Town Hall, 10 Central Street, Manchester-by-the-Sea, MA 01944.
Town of Marblehead	Abbot Hall, 188 Washington Street, Marblehead, MA 01945.
Town of Merrimac	Town Hall, 4 School Street, Merrimac, MA 01860.
Town of Middleton	Town Hall, 48 South Main Street, Middleton, MA 01949.
Town of Newbury	Newbury Municipal Offices, 12 Kent Way, Byfield, MA 01922.
Town of North Andover	Town Hall, 120 Main Street, North Andover, MA 01845.
Town of Rockport	Town Hall, 34 Broadway, Rockport, MA 01966.
Town of Rowley	Town Hall, 139 Main Street, Rowley, MA 01969.
Town of Salisbury	Town Hall, 5 Beach Road, Salisbury, MA 01952.
Town of Saugus	Town Hall, 298 Central Street, Saugus, MA 01906.
Town of Swampscott	Town Hall, 22 Monument Avenue, Swampscott, MA 01907.
Town of Topsfield	Town Offices, 8 West Common Street, Topsfield, MA 01983.
Town of Wenham	Town Hall, 138 Main Street, Wenham, MA 01984.
Town of West Newbury	Town Hall, 381 Main Street, West Newbury, MA 01985.
Middlesex County, Massachusetts (All Jurisdictions) Project: 15–01–0633S Preliminary Dates: August 13, 2021 and June 08, 2023	
City of Cambridge	City Hall, 795 Massachusetts Avenue, Cambridge, MA 02139.
City of Everett	City Hall, 484 Broadway, Everett, MA 02149.
City of Lowell	City Hall, 375 Merrimack Street, Lowell, MA 01852.
City of Malden	City Hall, 200 Pleasant Street, Malden, MA 02148.
City of Medford	City Hall, 85 George P. Hassett Drive, Medford, MA 02155.
City of Melrose	City Hall, 562 Main Street, Melrose, MA 02176.
City of Newton	City Hall, 1000 Commonwealth Avenue, Newton, MA 02459.
City of Somerville	City Hall, 93 Highland Avenue, Somerville, MA 02143.
City of Waltham	City Hall, 610 Main Street, Waltham, MA 02452.
City of Woburn	City Hall, 10 Common Street, Woburn, MA 01801.
Town of Arlington	Town Hall, 730 Massachusetts Avenue, Arlington, MA 02476.
Town of Ashby	Town Hall, 895 Main Street, Ashby, MA 01431.
Town of Ashland	Town Hall, 101 Main Street, Ashland, MA 01721.
Town of Ayer	Town Hall, 1 Main Street, Ayer, MA 01432.
Town of Bedford	Town Hall, 10 Mudge Way, Bedford, MA 01730.
Town of Belmont	Town Hall, 455 Concord Avenue, Belmont, MA 02478.
Town of Billerica	Town Hall, 365 Boston Road, Billerica, MA 01821.
Town of Boxborough	Town Hall, 29 Middle Road, Boxborough, MA 01719.
Town of Burlington	Town Hall, 29 Center Street, Burlington, MA 01803.
Town of Chelmsford	Town Hall, 50 Billerica Road, Chelmsford, MA 01824.
Town of Concord	Town House, 22 Monument Square, Concord, MA 01742.
Town of Dracut	Town Hall, 62 Arlington Street, Dracut, MA 01826.
Town of Dunstable	Town Hall, 511 Main Street, Dunstable, MA 01827.
Town of Groton	Town Hall, 173 Main Street, Groton, MA 01450.
Town of Holliston	Town Hall, 703 Washington Street, Holliston, MA 01746.
Town of Hopkinton	Town Hall, 18 Main Street, Hopkinton, MA 01748.
Town of Lexington	Town Offices, 1625 Massachusetts Avenue, Lexington, MA 02420.
Town of Lincoln	Town Hall, 16 Lincoln Road, Lincoln, MA 01773.
Town of Littleton	Town Hall, 37 Shattuck Street, Littleton, MA 01460.
Town of Natick	Town Hall, 13 East Central Street, Natick, MA 01760.
Town of North Reading	Town Hall, 235 North Street, North Reading, MA 01864.
Town of Pepperell	Town Hall, 1 Main Street, Pepperell, MA 01463.
Town of Reading	Town Hall, 16 Lowell Street, Reading, MA 01867.
Town of Sherborn	Town Hall, 19 Washington Street, Sherborn, MA 01770.

Community	Community map repository address
Town of Shirley	Town Hall, 7 Keady Way, Shirley, MA 01464.
Town of Stoneham	Town Hall, 35 Central Street, Stoneham, MA 02180.
Town of Tewksbury	Town Hall, 1009 Main Street, Tewksbury, MA 01876.
Town of Townsend	Town Hall, 272 Main Street, Townsend, MA 01469.
Town of Tyngsborough	Town Hall, 25 Bryants Lane, Tyngsborough, MA 01879.
Town of Wakefield	Town Hall, 1 Lafayette Street, Wakefield, MA 01880.
Town of Watertown	Town Hall, 149 Main Street, Watertown, MA 02472.
Town of Wayland	Town Hall, 41 Cochituate Road, Wayland, MA 01778.
Town of Westford	Town Hall, 55 Main Street, Westford, MA 01886.
Town of Weston	Town Hall, 11 Town House Road, Weston, MA 02493.
Town of Wilmington	Town Hall, 121 Glen Road, Wilmington, MA 01887.
Town of Winchester	Town Hall, 71 Mt. Vernon Street, Winchester, MA 01890.
Norfolk County, Massachusetts (All Jurisdictions) Project: 15–01–0633S Preliminary Dates: June 19, 2020 and April 07, 2023	
City of Quincy	City Hall, 1305 Hancock Street, Quincy, MA 02169.
Town of Avon	Town Hall, 65 East Main Street, Avon, MA 02322.
Town of Bellingham	Municipal Center, 10 Mechanic Street, Bellingham, MA 02019.
Town of Braintree	Town Hall, 1 John F. Kennedy Memorial Drive, Braintree, MA 02184.
Town of Brookline	Town Hall, 333 Washington Street, Brookline, MA 02445.
Town of Canton	Town Hall, 801 Washington Street, Canton, MA 02021.
Town of Cohasset	Town Hall, 41 Highland Avenue, Cohasset, MA 02025.
Town of Dedham	Town Hall, 450 Washington Street, Dedham, MA 02026.
Town of Dover	Town House, 5 Springdale Avenue, Dover, MA 02030.
Town of Foxborough	Town Hall, 40 South Street, Foxborough, MA 02035.
Town of Franklin	Town Hall, 355 East Central Street, Franklin, MA 02038.
Town of Holbrook	Town Hall, 50 North Franklin Street, Holbrook, MA 02343.
Town of Medfield	Town House, 459 Main Street, Medfield, MA 02052.
Town of Medway	Town Hall, 155 Village Street, Medway, MA 02053.
Town of Millis	Veterans Memorial Building, 900 Main Street, Millis, MA 02054.
Town of Milton	Town Office Building, 525 Canton Avenue, Milton, MA 02186.
Town of Needham	Town Hall, 1471 Highland Avenue, Needham, MA 02492.
Town of Norfolk	Town Hall, 1 Liberty Lane, Norfolk, MA 02056.
Town of Norwood	Town Hall, 566 Washington Street, Norwood, MA 02062.
Town of Plainville	Town Hall, 142 South Street, Plainville, MA 02762.
Town of Randolph	Town Hall, 41 South Main Street, Randolph, MA 02368.
Town of Sharon	Town Office Building, 90 South Main Street, Sharon, MA 02067.
Town of Stoughton	Town Hall, 10 Pearl Street, Stoughton, MA 02072.
Town of Walpole	Town Hall, 135 School Street, Walpole, MA 02081.
Town of Wellesley	Town Hall, 888 Worcester Street, Wellesley, MA 02482.
Town of Westwood	Town Hall, 580 High Street, Westwood, MA 02090.
Town of Weymouth	Town Hall, 75 Middle Street, Weymouth, MA 02189.
Town of Wrentham	Town Hall, 79 South Street, Wrentham, MA 02093.
Worcester County, Massachusetts (All Jurisdictions) Project: 16–01–0276S Preliminary Dates: August 13, 2021 and May 05, 2023	
City of Fitchburg	City Hall, 718 Main Street, Fitchburg, MA 01420.
City of Gardner	City Hall, 95 Pleasant Street, Gardner, MA 01440.
City of Leominster	City Hall, 25 West Street, Leominster, MA 01453.
City of Worcester	City Hall, 455 Main Street, Worcester, MA 01608.
Town of Ashburnham	Town Hall, 32 Main Street, Ashburnham, MA 01430.
Town of Berlin	Town Offices, 23 Linden Street, Berlin, MA 01503.
Town of Bolton	Town Hall, 663 Main Street, Bolton, MA 01740.
Town of Boylston	Town Hall, 221 Main Street, Boylston, MA 01505.
Town of Clinton	Town Hall, 242 Church Street, Clinton, MA 01510.
Town of Harvard	Town Hall, 13 Ayer Road, Harvard, MA 01451.
Town of Holden	Starbard Building, 1204 Main Street, Holden, MA 01520.
Town of Hopedale	Town Office, 78 Hopedale Street, Hopedale, MA 01747.
Town of Hubbardston	Town Hall, 7 Main Street, Hubbardston, MA 01452.
Town of Lancaster	Prescott Building, 701 Main Street, Lancaster, MA 01523.
Town of Lunenburg	Town Hall, 17 Main Street, Lunenburg, MA 01462.
Town of Mendon	Town Hall, 20 Main Street, Mendon, MA 01756.
Town of Milford	Town Hall, 52 Main Street, Milford, MA 01757.
Town of Paxton	Town Hall, 697 Pleasant Street, Paxton, MA 01612.
Town of Princeton	Town Hall, 6 Town Hall Drive, Princeton, MA 01541.
Town of Rutland	Town Hall, 250 Main Street, Rutland, MA 01543.
Town of Sterling	Butterick Municipal Building, 1 Park Street, Sterling, MA 01564.
Town of West Boylston	Town Hall, 140 Worcester Street, West Boylston, MA 01583.
Town of Westminster	Town Hall, 11 South Street, Westminster, MA 01473.

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2023–19891 Filed 9–13–23; 8:45 am]

BILLING CODE 9110–12–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–585–586 and 731–TA–1383–1384 (Review)]

Stainless Steel Flanges From China and India; Scheduling of Expedited Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of expedited reviews pursuant to the Tariff Act of 1930 (''the Act'') to determine whether revocation of the antidumping and countervailing duty orders on stainless steel flanges from China and India would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.

DATES: August 4, 2023.

FOR FURTHER INFORMATION CONTACT: Nitin Joshi (202) 708–1669, Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter 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 (*https://www.usitc.gov*). The public record for this proceeding may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On August 4, 2023, the Commission determined that the domestic interested party group response to its notice of institution (88 FR 26592, May 1, 2023) of the subject five-year reviews was adequate and that the respondent interested party group response was inadequate. The Commission did not find any other circumstances that would warrant conducting full reviews.[1] Accordingly, the Commission determined that it would conduct expedited reviews pursuant to section 751(c)(3) of the Act (19 U.S.C. 1675(c)(3)).

For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

Staff report.—A staff report containing information concerning the subject matter of the reviews has been placed in the nonpublic record, and will be made available to persons on the Administrative Protective Order service list for these reviews on September 19, 2023. A public version will be issued thereafter, pursuant to § 207.62(d)(4) of the Commission's rules.

Written submissions.—As provided in § 207.62(d) of the Commission's rules, interested parties that are parties to the reviews and that have provided individually adequate responses to the notice of institution,[2] and any party other than an interested party to the reviews may file written comments with the Secretary on what determination the Commission should reach in the reviews. Comments are due on or before September 27, 2023, and may not contain new factual information. Any person that is neither a party to the five-year reviews nor an interested party may submit a brief written statement (which shall not contain any new factual information) pertinent to the reviews by September 27, 2023. If comments contain business proprietary information (BPI), they must conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

In accordance with §§ 201.16(c) and 207.3 of the rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Determination.—The Commission has determined these reviews are extraordinarily complicated and therefore has determined to exercise its authority to extend the review period by up to 90 days pursuant to 19 U.S.C. 1675(c)(5)(B).

Authority: These reviews are being conducted under authority of title VII of the Act; this notice is published pursuant to § 207.62 of the Commission's rules.

By order of the Commission.

Issued: September 11, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–19873 Filed 9–13–23; 8:45 am]

BILLING CODE 7020–02–P

[1] A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements will be available from the Office of the Secretary and at the Commission's website.

[2] The Commission has found the responses submitted on behalf of Ameriforge, Core Pipe Products, Inc., and Kerkau Manufacturing to be individually adequate. Comments from other interested parties will not be accepted (*see* 19 CFR 207.62(d)(2)).

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Green Wave Analytical Decision and Order

On August 10, 2022, the Drug Enforcement Administration (hereinafter, DEA or Government) issued an Order to Show Cause (hereinafter, OSC) to Green Wave Analytical (hereinafter, Applicant) of San Diego, California. Request for Final Agency Action (hereinafter, RFAA), Exhibit (hereinafter, RFAAX) 10, at 1, 6. The OSC proposed the denial of Applicant's application for a DEA Certificate of Registration (hereinafter, registration), Control No. W21055614H, alleging that Applicant has ''committed such acts as would render [its] registration inconsistent with the public interest.'' *Id.* at 1, 2 (citing 21 U.S.C. 824(a)(4),[1] 823(g)(1)[2]).

The Agency makes the following findings of fact based on the uncontroverted evidence submitted by the Government in its RFAA dated March 3, 2023.[3]

[1] Prior Agency decisions have addressed whether it is appropriate to consider a provision of 21 U.S.C. 824(a) when determining whether to grant a practitioner registration application. For over forty-five years, Agency decisions have concluded that it is. *Robert Wayne Locklear, M.D.,* 86 FR 33738, 33744–45 (2021) (collecting cases); *see also Dinorah Drug Store, Inc.,* 61 FR 15972, 15973–74 (1996).

[2] Effective December 2, 2022, the Medical Marijuana and Cannabidiol Research Expansion Act, Public Law 117–215, 136 Stat. 2257 (2022) (Marijuana Research Amendments or MRA), amended the Controlled Substances Act (CSA) and other statutes. Relevant to this matter, the MRA redesignated 21 U.S.C. 823(f), cited in the OSC, as 21 U.S.C. 823(g)(1). Accordingly, this Decision cites to the current designation, 21 U.S.C. 823(g)(1), and to the MRA-amended CSA throughout.

[3] Based on the Declaration from a DEA Diversion Investigator, the Agency finds that the

I. Findings of Fact

According to the DEA Diversion Investigator assigned to investigate Applicant (hereinafter, the DI), on May 18, 2021, Applicant applied, through its owner (hereinafter, J.P.), for a DEA registration as an analytical lab. RFAAX 1, at 2; *see also* RFAAX 3. Applicant's previous DEA registration, Control No. RG0546359, expired on September 30, 2020, and since then, Applicant has not held an active DEA registration. RFAAX 1, at 3; *see also* RFAAX 4. As part of her investigation of the application, the DI exchanged emails with J.P. regarding Applicant's possession of controlled substances. RFAAX 1, at 3; *see also* RFAAX 5. The DI asked J.P. if Applicant continued to possess controlled substances at its facility, and J.P. stated that Applicant had old samples of phenobarbital injection (Schedule IV) and ''a very small amount'' of opium suppositories (Schedule II) stored. RFAAX 1, at 3; RFAAX 5, at 4–5. Further, J.P. added that Applicant was uncertain of the proper disposal procedure for such substances. RFAAX 1, at 3; RFAAX 5, at 4.

The DI attempted to schedule with J.P. an onsite preregistration inspection of Applicant and time to assist J.P. with disposal of the controlled substances that Applicant continued to unlawfully possess.[4] RFAAX 1, at 3; RFAAX 5, at 1–3. On August 3, 2021, the DI, along with another Diversion Investigator, traveled to Applicant's registered address ''for the purpose of [Applicant] voluntarily surrendering its controlled substances and with the understanding that the preregistration inspection would occur at a later date.'' RFAAX 1, at 4. According to the DI, J.P. showed her the area of the facility where controlled substances were kept locked in a cabinet, and the DI found that Applicant possessed greater quantities and more types of controlled substances than J.P. had previously claimed. *Id.* Further, only some portions of the substances possessed by Applicant were labeled as controlled substances, with other portions unlabeled and unidentified.[5] *Id.* Applicant surrendered all of the substances, which the DI took possession of, inventoried, and delivered to the DEA Southwest Laboratory. *Id.; see also* RFAAX 6.[6] While still at Applicant's location, the DI also asked J.P. for the accompanying receiving records, logs, and/or inventory documentation, to which J.P. indicated that ''he did not have any such records, except for a partially completed DEA Form 222 in which [Applicant] acquired powdered opium suppositories from Vitae Enim Vitae Scientific, Inc. (VEV).'' RFAAX 5, at 1; *see also* RFAAX 7.[7]

Thereafter, the DI requested administrative subpoenas for VEV's records ''[t]o determine whether [Applicant] received any controlled substance[s] as a DEA registrant, for which it lacked records of receipt, and whether [Applicant] received any controlled substances after its DEA registration expired, for which it lacked legal authorization.'' RFAAX 1, at 5–6. On August 9, 2021, DEA issued an administrative subpoena to VEV, pursuant to which VEV produced records of controlled substance distributions to Applicant and ''Order Information/Chain of Custody'' forms. *Id.* at 6; *see also* RFAAX 8. As noted by the DI, the records show that ''between on or about October 21, 2020, and July 15, 2021, on approximately 14 occasions—while [Applicant] was not registered—[Applicant] received approximately 7.958 [g] of powder phenobarbital sodium, and at least 21 [ml] of phenobarbital sodium at a concentration of 130 [mg/ml].'' *Id.*[8]

On July 6, 2022, DEA issued another administrative subpoena to VEV, pursuant to which VEV produced records of controlled substance distributions from VEV to Applicant between December 3, 2018, and September 30, 2020, ''Order Information/Chain of Custody'' forms, and DEA Forms 222. *Id.; see also* RFAAX 9. As noted by the DI, the records show that ''between on or about May 7, 2019, and September 29, 2020, on approximately 31 occasions—while [Applicant] was registered—[Applicant] received approximately 645 vials of 65 mg/ml phenobarbital sodium, 775 vials of 130 mg/ml phenobarbital sodium, 30.7 g of powder phenobarbital sodium, 3.9 g of powder opium, and 0.5 g of powder morphine sulfate, yet [Applicant] did not maintain any records of receipt.'' *Id.*

II. Discussion

Pursuant to Section 303(g)(1) of the CSA ''[t]he Attorney General shall register practitioners . . . to dispense . . . controlled substances . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(g)(1). Section 303(g)(1) further provides that an application for a practitioner's registration may be denied upon a determination that ''the issuance of such registration . . . would be inconsistent with the public interest.'' *Id.* In making the public interest determination, the CSA requires consideration of the following factors:

(A) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(B) The applicant's experience in dispensing, or conducting research with respect to controlled substances.

(C) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(D) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(E) Such other conduct which may threaten the public health and safety.

21 U.S.C. 823(g)(1).

The DEA considers these public interest factors in the disjunctive. *Robert A. Leslie, M.D.,* 68 FR 15227, 15230 (2003). Each factor is weighed on a case-by-case basis. *Morall* v. *Drug Enf't Admin.,* 412 F.3d 165, 173–74 (D.C. Cir. 2005). Any one factor, or combination of factors, may be decisive. *David H. Gillis, M.D.,* 58 FR 37507, 37508 (1993). While the Agency has considered all of the public interest factors in 21 U.S.C. 823(g)(1),[9] the Government's evidence

---

Government's service of the OSC on Applicant was adequate. RFAAX 1, at 7. Further, based on the Government's assertions in its RFAA, the Agency finds that more than thirty days have passed since Applicant was served with the OSC and Applicant has neither requested a hearing nor submitted a corrective action plan, and therefore, has waived any such rights. RFAA, at 6; *see also* 21 CFR 1301.43 and 21 U.S.C. 824(c)(2).

[4] Regarding the quantities of controlled substances possessed by Applicant, J.P. stated ''I guess there are about 250 to 400 × 2 mL small vials with septum caps. Most are variable amounts left as they were analyzed in most cases. I guess that is about 400 to 500 total mLs of Phenobarbital Sodium Injection Solution.'' RFAAX 1, at 3–4; RFAAX 5, at 1.

[5] The DI noted that ''in addition to quantities of phenobarbital injections and opium suppositories, [Applicant] also had quantities of morphine sulfate and tetrahydrocannabinol (THC) residue.'' *Id.*

[6] As listed by the DI, ''the controlled substances (as identified by label) that [Applicant] unlawfully possessed included suppositories of opium . . . approximately 500 milligrams (mg) of morphine sulfate . . . 200 mg of phenobarbital . . . 1,714 vials of phenobarbital of various concentrations; and one vial containing THC residue.'' RFAAX 1, at 5; *see also* RFAAX 6.

[7] The record purported to show that on March 3, 2020, Applicant ''ordered two packages of 180 mg powdered opium from VEV, and the supplier portions and [Applicant's] portions after delivery were not completed.'' RFAAX 1, at 5; RFAAX 7.

[8] The DI also noted that some of the ''Order Information/Chain of Custody'' forms stated the name ''Expert Chemical Analysis, Inc.'' as the purchaser. *Id.* Based on a review of DEA registration records and business entity records available online through the California Secretary of State, the DI found that ''Expert Chemical Analysis, Inc.'' was a non-registrant company controlled by J.P. at the same address as Applicant. RFAAX 1, at 6.

[9] As to Factor A, the record contains no evidence of a recommendation from any state licensing board or professional disciplinary authority. 21 U.S.C.

Continued

in support of its *prima facie* case for denial of Applicant's application is confined to Factors B and D. *See* RFAA, at 6–9. Moreover, the Government has the burden of proof in this proceeding. 21 CFR 1301.44.

Here, the Agency finds that the Government's evidence satisfies its *prima facie* burden of showing that Applicant's registration would be ''inconsistent with the public interest.'' 21 U.S.C. 824(a)(4).

1. Factors B and D

Evidence is considered under Public Interest Factors B and D when it reflects compliance (or non-compliance) with laws related to controlled substances and experience dispensing controlled substances. *See Kareem Hubbard, M.D.,* 87 FR 21156, 21162 (2022). In the current matter, the Government has alleged that Applicant has violated both federal and California state law regulating controlled substances. RFAAX 10, at 1–5.[10]

Under federal law, those engaged in chemical analysis are required to be registered with the DEA. 21 CFR 1301.13(e)(1)(x). Regarding recordkeeping, the CSA requires that DEA registrants maintain complete and accurate records of the manufacture, receipt, sale, delivery, or disposal of controlled substances. 21 U.S.C. 827(a)(3). Additional relevant recordkeeping requirements can be found at 21 CFR 1304.03(a) (all registrants shall maintain required records), 1304.04(a) (records must be retained and available for DEA inspection for at least two years), 1304.21(a) (records must be complete and accurate), 1304.23(a) (registrants registered for chemical analysis with controlled substances must maintain records for each controlled substance).

Here, the record demonstrates that prior to the expiration of its previous registration on September 30, 2020, Applicant failed to maintain necessary records as required by the CSA despite receiving and possessing controlled substances. Further, the record demonstrates that following the expiration of its previous registration on September 30, 2020, Applicant unlawfully continued to receive and possess large quantities of controlled substances without maintaining necessary records for two years as required by the CSA. As Applicant's conduct displays clear violations of federal law relating to controlled substances, the Agency hereby finds that Applicant violated 21 U.S.C. 827(a)(3) and 21 CFR 1301.13(e)(1)(x), 1304.03(a), 1304.04(a), 1304.21(a), 1304.23(a).

Accordingly, the Agency finds that Factors B and D weigh in favor of denial of Applicant's application and thus finds Applicant's registration to be inconsistent with the public interest in balancing the factors of 21 U.S.C. 823(g)(1). The Agency further finds that Applicant failed to provide sufficient evidence to rebut the Government's *prima facie* case.

III. Sanction

Where, as here, the Government has established grounds to deny Applicant's application, the burden shifts to the registrant to show why it can be entrusted with the responsibility carried by a registration. *Garret Howard Smith, M.D.,* 83 FR 18882, 18910 (2018). When a registrant has committed acts inconsistent with the public interest, it must both accept responsibility and demonstrate that it has undertaken corrective measures. *Holiday CVS, L.L.C., dba CVS Pharmacy Nos 219 and 5195,* 77 FR 62316, 62339 (2012) (internal quotations omitted). Trust is necessarily a fact-dependent determination based on individual circumstances; therefore, the Agency looks at factors such as the acceptance of responsibility, the credibility of that acceptance as it relates to the probability of repeat violations or behavior, the nature of the misconduct that forms the basis for sanction, and the Agency's interest in deterring similar acts. *See, e.g., Robert Wayne Locklear, M.D.,* 86 FR 33746.

Here, Applicant did not request a hearing, submit a corrective action plan, respond to the OSC, or otherwise avail itself of the opportunity to refute the Government's case. As such, Applicant has made no representations as to its future compliance with the CSA nor demonstrated that it can be entrusted with registration. Moreover, the evidence presented by the Government clearly shows that Applicant violated the CSA and the Agency has found that Applicant is ineligible for DEA registration. *See supra* at II.1. Accordingly, the Agency will order the denial of Applicant's application.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(g)(1) and 21 U.S.C. 824(a), I hereby deny the pending application for a Certificate of Registration, Control No. W21055614H, submitted by Green Wave Analytical, as well as any other pending application of Green Wave Analytical for additional registration in California. This Order is effective October 16, 2023.

Signing Authority

This document of the Drug Enforcement Administration was signed on September 5, 2023, by Administrator Anne Milgram. That document with the original signature and date is maintained by DEA. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DEA Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of DEA. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Scott Brinks,

Federal Register Liaison Officer, Drug Enforcement Administration.

[FR Doc. 2023–19820 Filed 9–13–23; 8:45 am]

BILLING CODE 4410–09–P

823(g)(1)(A). Nonetheless, an absence of such evidence ''does not weigh for or against a determination as to whether continuation of [or granting of a] DEA certification is consistent with the public interest.'' *Roni Dreszer, M.D.,* 76 FR 19434, 19444 (2011). As to Factor C, there is no evidence in the record that Applicant has been convicted of an offense under either federal or state law ''relating to the manufacture, distribution, or dispensing of controlled substances.'' 21 U.S.C. 823(g)(1)(C). Likewise to Factor A, Agency cases have found that ''the absence of such a conviction is of considerably less consequence in the public interest inquiry'' and is therefore not dispositive. *Dewey C. MacKay, M.D.,* 75 FR 49956, 49973 (2010). Finally, as to Factor E, the Government's evidence fits squarely within the parameters of Factors B and D and does not raise ''other conduct which may threaten the public health and safety.'' 21 U.S.C. 823(g)(1)(E). Accordingly, Factor E does not weigh for or against Applicant.

[10] The Agency need not adjudicate the criminal violations alleged in the instant Order to Show Cause. *Ruan* v. *United States,* 142 S. Ct. 2370 (2022) (decided in the context of criminal proceedings).

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 23–7]

Rachel Pittala, APRN; Decision and Order

On October 18, 2022, the Drug Enforcement Administration (DEA or Government) issued an Order to Show Cause and Immediate Suspension of Registration (OSC/ISO) to Rachel Pittala, APRN (Respondent) of Orlando, Florida. OSC/ISO, at 1. The OSC/ISO informed Respondent of the immediate suspension of her DEA Certificate of Registration, Control No. MP4600791, pursuant to 21 U.S.C. 824(d), alleging that Respondent's continued registration constitutes '''an imminent danger to the public health or safety.' '' OSC/ISO, at 1 (quoting 21 U.S.C. 824(d)). The OSC/

ISO also proposed the revocation of Respondent's registration, alleging that Respondent has ''committed such acts as would render [her] registration inconsistent with the public interest.'' *Id.* at 1, 4 (citing 21 U.S.C. 823(g)(1),[1] 824(a)(4)).

A hearing was held before DEA Administrative Law Judge Teresa A. Wallbaum (the ALJ) who, on May 15, 2023, issued her Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision (Recommended Decision or RD), which recommended revocation of Respondent's registration. RD, at 27. Respondent did not file exceptions to the RD. Having reviewed the entire record, the Agency adopts and hereby incorporates by reference the entirety of the ALJ's rulings, credibility findings,[2] findings of fact, conclusions of law, sanctions analysis, and recommended sanction as found in the RD.

I. Findings of Fact

Investigation and Undercover Phone Call

Respondent was a mid-level practitioner at Sawgrass Health of Florida (Sawgrass Health), a practice operated by physician S.H. RD, at 5; Tr. 37, 44. On April 4, 2022, an undercover detective (UC) posing as a patient went to Sawgrass Health and recorded his visit with S.H. and his attempt to obtain prescriptions. RD, at 5; Tr. 46–47, 74. Respondent was not present during the visit. RD, at 5; Tr. 66. UC testified that during the visit, S.H. did not perform a physical examination, take vital signs, or obtain a medical history; further, S.H. indicated that he would not be issuing any prescriptions and that Respondent would follow up with UC to issue him prescriptions. RD, at 5–6; Tr. 83, 92, 112. On April 5, 2022, Respondent and UC had a phone call. RD, at 6; Tr. 92, 94–95; GX 6–7.

At the beginning of the call, Respondent stated to UC, ''[S.H.] sent me a message and . . . asked me to give you a call so we can . . . see whatcha need,'' and then immediately asked UC ''what medication [he was] needing.'' RD, at 6; GX 8, at 1. UC stated that he wanted Adderall, to which Respondent asked UC if he had attention-deficit/hyperactivity disorder (ADHD) and UC replied, ''No I don't I just . . . like taking it[.] I don't . . . have any medical stuff.'' *Id.* UC told Respondent that he was buying 30 mg tablets of Adderall, the highest strength of Adderall tablets, from a friend but that he did not want to continue purchasing them from his friend. *Id.;* Tr. 161. Then, Respondent stated, ''[S]o I do have to put[,] in order to legally prescribe this medication for you[,] [ ] I have to document that you have a diagnosis of ADHD.'' RD, at 6; GX 8, at 4. When UC was non-responsive, Respondent reiterated, ''I have to document that otherwise I can't prescribe it,'' to which UC replied, ''Ok well I mean whatever you gotta put down.'' *Id.* Respondent asked UC if he was ever told as a child that he had ADHD to which UC said no twice; then Respondent stated, ''Oh ok so . . . a friend just let you try it out and it just gives you energy and helps you concentrate better,'' to which UC replied, ''Yeah.'' *Id.*

Following Respondent's indication that she would send a prescription for Adderall to UC's pharmacy, UC also asked Respondent for a Xanax[3] prescription. RD, at 6; GX 8, at 4. Respondent then stated that Sawgrass Health did not issue Xanax prescriptions, to which UC replied that he would ''keep getting that from [his] friend then.'' RD, at 6; GX 8, at 5. Respondent discouraged UC from buying Xanax from friends because the pills could be dangerous and illegitimate; Respondent and UC also briefly discussed the dangers of fentanyl and Respondent said that she could give UC Klonopin[4] instead of Xanax, but UC would need to choose between the Klonopin and Adderall prescriptions because Respondent was ''trying not to do too much combinations'' and she would need to check with S.H. RD, at 6; GX 8, at 5–6. Respondent told UC that he had to promise that he would not be ''using anything on the street'' if she gave him the prescriptions. RD, at 7; GX 8, at 7; Tr. 114. Respondent stated to UC, ''[y]ou have a lot of anxiety,'' to which UC responded, ''[n]o . . . I just started taking it when they . . . gave it to me and I was like alright I'll try it.'' RD, at 7; GX 8, at 7–8. When Respondent asked UC if he took Xanax for anxiety or to relax, UC said that it was ''[m]ore of a relax'' and said that he either took Xanax or ''smoke[d] weed'' to relax. RD, at 7; GX 8, at 8.

Respondent and UC again discussed the dangers of fentanyl; Respondent told UC that he did the right thing by coming to see S.H. and asked that UC not purchase anything illicitly. RD, at 7; GX 8, at 8–10. At the conclusion of the phone call, Respondent told UC that she would issue him prescriptions for 30 mg tablets of Adderall and 1 mg tablets of Klonopin. RD, at 7; GX 8, at 5–6, 10–11. After his call with Respondent, UC went to the pharmacy where Respondent had sent his prescriptions, filled the prescriptions, and obtained the controlled substances. RD, at 7; Tr. 106–108; GX 9a; GX 9b; GX 11.

Respondent

Respondent worked at Sawgrass Health and signed a collaborative agreement with S.H. for him to be her supervising physician. RD, at 8; Tr. 221–222, 225–226, 230; RX 2.[5] [6] When treating patients at Sawgrass Health, S.H. would establish care with new

[1] Effective December 2, 2022, the Medical Marijuana and Cannabidiol Research Expansion Act, Public Law 117–215, 136 Stat. 2257 (2022) (Marijuana Research Amendments or MRA), amended the Controlled Substances Act (CSA) and other statutes. Relevant to this matter, the MRA redesignated 21 U.S.C. 823(f), cited in the OSC/ISO, as 21 U.S.C. 823(g)(1). Accordingly, this Decision cites to the current designation, 21 U.S.C. 823(g)(1), and to the MRA-amended CSA throughout.

[2] The Agency adopts the ALJ's summary of each of the witnesses' testimonies as well as the ALJ's assessment of each of the witnesses' credibility. *See* RD, at 3–13. The Agency agrees with the ALJ that the Diversion Investigator's testimony, which was focused on the uncontroversial introduction of documentary evidence and the Diversion Investigator's contact with the case, was credible in that it was sufficiently detailed, plausible, and internally consistent. *Id.* at 4. The Agency also agrees with the ALJ that the undercover detective's testimony, which was focused on the recorded phone conversation that the detective had with Respondent to obtain controlled substances, was credible in that it was internally consistent as well as consistent with both the Diversion Investigator's testimony and the recording of the detective's conversation with Respondent. *Id.* Further, the Agency agrees with the ALJ that the testimony from the Government's expert witness, which was focused on Respondent's treatment of the undercover detective, was credible and reliable given the expert's knowledge of the Florida standard of care and Florida state law underlying the standard of care. *Id.* at 5. Finally, the Agency agrees with the ALJ that Respondent's testimony was not fully credible in that it was unclear, evasive, and both internally contradictory and contradictory with the recording of the detective's conversation with Respondent. *Id.* at 12–13. Specifically, Respondent contradicted herself multiple times regarding her reasoning for prescribing Adderall, her reasoning for prescribing Adderall and Klonopin together, and the extent of her autonomy in treating patients. *Id.*

[3] Xanax is a brand name for alprazolam. RD, at 6.

[4] Klonopin is a brand name for clonazepam. RD, at 6.

[5] Under the collaborative agreement, Respondent had the authority to, among other things, determine if a patient should receive treatment; examine and initiate treatment of a patient's mental health and psychiatric conditions; prescribe controlled and non-controlled substances; and ultimately manage the patient's care and make her own decisions regarding the proper diagnosis and treatment. RD, at 8; Tr. 305–310; RX 2.

[6] Respondent viewed S.H. as a mentor and expert in addiction due to his experience at the Betty Ford Clinic and his success in treating patients abusing methamphetamine, cocaine, and other substances by prescribing Adderall. RD, at 9; Tr. 233–234, 244–245, 299, 388–389, 406, 411. Respondent testified that although she now recognizes that Adderall should not be prescribed to treat drug abuse, she had previously ''felt confident and comfortable'' trusting S.H.'s opinion and S.H. had ''felt that it was a good practice'' despite a lack of published studies regarding the use of Adderall for managing drug abuse. RD, at 9; Tr. 244–245, 249.

patients and then assign patients to Respondent. RD, at 8; Tr. 229.[7] When Respondent began treatment of a patient, she became independently responsible for deciding the course of treatment including what, if any, medications to prescribe, with recommendations from S.H. RD, at 8–9; Tr. 358–359.

Regarding the current matter, Respondent testified that prior to the phone call with UC, S.H. had provided her with a verbal history and indicated that UC had a substance use disorder, but S.H. specifically stated that he did not diagnose UC with ADHD or anxiety. RD, at 9; Tr. 371–373, 393, 395–397.[8] Respondent testified that she issued the Adderall prescription to UC because of S.H.'s recommendation that Adderall was an effective treatment for patients with substance use disorder, and Respondent documented a diagnosis of ADHD because there were no ICD codes [9] that allowed for Adderall to be prescribed for substance use disorder. RD, at 10; Tr. 380–381. Respondent also stated that she prescribed the Adderall because she was concerned that UC was illicitly purchasing it and could potentially take something laced with fentanyl. RD, at 10; Tr. 374–375, 380–382.

Regarding the Klonopin prescription, Respondent testified that she prescribed Klonopin to UC because she wanted to keep him safe and further explore a plan of care with follow-up visits. RD, at 10; Tr. 385–386.[10] Respondent testified that although UC stated multiple times that he did not have anxiety, she believed that his statements about wanting a benzodiazepine to relax were an indicator of generalized anxiety disorder (GAD); however, Respondent acknowledged that UC's statements about wanting to relax were not enough to establish a diagnosis of GAD and S.H. had not provided any diagnosis justifying a benzodiazepine prescription. RD, at 10–11; Tr. 378, 385, 397, 399–400.

In the time since her call with UC and since leaving Sawgrass Health, Respondent has obtained her post-master's certification to treat psychiatric and mental health conditions as well as completed two additional courses, one regarding safely and effectively prescribing controlled substances in Florida and the other regarding the laws and rules governing nursing in Florida. RD, at 11; Tr. 248–249; RX 8–9. Respondent testified that this training ''really clarified some things for [her].'' RD, at 11; Tr. 247. Respondent also testified that she now understands that S.H.'s opinion on Adderall was wrong and that she violated the CSA. RD, at 11; Tr. 249, 299.[11]

Florida Standard of Care

DEA hired Dr. Kennedy to testify as an expert in the standard of care in prescribing controlled substances in Florida, including for the management of pain and addiction and including prescribing by nurse practitioners. RD, at 4; Tr. 136–137.[12] Dr. Kennedy testified that a nurse practitioner is independently responsible for the controlled substance prescriptions that he or she issues and remains subject to any obligations under the Florida standard of care even if he or she has a collaborative agreement with a physician. RD, at 13; Tr. 186, 189, 204. According to Dr. Kennedy, the Florida standard of care requires that a nurse practitioner perform a physical examination,[13] obtain a medical history, create an individualized treatment plan, and maintain accurate and complete records. RD, at 13; Tr. 147. Further, a nurse practitioner may only prescribe controlled substances for a legitimate medical purpose and cannot provide treatment beyond his or her training. RD, at 14; Tr. 140–141.[14] Dr. Kennedy also testified that a nurse practitioner must monitor for red flags,[15] and to resolve a red flag, a nurse practitioner must, at a minimum, discuss and define the red flag with the patient and document it. RD, at 14; Tr. 154–155. Regarding the prescribing of Adderall by a nurse practitioner, Dr. Kennedy testified that under the Florida standard of care, a nurse practitioner can only prescribe Adderall for patients falling into one of three categories [16] and must consider the FDA ''Black Box'' warning for Adderall before prescribing it to a patient.[17] RD, at 14; Tr. 169, 419–420.

In reviewing the current matter, Dr. Kennedy determined, and the Agency agrees, that Respondent issued both prescriptions to UC beneath the Florida standard of care because, as detailed above, Respondent failed to make a diagnosis justifying either prescription, failed to take a medical history, failed to perform a physical examination, and failed to accurately document her treatment. RD, at 15; Tr. 170–172. Respondent's diagnostic procedure consisted of asking UC if he had ADHD and anxiety, to which UC repeatedly stated that he did not have either condition and wanted to take Adderall and Klonopin because he liked them and wanted to relax; and, Respondent ultimately failed to diagnose UC with any condition justifying either prescription, as well as ignored the FDA ''Black Box'' warning for Adderall in particular. RD, at 15–16; 159, 163–164, 166–169, 171–172, 419–420; GX 8, at 4, 8. Moreover, Respondent did not take a medical history for either prescription, did not perform any diagnostic interview for either prescription, failed

[7] Respondent exclusively provided care via telemedicine and never went to Sawgrass Health. RD, at 8; Tr. 232, 351. Following an in-person visit with a new patient, S.H. would contact Respondent to assign her the patient, give Respondent background on the patient, state a diagnosis, and make recommendations about treatment. RD, at 8; Tr. 251–252, 356.

[8] Respondent testified that UC ''didn't have an extensive history'' compared to other mental health patients that she treated and that she had no medical records for UC, so her conversation with S.H. was the only information she had besides what UC told her during their phone call. RD, at 9; Tr. 253–254, 372, 395.

[9] Respondent testified that ICD codes are codes that represent a diagnosis and are attached to medications that are prescribed to treat the diagnosis. RD, at 10 n.9; Tr. 387–388.

[10] On cross-examination, Respondent admitted that if a patient is not receiving controlled substances pursuant to a prescription, ''then that would be illicit drug use.'' RD, at 11; Tr. 300–301.

[11] Respondent stated that, at the time she prescribed Adderall, she ''did not willingly violate the Nurse Practice Act.'' RD, at 11; Tr. 246. Respondent also stated that she should have done a further assessment, assigned diagnostic criteria more appropriately, and used the ADHD and GAD screening questionnaires before prescribing Adderall and Klonopin. RD, at 11; Tr. 412. Respondent admitted that even when a patient reports having a particular condition, a practitioner must still evaluate the patient and confirm the diagnosis before prescribing controlled substances, and it was inappropriate for her to document a diagnosis or ICD code for a condition that a patient did not have. RD, at 11; Tr. 285–286, 291–292, 294–295, 394–395.

[12] For Dr. Kennedy's qualifications, *see* RD, at 4–5; Tr. 119, 124–129, 132–133, 135, 188. Dr. Kennedy testified that Florida statutes and Florida medical board regulations form the Florida standard of care. RD, at 13; Tr. 130–131.

[13] When treating a patient for a psychiatric condition, the physical examination may be a mental status examination or diagnostic interview without physical contact. RD, at 14; Tr. 182.

[14] Dr. Kennedy noted that it would be outside of the standard of care to prescribe controlled substances solely for the purpose of preventing a patient from obtaining controlled substances illicitly and that such a situation would more likely warrant ''a very strong reason not to prescribe that medication.'' RD, at 14; Tr. 422, 424.

[15] Dr. Kennedy defined red flags as ''cautionary things'' that should raise a practitioner's attention and indicated that a patient stating that he or she obtains controlled substances from an illicit source ''would be a big red flag.'' RD, at 14; Tr. 154–155. Moreover, a history of drug abuse would also constitute a red flag. RD, at 14; Tr. 153–154.

[16] The three categories include: (1) patients with narcolepsy, patients with ADHD, or children with behavioral syndrome; (2) patients receiving a differential diagnostic psychiatric evaluation of depression or treatment of depression that has been refractory to other therapies; and (3) patients participating in clinical investigations. RD, at 14; Tr. 169.

[17] The ''Black Box'' warning for Adderall states that Adderall has a high potential for abuse and diversion and should not be prescribed to patients with a history of drug abuse. RD, at 14; Tr. 151–154; GX 12, at 1.

to properly address clear red flags of diversion and abuse, and knowingly documented false diagnoses of ADHD and GAD. RD, at 15–16; Tr. 161–162, 164, 167–168, 170, 172–173, 180–182, 197–200, 202, 400–401, 422–423; GX 8 at 4–5, 7–8.

II. Discussion

A. The Five Public Interest Factors

Under the CSA, ''[a] registration . . . to . . . dispense a controlled substance . . . may be suspended or revoked by the Attorney General upon a finding that the registrant . . . has committed such acts as would render her registration under section 823 of this title inconsistent with the public interest as determined under such section.'' 21 U.S.C. 824(a). In making the public interest determination, the CSA requires consideration of the following factors:

(A) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(B) The [registrant's] experience in dispensing, or conducting research with respect to controlled substances.

(C) The [registrant's] conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(D) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(E) Such other conduct which may threaten the public health and safety.

21 U.S.C. 823(g)(1).

The DEA considers these public interest factors in the disjunctive. *Robert A. Leslie, M.D.,* 68 FR 15,227, 15,230 (2003). Each factor is weighed on a case-by-case basis. *Morall* v. *Drug Enf't Admin.,* 412 F.3d 165, 173–74 (D.C. Cir. 2005). Any one factor, or combination of factors, may be decisive. *David H. Gillis, M.D.,* 58 FR 37,507, 37,508 (1993).

The Government has the burden of proof in this proceeding. 21 CFR 1301.44. While the Agency has considered all of the public interest factors in 21 U.S.C. 823(g)(1), the Government's evidence in support of its *prima facie* case for revocation of Respondent's registration is confined to Factors B and D. RD, at 18; *see also* RD, at 18. n.16 (finding that Factors A, C, and E do not weigh for or against revocation).

Having reviewed the record and the RD, the Agency agrees with the ALJ, adopts the ALJ's analysis, and finds that the Government's evidence satisfies its *prima facie* burden of showing that Respondent's continued registration would be ''inconsistent with the public interest.'' 21 U.S.C. 824(a)(4). RD, at 18–23.

B. Factors B and D

Evidence is considered under Public Interest Factors B and D when it reflects compliance (or non-compliance) with laws related to controlled substances and experience dispensing controlled substances. *See Sualeh Ashraf, M.D.,* 88 FR 1095, 1097 (2023); *Kareem Hubbard, M.D.,* 87 FR 21156, 21162 (2022). DEA regulations require that for a prescription for a controlled substance to be effective, it must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of professional practice. 21 CFR 1306.04(a); *see also* 21 U.S.C. 829. Further, Florida state law provides that a practitioner, including an advanced practice registered nurse, may only prescribe controlled substances when acting in good faith and in the course of professional practice. Fla. Stat. 893.02(3), 893.05(1)(a). Florida state law also provides that a nurse practitioner may be subject to discipline for, among other things, prescribing controlled substances for any purpose other than legitimate purposes [18] and for ''[f]ailing to meet minimal standards of acceptable and prevailing nursing practice, including engaging in acts for which the nurse is not qualified by training or experience.'' *Id.* 464.018(1)(i), (n). Under Florida state law, it is ''legally presumed that prescribing . . . controlled substances[ ] inappropriately . . . is not in the best interest of the patient and is not in the course of the advanced practice registered nurse's professional practice, without regard to his or her intent.'' *Id.* 464.018(1)(p)(6). Finally, Florida state law only authorizes the prescribing of amphetamines by a nurse practitioner for three specific purposes: (1) to treat patients with narcolepsy, patients with ADHD, or children with behavioral syndrome; (2) to treat patients receiving a differential diagnostic psychiatric evaluation of depression or treatment of depression that has been refractory to other therapies; and (3) to patients participating in clinical investigations. *Id.* 464.018(1)(p)(3).

In the current matter, the Agency agrees with the ALJ's analysis that Respondent issued prescriptions for Adderall and Klonopin to UC beneath the Florida standard of care and thus violated Federal and State Law because, as detailed above, Respondent failed to make a diagnosis justifying either prescription, failed to take a medical history, failed to perform a physical examination (conduct a diagnostic interview), and failed to accurately document her treatment. RD, at 20. Instead, Respondent ''prescribed two controlled substances to a person who repeatedly denied having any medical justification for those medications, repeatedly admitted that he was obtaining controlled substances illegally, and admitted that he wanted the controlled substances for recreational use.'' *Id.* Moreover, Respondent knowingly created and documented false diagnoses to issue the prescriptions for an improper purpose, that is, to prevent UC from illicitly obtaining controlled substances. *Id.* at 20, 21.

As Respondent's conduct displays clear violations of the federal and state regulations described above, the Agency agrees with the ALJ and hereby finds that Respondent violated 21 CFR 1306.04(a) and Fla. Stat. 464.018(1)(i), 464.018(1)(n), 464.018(1)(p)(3), 464.018(1)(p)(6), 893.02(3), 893.05(1)(a). RD, at 23. Accordingly, the Agency agrees with the ALJ and finds that Factors B and D weigh in favor of revocation of Respondent's registration and thus finds Respondent's continued registration to be inconsistent with the public interest in balancing the factors of 21 U.S.C. 823(g)(1). *Id.*

III. Sanction

Where, as here, the Government has established sufficient grounds to revoke Respondent's registration, the burden shifts to the registrant to show why she can be entrusted with the responsibility carried by a registration. *Garret Howard Smith, M.D.,* 83 FR 18882, 18910 (2018). When a registrant has committed acts inconsistent with the public interest, she must both accept responsibility and demonstrate that she has undertaken corrective measures. *Holiday CVS, L.L.C., dba CVS Pharmacy Nos 219 and 5195,* 77 FR 62316, 62339 (2012) (internal quotations omitted). Trust is necessarily a fact-dependent determination based on individual circumstances; therefore, the Agency looks at factors such as the acceptance of responsibility, the credibility of that acceptance as it relates to the probability of repeat violations or behavior, the nature of the misconduct that forms the basis for sanction, and the Agency's interest in deterring similar acts. *See, e.g., Robert Wayne Locklear, M.D.,* 86 FR 33738, 33746 (2021).

Here, the Agency agrees with the ALJ that Respondent failed to accept responsibility because ''[w]hile [she] acknowledged that she made mistakes with [UC] and would do things differently if she had the opportunity, she made excuses and shifted blame,''

[18] Legitimate purposes are as authorized by Fla. Stat. § 464.001–464.027 (the Nurse Practice Act).

such as repeatedly emphasizing that she had been trying to prevent UC from taking illicit controlled substances. RD, at 24–25.

When a registrant fails to make the threshold showing of acceptance of responsibility, the Agency need not address the registrant's remedial measures. *Ajay S. Ahuja, M.D.,* 84 FR 5479, 5498 n.33 (2019) (citing *Jones Total Health Care Pharmacy, L.L.C. & SND Health Care, L.L.C.,* 81 FR 79188, 79202–03 (2016)); *Daniel A. Glick, D.D.S.,* 80 FR 74800, 74801, 74810 (2015). Even so, in the current matter, the Agency agrees with the ALJ that although Respondent indicated that she has obtained her post-master's certification to treat psychiatric and mental health conditions as well as completed two additional courses, one regarding safely and effectively prescribing controlled substances in Florida and the other regarding the laws and rules governing nursing in Florida, ''these measures are inadequate in the face of her actions.'' RD, at 25.

In addition to acceptance of responsibility, the Agency considers both specific and general deterrence when determining an appropriate sanction. *Daniel A. Glick, D.D.S.,* 80 FR 74810. In this case, the Agency agrees with the ALJ that revocation will remind practitioners that a prescriber is independently responsible for the prescriptions that he or she issues. RD, at 27. Regarding Respondent in particular, ''[a]ny sanction short of revocation would fail to deter Respondent from ignoring red flags of diversion and prescribing controlled substances for other than legitimate medical purposes.'' *Id.* Moreover, the Agency agrees with the ALJ that Respondent's actions were egregious because Respondent knowingly recorded two false diagnoses when she documented ADHD and GAD to justify prescribing UC Adderall and Klonopin despite no medical justification for issuing the two prescriptions and in the face of obvious signs of diversion. RD, at 26–27.

In sum, Respondent has not offered any credible evidence on the record to rebut the Government's case for revocation of her registration and Respondent has not demonstrated that she can be entrusted with the responsibility of registration. RD, at 27. Accordingly, the Agency will order that Respondent's registration be revoked.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificate of Registration No. MP4600791 issued to Rachel Pittala, APRN. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(g)(1), I hereby deny any pending applications of Rachel Pittala, APRN, to renew or modify this registration, as well as any other pending application of Rachel Pittala, APRN, for additional registration in Florida. This Order is effective October 16, 2023.

Signing Authority

This document of the Drug Enforcement Administration was signed on September 5, 2023, by Administrator Anne Milgram. That document with the original signature and date is maintained by DEA. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DEA Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of DEA. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Scott Brinks,

Federal Register Liaison Officer, Drug Enforcement Administration.

[FR Doc. 2023–19819 Filed 9–13–23; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (BJA) Docket No. 1815]

Meeting of the Public Safety Officer Medal of Valor Review Board

AGENCY: Office of Justice Programs (OJP), Bureau of Justice Assistance (BJA).

ACTION: Notice of meeting.

SUMMARY: This is an announcement of a meeting (via WebEx/conference call-in) of the Public Safety Officer Medal of Valor Review Board to consider nominations for the 2022–2023 Medal of Valor, and to make a limited number of recommendations for submission to the U.S. Attorney General to be cited. Additional issues of importance to the Board may also be discussed.

DATES: October 12, 2023, 12:30 p.m. to 3:00 p.m. EDT.

ADDRESSES: This meeting will be held virtually using web conferencing technology. The public may hear the proceedings of this virtual meeting/conference call by registering with Gregory Joy at last seven (7) days in advance with Gregory Joy (contact information below).

FOR FURTHER INFORMATION CONTACT: Gregory Joy, Policy Advisor, Bureau of Justice Assistance, Office of Justice Programs, by telephone at (202) 514–1369, or by email at *Gregory.joy@usdoj.gov.*

SUPPLEMENTARY INFORMATION: The Public Safety Officer Medal of Valor Review Board carries out those advisory functions specified in 42 U.S.C. 15202. Pursuant to 42 U.S.C. 15201, the President of the United States is authorized to award the Public Safety Officer Medal of Valor, the highest national award for valor by a public safety officer.

This virtual meeting/conference call is open to the public to participate remotely. For security purposes, members of the public who wish to participate must register at least seven (7) days in advance of the meeting/conference call by contacting Mr. Joy.

Access to the virtual meeting/conference call will not be allowed without prior registration. Please submit any comments or written statements for consideration by the Review Board in writing at least seven (7) days in advance of the meeting date.

Gregory Joy,

Policy Advisor/Designated Federal Officer, Bureau of Justice Assistance.

[FR Doc. 2023–19918 Filed 9–13–23; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (BJA) Docket No. 1816]

Meeting of the Public Safety Officer Medal of Valor Review Board

AGENCY: Office of Justice Programs (OJP), Bureau of Justice Assistance (BJA).

ACTION: Notice of meeting.

SUMMARY: This is an announcement of a meeting (via WebEx/conference call-in) of the Public Safety Officer Medal of Valor Review Board to cover a range of issues of importance to the Board, to include but not limited to: Membership/terms; Board Bylaws; program marketing and outreach.

DATES: November 15, 2023, 1:00 p.m. to 2:00 p.m. EST.

ADDRESSES: This meeting will be held virtually using web conferencing technology. The public may hear the proceedings of this virtual meeting/conference call by registering at last

seven (7) days in advance with Gregory Joy (contact information below).

FOR FURTHER INFORMATION CONTACT: Gregory Joy, Policy Advisor, Bureau of Justice Assistance, Office of Justice Programs, by telephone at (202) 514–1369, or by email at *Gregory.joy@usdoj.gov.*

SUPPLEMENTARY INFORMATION: The Public Safety Officer Medal of Valor Review Board carries out those advisory functions specified in 42 U.S.C. 15202. Pursuant to 42 U.S.C. 15201, the President of the United States is authorized to award the Public Safety Officer Medal of Valor, the highest national award for valor by a public safety officer.

This virtual meeting/conference call is open to the public to participate remotely. For security purposes, members of the public who wish to participate must register at least seven (7) days in advance of the meeting/conference call by contacting Mr. Joy.

Access to the virtual meeting/conference call will not be allowed without prior registration. Please submit any comments or written statements for consideration by the Review Board in writing at least seven (7) days in advance of the meeting date.

Gregory Joy,

Policy Advisor/Designated Federal Officer, Bureau of Justice Assistance.

[FR Doc. 2023–19917 Filed 9–13–23; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Safety Defects; Examination, Correction, and Records

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Mine Safety and Health Administration (MSHA)-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 October 16, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Michael Howell by telephone at 202–693–6782, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: 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.

Title 30 CFR 56.13015 and 57.13015 require compressed-air receivers and other unfired pressure vessels to be inspected by inspectors holding a valid National Board Commission and in accordance with the applicable chapters of the National Board Inspection Code, a Manual for Boiler and Pressure Vessels Inspectors, 1979. Safety defects found on compressed-air receivers and other unfired pressure vessels have caused injuries and fatalities in the mining industry.

Records of inspections must be kept in accordance with the requirements of the National Board Inspection Code and the records must be made available to the Secretary or an authorized representative.

Title 30 CFR 56.13030 and 57.13030 require that fired pressure vessels (boilers) must be equipped with water level gauges, pressure gauges, automatic pressure-relief valves, blowdown piping and other safety devices approved by the American Society of Mechanical Engineers (ASME) to protect against hazards from overpressure, flameouts, fuel interruptions and low water level.

These sections also require that records of inspection and repairs be retained by the mine operator in accordance with the requirements of the ASME Boiler and Pressure Vessel Code, 1977, and the National Board Inspection Code (progressive records—no limit on retention time) and shall be made available to the Secretary or an authorized representative.

Title 30 CFR 56.14100 and 57.14100 require operators to inspect equipment, machinery, and tools that are to be used during a shift for safety defects before the equipment is placed in operation. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on March 21, 2023 (88 FRN 17022).

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.

Agency: DOL–MSHA.

Title of Collection: Respirator Program Records.

OMB Control Number: 1219–0089.

Affected Public: Businesses or other for-profits.

Number of Respondents: 11,279.

Frequency: On occasion.

Number of Responses: 5,487,441.

Annual Burden Hours: 1,236,293 hours.

Total Estimated Annual Other Costs Burden: $218,190.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michael Howell,

Senior Paperwork Reduction Act Analyst.

[FR Doc. 2023–19858 Filed 9–13–23; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Health Standards for Diesel Particulate Matter Exposure (Underground Coal Mines)

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Mine Safety and Health Administration (MSHA)-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 October 16, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Michael Howell by telephone at 202–693–6782, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: Under section 101(a) of the Federal Mine Safety and Health Act of 1977 (Mine Act), the Secretary of Labor shall 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 or other mines. In addition, section 103(h) of the Mine Act mandates that mine operators keep any records and make any reports that are reasonably necessary for the Mine Safety and Health Administration to perform its duties under the Mine Act.

MSHA established standards and regulations for diesel-powered equipment in underground coal mines that provide additional important protection for coal miners who work on and around diesel-powered equipment. The standards were designed to reduce the risks to underground coal miners of serious health hazards that are associated with exposure to high concentrations of diesel particulate matter. The standards contain information collection requirements for underground coal mine operators in §§ 72.510(a) & (b), 72.520(a) & (b).

Section 72.510(a) requires underground coal mine operators to provide annual training to all miners who may be exposed to diesel emissions. The training must include health risks associated with exposure to diesel particulate matter; methods used in the mine to control diesel particulate concentrations; identification of the personnel responsible for maintaining those controls; and actions miners must take to ensure controls operate as intended.

Section 72.510(b) requires underground coal mine operators to keep a record of the training for one year.

Section 72.520(a) and (b) requires underground coal mine operators to maintain an inventory of diesel powered equipment units together with a list of information about any unit's emission control or filtration system. The list must be updated within 7 calendar days of any change. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on March 21, 2023 (88 FRN 17019).

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.

Agency: DOL–MSHA.

Title of Collection: Respirator Program Records.

OMB Control Number: 1219–0124.

Affected Public: Businesses or other for-profits.

Number of Respondents: 164.

Frequency: On occasion.

Number of Responses: 55,980.

Annual Burden Hours: 710 hours.

Total Estimated Annual Other Costs Burden: $24.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michael Howell,

Senior Paperwork Reduction Act Analyst.

[FR Doc. 2023–19859 Filed 9–13–23; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Periodic Medical Surveillance Examinations for Coal Miners

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Mine Safety and Health Administration (MSHA)-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 October 16, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Michael Howell by telephone at 202–693–6782, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: Section 72.100(d) requires that each mine operator must develop and submit for approval to NIOSH a plan in accordance with 42 CFR part 37 for providing miners with the required periodic examinations specified in 72.100(a) and a roster specifying the name and current address of each miner covered by the plan.

Section 72.100(e) requires that each mine operator must post on the mine bulletin board at all times the approved plan for providing the examinations specified in 72.100(a). For additional substantive information about this ICR, see the related notice published in the **Federal Register** on March 21, 2023 (88 FRN 17025).

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.

Agency: DOL–MSHA.

Title of Collection: Periodic Medical Surveillance Examinations for Coal Miners.

OMB Control Number: 1219–0152.

Affected Public: Businesses or other for-profits.

Number of Respondents: 664.

Frequency: On occasion.

Number of Responses: 797.

Annual Burden Hours: 310 hours.

Total Estimated Annual Other Costs Burden: $239.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michael Howell,

Senior Paperwork Reduction Act Analyst.

[FR Doc. 2023–19860 Filed 9–13–23; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Presence Sensing Device Initiation (PSDI) Standard

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Occupational Safety & Health Administration (OSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before October 16, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Nicole Bouchet by telephone at 202–693–0213, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: Regulation 29 CFR 1910.217(h) regulates the use of Presence Sensing Devices (PSDs) in mechanical power-press safety systems. A PSD (*e.g.,* a photoelectric field or curtain) automatically stops the stroke of a mechanical power press when the device detects an operator entering a danger zone near the press. The PSD initiation standard contains a number of information collection requirements, including: certifying brake monitor adjustments, alternatives to photoelectric PSDs, safety system design and installation, and worker training; annual recertification of safety systems; establishing and maintaining the original certification and validation records, as well as the most recent recertification and revalidation records; affixing labels to test rods and to certified and recertified presses; and notifying an OSHA-recognized third-party validation organization when a safety system component fails, the employer modifies the safety system, or a point-of-operation injury occurs. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on May 26, 2023 (88 FR 34188).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–OSHA.

Title of Collection: Extension without change of a currently approved collection.

OMB Control Number: 1218–0143.

Affected Public: Private Sector—Businesses or other for-profits.

*Total Estimated Number of Respondents:*10.

*Total Estimated Number of Responses:*10.

Total Estimated Annual Time Burden: 1 hour.

Total Estimated Annual Other Costs Burden: $0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Nicole Bouchet,

Acting Departmental Clearance Officer.

[FR Doc. 2023–19857 Filed 9–13–23; 8:45 am]

BILLING CODE 4510–26–P

NUCLEAR REGULATORY COMMISSION

[NRC–2022–0189]

Information Collection: Licenses for Radiography and Radiation Safety Requirements for Radiographic Operations

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of submission to the Office of Management and Budget; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted a request for renewal of an existing collection of information to the Office of Management and Budget (OMB) for review. The information collection is entitled, ''Licenses for Radiography and Radiation Safety Requirements for Radiographic Operations.''

DATES: Submit comments by October 16, 2023. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: David Cullison, NRC Clearance Officer,

U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2022–0189 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2022–0189.
- *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, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The supporting statement and Burden and Responses Tables are available in ADAMS under Accession Nos. ML23194A135 and ML22336A232.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.
- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David C. Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

B. Submitting Comments

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment submissions are posted at *https://www.regulations.gov* and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the OMB, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the NRC recently submitted a request for renewal of an existing collection of information to OMB for review entitled, ''Part 34 of title 10 of the *Code of Federal Regulations* (10 CFR), Licenses for Radiography and Radiation Safety Requirements for Radiographic Operations.'' The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on April 20, 2023, 88 FR 24453.

1. *The title of the information collection:* 10 CFR part 34, Licenses for Radiography and Radiation Safety Requirements for Radiographic Operations.
2. *OMB approval number:* 3150–0007.
3. *Type of submission:* Extension.
4. *The form number, if applicable:* Not applicable.
5. *How often the collection is required or requested:* Applications for new licenses and amendments may be submitted at any time (on occasion). Applications for renewal are submitted every 15 years. Reports are submitted as events occur.
6. *Who will be required or asked to respond:* Applicants for and holders of specific licenses authorizing the use of licensed radioactive material for radiography.
7. *The estimated number of annual responses:* 2,938.
8. *The estimated number of annual respondents:* 548.
9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 243,547.12 (3,814 reporting + 217,977.52 recordkeeping + 21,755.60 third party disclosure).
10. *Abstract:* 10 CFR part 34, establishes radiation safety requirements for the use of radioactive material in industrial radiography. The information in the applications, reports and records is used by the NRC staff to ensure that the health and safety of the public is protected, and that licensee possession and use of source and byproduct material is in compliance with license and regulatory requirements.

Dated: September 11, 2023.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2023–19911 Filed 9–13–23; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

[Docket ID: OPM–2023–0033]

Privacy Act of 1974; System of Records

AGENCY: Office of Personnel Management.

ACTION: Notice of a new system of records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, the Office of Personnel Management (OPM) proposes to establish a new government-wide system of records titled ''OPM/GOVT–11 Federal Fair Chance Act Complaint Records.''

DATES: Submit comments on or before October 16, 2023. This new system is effective upon publication in the **Federal Register**, except for the routine uses, which are effective October 19, 2023.

ADDRESSES: You may submit written comments through the:

- *Federal Rulemaking Portal: https://www.regulations.gov.*

All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *https://www.regulations.gov* as they are

received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: For general questions, please contact: Timothy Curry, Deputy Associate Director, Employee Services, Accountability and Workforce Relations, Office of Personnel Management, at (202) 606–2930 or *employeeaccountability@opm.gov*. For privacy questions, please contact: Marc Flaster, Acting Senior Agency Official for Privacy, Office of Personnel Management, at (202) 606–2115 or *privacy@opm.gov.*

SUPPLEMENTARY INFORMATION: In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, OPM proposes to establish a new system of records titled ''OPM/GOVT–11 Federal Fair Chance Act Complaint Records.'' This system of records will enable Federal agencies to collect and maintain complaint records pertaining to the Fair Chance to Compete for Jobs Act of 2019 or the Fair Chance Act, 5 U.S.C. 9201–9206 (''FCA'' or ''the Act'').

The FCA limits the circumstances in which agencies may request criminal history information from an applicant prior to extending a conditional offer of employment. In addition, the FCA requires OPM to establish a complaint process by which applicants for appointment to a position in the civil service may submit a complaint, or any other information, relating to compliance with the requirements of the Act. Furthermore, the Act establishes requirements and procedures regarding penalties for violations.

The FCA directs OPM to establish and publish procedures under which an applicant for an appointment to a position in the civil service may submit a complaint, or any other information, relating to compliance by an employee of an agency with 5 U.S.C. 9202. The complaint, or any other information, is submitted to and maintained by the employing agency until such time as the complaint is referred to OPM or OPM requests the records.

The records in this system of records include the applicant's complaint or any other information submitted by the applicant and the agency's investigative report, which includes the agency's factual findings; a complete copy of all information gathered during the investigation, including documentary and testimonial evidence; any other information the agency believes OPM should consider; and any additional information OPM requests the agency provide. In addition, the records include OPM's written notification to the agency and the subject(s) of the complaint regarding OPM's assessment of the complaint, including whether to dismiss the complaint or that a violation may have occurred such that OPM is initiating adverse action proceedings under 5 CFR part 754, subpart B.

This proposed Government-wide system of records will include the complaint records in the custody and control of the agencies as well as those with OPM. OPM has provided a report of this system of records to the Committee on Oversight and Government Reform of the House of Representatives, the Committee on Homeland Security and Governmental Affairs of the Senate, and the Office of Management and Budget (OMB), pursuant to 5 U.S.C. 552a(r) and OMB Circular A–108, ''Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act,'' dated December 23, 2016. This system of records will be included in the OPM's inventory of records systems.

Dated: September 11, 2023.

Kayyonne Marston,

Federal Register Liaison.

SYSTEM NAME AND NUMBER:

Office of Personnel Management, OPM/Government-wide-11 Federal Fair Chance Act Complaint Records.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Employee Services, Accountability and Workforce Relations, Office of Personnel Management, and other Federal agencies are responsible for the records in this system of records. Records in OPM's custody are maintained at 1900 E Street NW, Washington, DC 20415. Other Federal agencies that receive Fair Chance Act complaints, or any other information, maintain records at their headquarters and field offices.

SYSTEM MANAGER(S):

Deputy Associate Director, Employee Services, Accountability and Workforce Relations, Office of Personnel Management, 1900 E Street NW, Washington, DC 20415.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Fair Chance to Compete for Jobs Act of 2019; 5 U.S.C. 9202; 5 CFR 754.

PURPOSE(S) OF THE SYSTEM:

The purpose of this system of records is to permit OPM and other Federal agencies to collect and maintain records to administer the provisions of the Fair Chance Act (FCA) regarding complaints, or any other information, for alleged violations of the FCA. This includes conducting all activities related to complaints, or any other information, receipt, investigation, adjudication, and, where applicable, appeal of the final decision.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals covered by this system of records are:

- Applicants for Federal civil service positions, other than positions excepted under 5 CFR 920.201(b), in a covered agency defined in 5 U.S.C. 105; and
- Agency employees who violate or have been alleged to have violated the Fair Chance Act.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records maintained in this system are:

- Full name;
- Phone numbers;
- Email addresses;
- Mailing addresses; and
- The applicant's complaint, or any other information provided;
- Any information provided by the applicant in support of the complaint;
- Documentation of the applicant's authorized representative;
- Information from current and potential parties and participants about the complaint and complaint process;
- Any records OPM creates when another agency refers a complaint to OPM;
- Correspondence or documentation issued by the t employing Federal agency; and
- Any other information related to the complaint and the complaint process, including OPM's processing of the complaint through the adjudication and any appeal.

RECORD SOURCE CATEGORIES:

Information contained in this system may be obtained from:

a. The applicant to whom the records pertain.

b. Supervisors, managers, and other agency officials.

c. Federal employees (non-applicants) and others who provide information regarding the complaint.

d. Investigators.

e. The individual applicant/complainant's authorized representative.

f. The employing Federal agency that received the complaint.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

The records in this system of records are records of OPM and should be

provided to those OPM employees who have an official need or use for those records. Therefore, if an employing agency is asked by an OPM employee to access the records within this system, such a request should be honored.

In addition to disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed as a routine use pursuant to 5 U.S.C. 552a(b)(3), as follows:

a. To the Department of Justice, including Offices of the U.S. Attorneys; another Federal agency conducting litigation or in proceedings before any court, adjudicative, or administrative body; another party in litigation before a court, adjudicative, or administrative body; or to a court, adjudicative, or administrative body. Such disclosure is permitted only when it is relevant and necessary to the litigation or proceeding, and one of the following is a party to the litigation or has an interest in such litigation:

(1) OPM, the employing Federal agency, or any component thereof;

(2) Any employee or former employee of OPM or the employing Federal agency in their official capacity;

(3) Any employee or former employee of OPM or the employing Federal agency in their individual capacity where the Department of Justice or another Federal agency has agreed to represent the employee;

(4) The United States, a Federal agency, or another party in litigation before a court, adjudicative, or administrative body, pursuant to 5 CFR part 295 or otherwise.

b. To the appropriate Federal, State, or local agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, when a record, either on its face or in conjunction with other information, indicates or is relevant to a violation or potential violation of civil or criminal law or regulation.

c. To a member of Congress from the record of an individual in response to an inquiry made at the request of the individual to whom the record pertains.

d. To the National Archives and Records Administration (NARA) for records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

e. To appropriate agencies, entities, and persons when (1) OPM or the employing Federal agency suspects or has confirmed that there has been a breach of the system of records; (2) OPM or the employing Federal agency has determined that, as a result of the suspected or confirmed breach, there is a risk of harm to individuals, OPM or the employing Federal agency (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

f. To another Federal agency or Federal entity, when OPM or the employing Federal agency determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

g. To contractors, experts, consultants, or volunteers performing or working on a contract or other assignment for OPM or the employing Federal agency when OPM or the employing Federal agency determines that it is necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use will have proper clearance, act on behalf of the relevant federal agency and understand the need to protect Privacy Act information.

h. To the Merit Systems Protection Board or the Office of the Special Counsel, the Federal Labor Relations Authority and its General Counsel, the Equal Employment Opportunity Commission, arbitrators, and hearing examiners to the extent necessary to carry out their authorized duties.

i. To any source, including but not limited to a former employee or Federal agency, from which information is requested in the course of reviewing, investigating, and responding to a complaint, to the extent necessary to identify the individual, inform the source of the nature of the complaint, and to identify the type of information being requested.

j. To the employing Federal agency and the employee who was the subject of the complaint, by OPM, to provide information to the employing agency concerning OPM's review and OPM's assessment regarding the complaint, including any decision to initiate adverse action proceedings or to dismiss the complaint.

k. To the Office of Government Information Services (OGIS), NARA, to the extent necessary to fulfill its responsibilities in 5 U.S.C. 552(h) to review administrative policies, procedures, and compliance with the FOIA, and to facilitate OGIS' offering of mediation services to resolve disputes between persons making FOIA requests and administrative agencies.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

The records in this system of records are stored electronically on OPM or Federal agency or cloud servers or on paper in locked file cabinets or locked offices with access restricted to those who have a need to know.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records may be retrieved by the name or by any other personal identifier, or combination of identifiers, contained in this system of records.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

The records in this system of records are subject to General Record Schedule 2.3, Item 060, which requires that they be destroyed no sooner than 4 years but no later than 7 years after the case is closed or there is a final settlement on appeal, as appropriate. Agencies must select one fixed retention period, between 4 and 7 years, for all administrative grievance, adverse action, and performance-based action case files. Agencies may not use different retention periods for individual cases.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Records in this system are protected from unauthorized access and misuse through various administrative, technical, and physical security measures. OPM and the other Federal agencies who maintain custody and control of records in this system of records are required to maintain security measures in compliance with the Federal Information Security Modernization Act of 2014 (Pub. L. 113–203), associated OMB policies, and applicable standards and guidance from the National Institute of Standards and Technology. Electronic records are protected by restricted access procedures, including passwords and sign-on protocols; paper records are in locked file cabinets or locked offices with restricted access. Only employees whose official duties require access to the electronic or paper records are authorized to view, administer, and control these records.

RECORD ACCESS PROCEDURES:

Individuals seeking notification of and access to their records in this system of records may submit a request in writing to the Office of Personnel Management, Office of Privacy and Information Management—FOIA, 1900 E Street NW, Room 5H25, Washington, DC 20415–7900 or by emailing *foia@opm.gov;* ATTN: Employee Services, Accountability and Workforce Relations. OPM may refer notification and access requests to the agency named in the complaint. In addition, if the individual is seeking notification of and access to records stored at the agency named in the complaint, or any other information, relating to a violation of 5 U.S.C. 9202, the individual may submit a request to that agency in accordance with the agency's FOIA and Privacy Act procedures. Individuals must furnish the following information to locate and identify the records sought:

1. Full name.
2. Email address or mailing address.
3. Name of the relevant agency named in the complaint.
4. Signature.

Individuals requesting access must also comply with OPM's Privacy Act regulations on verification of identity and access to records (5 CFR part 297).

CONTESTING RECORD PROCEDURES:

Individuals may request that records about them be amended by submitting a request in writing to the Office of Personnel Management, Office of Privacy and Information Management—FOIA, 1900 E Street NW, Room 5H25, Washington, DC 20415–7900 or by emailing *foia@opm.gov;* ATTN: Employee Services, Accountability and Workforce Relations. OPM may refer amendment requests to the agency named in the complaint. In addition, if the individual is seeking amendment of records stored at the agency named in the complaint, the individual may submit a request to the agency in accordance with the agency's Privacy Act procedures. Individuals must furnish the following information to locate and identify the records sought:

1. Full name.
2. Email address or mailing address.
3. Name of the relevant agency named in the complaint.
4. A precise description of the records for which they are requesting amendment and the reason for the amendment.
5. Signature.

Individuals must also comply with OPM's Privacy Act regulations on verification of identity and access to records (5 CFR part 297).

NOTIFICATION PROCEDURES:

See ''Record Access Procedures.''

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

None.

[FR Doc. 2023–19926 Filed 9–13–23; 8:45 am]

BILLING CODE 6325–67–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2023–1; MC2023–263 and CP2023–266; MC2023–264 and CP2023–267]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* September 15, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2023–1; *Filing Title:* Notice of the United States Postal Service of Filing Modification One to Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 6; *Filing Acceptance Date:* September 7, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Katalin K. Clendenin; *Comments Due:* September 15, 2023.

2. *Docket No(s).:* MC2023–263 and CP2023–266; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 52 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* September 7, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C.Mohr; *Comments Due:* September 15, 2023.

3. *Docket No(s).:* MC2023–264 and CP2023–267; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 7 to Competitive Product List and Notice of Filing Materials Under

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

Seal; *Filing Acceptance Date:* September 7, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* September 15, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2023–19822 Filed 9–13–23; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2022–52; CP2023–16; CP2023–21]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* September 18, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2022–52; *Filing Title:* Notice of the United States Postal Service of Filing Modification One to Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 4; *Filing Acceptance Date:* September 8, 2023; *Filing Authority:* 39 CFR 3035.105; *Public Representative:* Katalin K. Clendenin; *Comments Due:* September 18, 2023.

2. *Docket No(s).:* CP2023–16; *Filing Title:* Notice of the United States Postal Service of Filing Modification One to Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 8; *Filing Acceptance Date:* September 8, 2023; *Filing Authority:* 39 CFR 3035.105; *Public Representative:* Katalin K. Clendenin; *Comments Due:* September 18, 2023.

3. *Docket No(s).:* CP2023–21; *Filing Title:* Notice of the United States Postal Service of Filing Modification One to Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 9; *Filing Acceptance Date:* September 8, 2023; *Filing Authority:* 39 CFR 3035.105; *Public Representative:* Katalin K. Clendenin; *Comments Due:* September 18, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2023–19889 Filed 9–13–23; 8:45 am]

BILLING CODE 7710–FW–P

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* September 14, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on September 5, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 49 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–260, CP2023–263.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–19825 Filed 9–13–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* September 14, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on September 1, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 786 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–256, CP2023–259.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–19831 Filed 9–13–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* September 14, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on September 6, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 51 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–262, CP2023–265.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–19824 Filed 9–13–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Privacy Act; System of Records

AGENCY: Postal Service™.

ACTION: Notice of a modified system of records.

SUMMARY: The United States Postal Service™ (USPS™) is proposing to revise one General and one Customer Privacy Act Systems of Records. These updates are being made to support an initiative to implement a platform to manage Application Program Interfaces (APIs).

DATES: These revisions will become effective without further notice on October 16, 2023, unless comments received on or before that date result in a contrary determination.

ADDRESSES: Comments may be submitted via email to the Privacy and Records Management Office, United States Postal Service Headquarters (*uspsprivacyfedregnotice@usps.gov*). Arrangements to view copies of any written comments received, to facilitate public inspection, will be made upon request.

FOR FURTHER INFORMATION CONTACT: Janine Castorina, Chief Privacy and Records Management Officer, Privacy and Records Management Office at *uspsprivacyfedregnotice@usps.gov* or 202–268–2000.

SUPPLEMENTARY INFORMATION:

I. Background

This notice is in accordance with the Privacy Act requirement that agencies publish their systems of records in the **Federal Register** when there is a revision, change, or addition, or when the agency establishes a new system of records.

The Postal Service is proposing to modify the following SORs to implement a platform to manage APIs:

- USPS SOR 550.200 Commercial Information Technology Resources—Administrative
- USPS SOR 830.000 Customer Service and Correspondence

II. Rationale for Changes to USPS Privacy Act Systems of Records

Versatility and manageability are integral components of an organization's technology infrastructure. Application Programming Interfaces (APIs) allow applications to coordinate, send, and process data between otherwise disparate applications. The Postal Service utilizes a variety of these APIs for numerous reasons; however, the number and deployability of these APIs within the Postal Service's technology ecosystem can prove onerous. To that end, the Postal Service intends to implement an API manager for a limited scope. The scope of this new application will manage APIs connected or associated with an existing customer relationship management application.

To achieve this effort, the systems of records will be revised as follows:

- USPS SOR 550.200 Commercial Information Technology Resources—Administrative will be revised to modify one existing category of records, and will add fifteen new categories of records to reflect the auditing and tracking capabilities of users of the API manager.
- USPS SOR 830.000 Customer Service and Correspondence will be revised with one new purpose to allow the transmission of data to the API manager and to the ultimate destination of that customer data.

III. Description of the Modified System of Records

Pursuant to 5 U.S.C. 552a (e)(11), interested persons are invited to submit written data, views, or arguments on this proposal. A report of the proposed revisions has been sent to Congress and to the Office of Management and Budget for their evaluations. The Postal Service does not expect these amended systems of records to have any adverse effect on individual privacy rights. The notices for USPS SOR 550.200 Commercial Information Technology Resources—Administrative and USPS SOR 830.000 Customer Service and Correspondence are provided below in their entirety:

SYSTEM NAME AND NUMBER:

550.200 Commercial Information Technology Resources—Administrative

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

All USPS facilities and contractor sites.

SYSTEM MANAGER(S):

For records of computer access authorizations: Chief Information Officer and Executive Vice President, United States Postal Service, 475 L'Enfant Plaza SW, Washington, DC 20260.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

39 U.S.C. 401, 403, and 404.

PURPOSE(S) OF THE SYSTEM:

1. To provide active and passive monitoring and review of information system applications and user activities.
2. To generate logs and reports of information system application and user activities.
3. To provide a means of auditing commercial information system activities across applications and users.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

1. Individuals with authorized access to USPS computers, information resources, and facilities, including employees, contractors, business partners, suppliers, and third parties.
2. Individuals participating in web-based meetings, web-based video

conferencing, web-based communication applications, and web-based collaboration applications.

CATEGORIES OF RECORDS IN THE SYSTEM:

1. *General Audit Log activities:* DateTime, IP Address, User Activity, User Item Accessed, Activity Detail, Object ID, Record Type, Client IP Address, CorrelationID, CreationTime, EventData, EventSource, ItemType, OrganizationID, UserAgent, USerKEy, UserType, Version, Workload.

2. *File and page activities:* Accessed file, Change retention label for a file, Deleted file marked as a record, Checked in file, Changed record status to locked, Changed record status to unlocked, Checked out file, Copied file, Discarded file checkout, Deleted file, Deleted file from recycle bin, Deleted file from second-stage recycle bin, Detected document sensitivity mismatch, Detected malware in file, Deleted file marked as a record, Downloaded file, Modified file, Moved file, Recycled all minor versions of file, Recycled all versions of file, Recycled version of file, Renamed file, Restored file, Uploaded file, Viewed page, View signaled by client, Performed search query.

3. *Folder activities:* Copied folder, Created folder, Deleted folder, Deleted folder from recycle bin, Deleted folder from second-stage recycle bin, Modified folder, Moved folder, Renamed folder, Restored folder.

4. *Cloud-based Enterprise Storage activities:* Created list, Created list column, Created list content type, Created list item, Created site column, Created site content type, Deleted list, Deleted list column, Deleted list content type, Deleted list item, Deleted site column, Deleted site content type, Recycled list item, Restored list, Restored list item, Updated list, Updated list column, Updated list content type, Updated list item, Updated site column, Updated site content type.

5. *Sharing and access request activities:* Added permission level to site collection, Accepted access request, Accepted sharing invitation, Blocked sharing invitation, Created access request, Created a company shareable link, Created an anonymous link, Created secure link, Deleted secure link, Created sharing invitation, Denied access request, Removed a company shareable link, Removed an anonymous link, Shared filer, folder, or site, Unshared file folder or site, Updated access request, Updated an anonymous link, Updated sharing invitation, Used a company shareable link, Used an anonymous link, Used secure link, User added to secure link, User removed from secure link, Withdrew sharing invitation.

6. *Synchronization activities:* Allowed computer to sync files, Blocked computer from syncing files, Downloaded files to computer, Downloaded file changes to computer, Uploaded files to document library, Uploaded file changes to document library.

7. *Site permissions activities:* Added site collection admin, Added user of group to Cloud-based Enterprise Storage group, Broke permission level inheritance, Broke sharing inheritance, Created group, Deleted group, Modified access request setting, Modified ''Members Can Share'' setting, Modified permission level on site collection, Modified site permissions, Removed site collection admin, Removed permission level from site collection, Removed user or group from Cloud-based Enterprise Storage group, Requested site admin permissions, Restored sharing inheritance, Updated group.

8. *Site administration activities:* Added allowed data location, Added exempt user agent, Added geo location admin, Allowed user to create groups, Cancelled site geo move, Changed a sharing policy, Changed deice access policy, Changed exempt user agents, Changed network access policy, Completed site geo move, Created Sent To connection, Created site collection, Deleted orphaned hub site, Deleted Sent To connection, Deleted site, Enabled document preview, Enabled legacy workflow, Enabled Office on Demand, Enabled result source for People Searched, Enabled RSS feeds, Failed site swap, Joined site to hub site, Registered hub site, Removed allowed data location, Removed geo location admin, Renamed site, Scheduled site rename, Scheduled site swap, Scheduled site geo move, Set host site, Set storage quota for geo location, Swapped site, Unjoined site from hub site, Unregistered hub site.

9. *Cloud-based Email Server mailbox activities:* Created mailbox item, Copied messages to another folder, User signed in to mailbox, Accessed mailbox items, Sent message using Send On Behalf permissions, Purged messages from mailbox, Moved messages to Deleted Items folder, Moved messages to another folder, Sent message using Send As permissions, Sent message, Updated message, Deleted messages from Deleted Items folder, New-Inbox Rule Create-Inbox Rule from email web application, Set-Inbox Rule Modify inbox rule from email web application, Update inbox rules from email web application, Added delegate mailbox permissions, Removed delegate mailbox permissions, Added permissions to folder, Modified permissions of folder, Removed permissions from folder, Added or removed user with delegate access to calendar folder, Labeled message as a record.

10. *Retention policy and retention level activities:* Created retention label, Created retention policy, Configured settings for a retention policy, Deleted retention label, Deleted retention policy, Deleted settings from a retention policy, Updated retention label, Updated retention policy, Updated settings for a retention policy, Enabled regulatory record option for retention labels.

11. *User administration activities:* Added user, Deleted user, Set license properties, Reset user password, Changed user password, Changed user license, Updated user, Set property that forces user to change password, Organization Signup, Organization Creation, User creation without organization, Password reset requested, Disable user, Login success, Login success reauthenticate, Login failure, Login failure reauthentication, Logout, User permission change, Role permission change, Environment permissions change, Create role, Edit role—add user, Edit role—remove user, Edit role—change external group mapping, Delete role.

12. *Enterprise User Administration group administration activities:* Added group, Updated group, Deleted group, Added member to group, Removed member from group.

13. *Application administration activities:* Added service principal, Removed a service principal from the directory, Set delegation entry, Removed credentials from a service principal, Added delegation entry, Added credentials to a service principal, Removed delegation entry.

14. *Role administration activities:* Added member to Role, Removed a user from a directory role, Set company contact information.

15. *Directory administration activities:* Added a partner to the directory, Removed a partner from the directory, Added domain to company, Removed domain from company, Updated domain, Set domain authentication, Verified domain, Updated the federation settings for a domain, Verified email verified domain, Turned on Enterprise Information Technology Account Administration sync, Set password policy, Set company information.

16. *eDiscovery activities:* Created content search, Deleted content search, Changed content search, Started content search, Stopped content search, Started export of content search, Started export

report, Previewed results of content search, Purged results of content search, Started analysis of content search, Removed export of content search, Removed preview results of content search, Removed purse action performed on content search, Removed analysis of content search, Removed search report, Content search preview item listed, Content search preview item viewed, Content search preview item downloaded, Downloaded export of content search, Created search permissions filter, Deleted search permissions filter, Changed search permissions filter, Created hold in eDiscovery case, Deleted hold in eDiscovery case, Changed hold in eDiscovery case, Created eDiscovery case, Deleted hold in eDiscovery case, Changed hold in eDiscovery case, Created eDiscovery case, Deleted eDiscovery data, Changed hold in eDiscovery case, Added member to eDiscovery case, Removed member from eDiscovery case, Changed eDiscovery case membership, Created eDiscovery administrator, Deleted eDiscovery administrator, Changed eDiscovery administrator membership, Remediation action created, Item deleted using Remediation, Created workingset search, Updated workingset search, Deleted workingset search, Previewed workingset search, Document viewed, Document annotated, Document downloaded, Tag created, Tag edited, Tag deleted, Tag files, Tag job, Created review set, Added Cloud-based productivity software data, Added non-office data, Added data to another workingset, Added remediated data, Run algo job, Run export job, Run burn job, Run error remediation job, Run load comparison job, Updated case settings.

17. *eDiscovery system command activities:* Created content search, Deleted content search, Changed content search, Started content search, Stopped content search, created content search action, Deleted content search action, Created search permissions filter, Deleted search permissions filter, Changed search permissions filter, Created hold in eDiscovery case, Deleted hold in eDiscovery case, Changed hold in eDiscovery case, Created search query for eDiscovery case hold, Deleted search query for eDiscovery case hold, Changed search query for eDiscovery case hold, Created eDiscovery case, Deleted eDiscovery case, Changed eDiscovery case, Added member to eDiscovery case, Removed member from eDiscovery case, Changed eDiscovery case membership, Created eDiscovery administrator, Deleted eDiscovery administrator, Changed eDiscovery administrator membership.

18. *Data Analysis application activities:* Viewed program dashboard, Created program dashboard, Edited program dashboard, Deleted program dashboard, Shared program dashboard, Printed program dashboard, Copied program dashboard, Viewed program tile, Exported program tile data, Viewed program report, Deleted program report, Printed program report page, Created program report, Edited program report, Copied program report, Exported program artifact to another file format, Export program activity events, Updated program workspace access, Restored program workspace, Updated program workspace, Viewed program metadata, Created program dataset, Deleted program dataset, Created program group, Deleted program group, Added program group members, Retrieved program groups, Retrieved program dashboard, Retrieved data sources from program dataset, Retrieved upstream data flows from program dataflow, Retrieved data sources from program dataflow, Removed program group members, Retrieved links between datasets and dataflows, Created organizational program content pack, Created program app, Installed program app, Updated program app, Updated organization's program settings, Started program trial, Started program extended trial, Analyzed program dataset, Created program gateway, Deleted program gateway, Added data source to program gateway, Removed data source from program gateway, Changed program gateway admins, Changed program gateway data source users, Set scheduled refresh on program dataset, Unpublished program app, Deleted organizational program content pack, Renamed program dashboard, Edited program dataset, Updated capacity display name, Changed capacity state, Updated capacity admin, Changed capacity user assignment, Migrated workspace to a capacity, Removed workspace from a capacity, Retrieved program workspaces, Shared program report, Generated program Embed Token, Discover program dataset data sources, Updated program dataset data sources, Requested program dataset refresh, Binded program dataset to gateway, Changed program dataset data sources, Requested program dataset refresh, Binded program dataset to gateway, Changed program dataset connections, Took over program dataset, Updated program gateway data source credentials, Imported file to program, Updated program dataset parameters, Generated program dataflow SAS token, Created program dataflow, Updated program dataflow, Deleted program dataflow, Viewed program dataflow, Exported program dataflow, Set scheduled refresh on program dataflow, Requested program dataflow refresh, Received program dataflow secret from Key Vault, Attached dataflow storage account, Migrated dataflow storage location, Updated dataflow storage assignment permissions, Set dataflow storage location for workspace, Took ownership of program dataflow, Canceled program dataflow refresh, Created program email subscription, Updated program email subscription, Deleted program email subscription, Created program folder, Deleted program folder, Updated program folder, Added program folder access, Deleted program folder access, Updated program folder access, Posted program comment, Deleted program comment, Analyzed program report, Viewed program usage metrics, Edited program dataset endorsement, Edited program dataflow endorsement, Edited program report endorsement, Edited program app endorsement, Retrieved list of modified workspaces in program tenant, Sent a scan request in program tenant, Retrieve scan result in program tenant, Inserted snapshot for user in program tenant, Updated snapshot for user in program tenant, Deleted snapshot for user in program tenant, Inserted snapshot for user in program tenant, Updated snapshot for user in program tenant, Deleted snapshot for user in program tenant, Retrieved snapshots for user in program tenant, Edited program certification permission, Took over a program data source, Updated capacity custom settings, Created workspace for program template app, Deleted workspace for program template app, Updated settings for program template app, Updated testing permissions for program template app, Created program template app, Deleted program template app, Promoted program template app, Installed program template app, Updated parameters for installed program template app, Created install ticker for installing program template app, Updated an organizational custom visual, Created an organizational custom visual, Deleted an organizational custom visual, Custom visual requested Enterprise Information Technology Account Administration access token, Customer visual requested Cloud-based productivity software access token, Connected to program dataset from external app, Created program dataset from external app, Deleted program dataset from external app, Edited program dataset from external app,

Requested program dataset refresh from external app, Requested SAS token for program storage, Requested account key for program storage, Assigned a workspace to a deployment pipeline, Removed a workspace from a deployment pipeline, Deleted deployment pipeline, Created deployment pipeline, Deployed to a pipeline stage, Updated deployment pipeline configuration, Updated deployment pipeline access, Added external resource, Added link to external resource, Deleted link to external resource, Updated featured tables, Applied sensitivity label to program artifact, Changed sensitivity label for program artifact, Deleted sensitivity label from program artifact.

19. *Productivity Analysis activities:* Updated privacy setting, Updated data access setting, Uploaded organization data, Created meeting exclusion, Updated preferred meeting exclusion, Execute query, Canceled query, Deleted result, Downloaded report, Accessed Odata link, Viewed query visualization, Viewed explore, Created partition, Updated partition, Deleted partition, User logged in, User logged out.

20. *Briefing email activities:* Updated user privacy settings, Updated organization privacy settings.

21. *Cloud-based Collaboration Application activities:* Created team, Deleted team, Added channel, Deleted channel, Changed organization setting, Changed team setting, Changed channel setting, User signed in to Cloud-based Collaboration Application, Added members, Changed role of members, Removed members, Added bot to team, Removed bot from team, Added tab, Removed tab, Updated tab, Added connector, Removed connector, Updated connector, Downloaded analytics report, Upgraded Cloud-based Collaboration Application device, Blocked Cloud-based Collaboration Application device, Unblocked Cloud-based Collaboration Application device, Changed configuration of Cloud-based Collaboration Application device, Enrolled Cloud-based Collaboration Application device, Installed app, Upgraded app, Uninstalled app, Published app, Updated app, Deleted app, Deleted all organization apps, Performed action on card, Added scheduling group, Edited scheduling group, Deleted scheduling group, Added shift, Edited shift, Deleted shift, Added time off, Edited time off, Deleted time off, Added open shift, Edited open shift, Deleted open shift, Shared schedule, Clocked in using Time clock, Clocked out using Time clock, Started break using Time clock, Ended break using Time clock, Added Time clock entry, Edited Time clock entry, Deleted Time clock entry, Added shift request, Responded to shift request, Canceled shift request, Changed schedule setting, Added workforce integration, Accepted off shift message.

22. *Cloud-based Collaboration Application approvals activities:* Created new approval request, Viewed approval request details, Approved approval request, Rejected approval request, Canceled approval request, Shared approval request, File attached to approval request, Reassigned approval request, Added e-signature to approval request.

23. *Enterprise Social Network activities:* Changed data retention policy, Changed network configuration, Changed network profile settings, Changed private content mode, Changed security configuration, Created file, Created group, Deleted group, Deleted message, Downloaded file, Exported data, Shared file, Suspended network user, Suspended user, Updated file description, Updated file name, Viewed file.

24. *Enterprise Customer Relationship Management activities:* Accessed out-of-box entity (deprecated), Accessed custom entity (deprecated), Accessed admin entity (deprecated), Performed bulk actions (deprecated), All Enterprise Customer Relationship Management activities, Accessed Enterprise Customer Relationship Management admin center (deprecated), Accessed internal management tool (deprecated), Signed in or out (deprecated), Activated process or plug-in (deprecated).

25. *Information Systems Infrastructure Automation activities:* Created flow, Edited flow, Deleted flow, Edited flow permissions, Deleted flow permissions, Started a Flow paid trial, Renewed a Flow paid trial.

26. *Application authoring program activities:* Created app, Edited app, Deleted app, Launched app, Published app, Marked app as Hero, Marked app as Featured, Edited app permission, Restored app version.

27. *Enterprise Automation DLP activities:* Created DLP Policy, Updated DLP Policy, Deleted DLP Policy.

28. *Video platform activities:* Created video, Edited video, Deleted video, Uploaded video, Downloaded video, Edited video permission, Viewed video, Shared video, Liked video, Unliked video, Commented on video, Deleted video comment, Uploaded video text track, Deleted video text track, Uploaded video thumbnail, Deleted video thumbnail, Replaced video permissions and channel links, Marked video public, Marked video private, Created Video platform group, Edited Video platform group, Deleted Video platform group, Edited Video platform group memberships, Created Video platform channel, Edited Video platform channel, Deleted a Video platform channel, Replaced Video platform channel thumbnails, Edited Video platform user settings, Edited tenant settings, Edited global role members, Deleted Video platform user, Deleted Video platform user's data report, Edited Video platform user, Exported Video platform user's data report, Downloaded Video platform user's data report, Video Platform Event Date, Video Platform Event Name, Video Platform Event Description, Video Platform Meeting Code, Video Platform Participant Identifiers.

29. *Content explorer activities:* Accessed item.

30. *Quarantine activities:* Previewed Quarantine message, Deleted Quarantine message, Released Quarantine message, Exported Quarantine message, Viewed Quarantine Message's header.

31. *Customer Key Service Encryption activities:* Fallback to Availability Key.

32. *Form application activities:* Created form, Edited form, Moved form, Deleted form, Viewed form, Previewed form, Exported form, Allowed share form for copy, Added form co-author, Removed form co-author, Viewed response page, Created response, Updated response, Deleted all responses, Deleted response, Viewed responses, Viewed response, Created summary link, Deleted summary link, Updated from phishing status, Updated user phishing status, Sent premium form product invitation, Updated form setting, Updated user setting, Listed forms.

33. *Sensitivity label activities:* Applied sensitivity label to site, Removed sensitivity label from site, Applied sensitivity label to file, Changed sensitivity label applied to file, Removed sensitivity label from file.

34. *Local machine communications platform system command activities:* Set tenant federation.

35. *Search activities:* Performed email search, Performed Cloud-based Enterprise Storage search.

36. *Security analytics activities:* Attempted to compromise accounts.

37. *Device activities:* Printed file, Deleted file, Renamed file, Created file, Modified file, Read file, Captured screen, Copied file to removable media, Copied file to network share, Copied file to clipboard, Uploaded file to cloud, File accessed by an unallowed application.

38. *Information barrier activities:* Removed segment from site, Changed segment of site, Applied segment to site.

39. *On-premises DLP scanning activities:* Matched DLP rule, Enforced DLP rule.

40. *Individual Productivity Analytics activities:* Updated user settings, Updated organization settings.

41. *Exact Data Match (EDM) activities:* Created EDM schema, Modified EDM schema, Removed EDM scheme, Completed EDM data upload, Failed EDM data upload.

42. *Enterprise Information System Information Protection activities:* Accessed file, Discovered file, Applied sensitivity label, Updated sensitivity label, Removed sensitivity label, Removed file, Applied protection, Changed protection, Removed protection, Received AIP heartbeat.

43. *Data Repository Team Discussion Post Actions:* Team Discussion Post Updated, Team Discussion Post Destroyed.

44. *Data Repository Team Discussion Post Reply Actions:* Team Discussion Post Reply Updated, Team Discussion Post Reply Destroyed.

45. *Data Repository Enterprise Actions:* Self-Hosted Runner Removed, Self-Hosted Runner Registered, Self-Hosted Runner Group Created, Self-Hosted Runner Group Removed, Self-Hosted Runner Removed From Group, Self-Hosted Runner Added To Group, Self-Hosted Runner Group Member List Updated, Self-Hosted Runner Group Configuration Changed, Self-Hosted Runner Updated.

46. *Data Repository Hook Actions:* Hook Created, Hook Configuration Changed, Hook Destroyed, Hook Events Altered.

47. *Data Repository Integration Installation Request Actions:* Integration Installation Request Created, Integration Installation Request Closed.

48. *Data Repository Issue Action:* Issue Destroyed.

49. *Data Repository Org Actions:* Secret Action Created, Member Creation Disabled, Two Factor Authentication Requirement Disabled, Member Creation Enabled, Two Factor Authentication Enabled, Member Invited, Self-Hosted Runner Registered, Secret Action Removed, Member Removed, Outside Collaborator Removed, Self-Hosted Runner Removed, Self-Hosted Runner Group Created, Self-Hosted Runner Group Removed, Self-Hosted Runner Group Updated, Secret Action Updated, Repository Default Branch Named Updated, Default Repository Permission Updated, Member Role Updated, Member Repository Creation Permission Updated.

50. *Data Repository Organization Label Actions:* Default Label Created, Default Label Updated, Default Label Destroyed.

51. *Data Repository Oauth Application Actions:* Oauth Application Created, Oauth Application Destroyed, Oauth Application Secret Restet, Oauth Application Token Revoked, Oauth Application Transferred.

52. *Data Repository Profile Picture Actions:* Organization Profile Picture Updated.

53. *Data Repository Project Actions:* Project Board Created, Project Board Linked, Project Board Renamed, Project Board Updated, Project Board Deleted, Project Board Unlinked, Project Board Permissions Updated, Project Board Team Permissions Updated, Project Board User Permission Updated.

54. *Data Repository Protected Branch Actions:* Branch Protection Enabled, Branch Protection Destroyed, Branch Protection Enforced For Administrators, Branch Enforcement Of Required Code Owner Enforced, Stale Pull Request Dismissal Enforced, Branch Commit Signing Updated, Pull Request Review Updated, Required Status Check Updated, Requirement For Branch To Be Up To Date Before Merging Changed, Branch Update Attempt Rejected, Branch Protection Requirement Overridden, Force Push Enabled, Force Push Disabled, Branch Deletion Enabled, Branch Deletion Disabled, Linear Commit History Enabled, Linear Commit History Disabled.

55. *Data Repository Repo Actions:* User Visibility Changed, Actions Enabled For Repository, Collaboration Member Added, Topic Added To Repository, Repository Archived, Anonymous Git Read Access Disabled, Anonymous Git Read Access Enabled, Anonymous Git Read Access Setting Locked, Anonymous Git Read Access Setting Unlocked, New Repository Created, Secret Created For Repository, Repository Deleted, Repository Enabled, Secret Removed, User Removed, Self-Hosted Runner Registered, Topic Removed From Repository, Repository Renamed, Self-Hosted Runner Updated, Repository Transferred, Repository Transfer Started, Repository Unarchived, Secret Action Updated.

56. *Data Repository Dependency Graph Actions:* Dependency Graph Disabled, Dependency Graph Disabled For New Repository, Dependency Graph Enabled, Dependency Graph Enabled For New Repository.

57. *Data Repository Secret Scanning Actions:* Secret Scanning Disabled For Individual Repository, Secret Scanning Disabled For All Repositories, Secret Scanning Disabled For New Repositories, Secret Scanning Enabled For Individual Repository, Secret Scanning Enabled For All Repositories, Secret Scanning Enabled For New Repositories.

58. *Data Repository Vulnerability Alert Actions:* Vulnerable Dependency Alert Created, Vulnerable Dependency Alert Dismissed, Vulnerable Dependency Alert Resolved.

59. *Data Repository Team Actions:* Member Added To Team, Repository Added To Team, Team Parent Changed, Team Privacy Level Changed, Team Created, Member Demoted In Team, Team Destroyed, Member Promoted In Team, Member Removed From Team, Repository Removed From Team.

60. *Data Repository Team Discussion Actions:* Team Discussion Disabled, Team Discussion Enabled.

61. *Data Repository Workflow Actions:* Workflow Run Cancelled, Workflow Run Completed, Workflow Run Created, Workflow Run Deleted, Workflow Run Rerun, Workflow Job Prepared.

62. *Data Repository Account Actions:* Billing Plan Change, Plan Change, Pending Plan Change, Pending Subscription Change.

63. *Data Repository Advisory Credit Actions:* Accept Credit, Create Credit, Decline Credit, Destroy Credit.

64. *Data Repository Billing Actions:* Change Billing Type, Change Email.

65. *Data Repository Bot Alerts Actions:* Disable Bot, Enable Bot.

66. *Data Repository Bot Alerts for New Repository Actions:* Disable Alerts, Enable Alerts.

67. *Data Repository Bot Security Alerts for Update Actions:* Disable Security Update Alerts, Enable Security Update Alerts.

68. *Data Repository Bot Security Alerts for New Repository Actions:* Disable New Repository Security Alerts, Enable New Repository Security Alerts.

69. *Data Repository Environment Actions:* Create Actions Secret, Delete, Remove Actions Secret, Update Actions Secret.

70. *Data Repository Git Actions:* Clone, Fetch, Push.

71. *Data Repository Marketplace Agreement Signature Actions:* Create.

72. *Data Repository Marketplace Listing Actions:* Approve, Create, Delist, Redraft, Reject

73. *Data Repository Members Can Create Pages Actions:* Enable, Disable

74. *Data Repository Organization Credential Authorization Actions:* Security Assertion Markup Language Single-Sign On Authorized, Security Assertion Markup Language Single-Sign On Deauthorized, Authorized Credentials Revoked.

75. *Data Repository Package Actions:* Package Version Published, Package Version Deleted, Package Deleted, Package Version Restored, Package Restored.

76. *Data Repository Payment Method Actions:* Payment Method Cleared, Payment Method Created, Payment Method Updated.

77. *Data Repository Advisory Actions:* Security Advisory Closed, Common Vulnerabilities And Exposures Advisory Requested, Data Repository Security Advisory Made Public, Data Repository Security Advisory Withdrawn, Security Advisory Opened, Security Advisory Published, Security Advisory Reopened, Security Advisory Updated.

78. *Data Repository Content Analysis:* Data Use Settings Enabled, Data Use Settings Disabled.

79. *Data Repository Sponsors Actions:* Repo Funding Link Button Toggle, Repo Funding Links File Action, Sponsor Sponsorship Cancelled, Sponsor Sponsorship Created, Sponsor Sponsorship Preference Changed, Sponsor Sponsorship Tier Changed, Sponsored Developer Approved, Sponsored Developer Created, Sponsored Developer Profile Updated, Sponsored Developer Request Submitted For Approval, Sponsored Developer Tier Description Updated, Sponsored Developer Newsletter Sent, Sponsored Developer Invited From Waitlist, Sponsored Developer Joined From Waitlist.

80. *Administrator audit log events:* Admin privileges grant, Group events, Marketplace login audit change, Auto provisioning automatically disabled.

81. *Group enterprise audit log events:* Add service account permission, Remove service account permission, Add user, Add user role, Remove user, Request to join, Approve join request, Reject join request, Invite user, Accept invitation, Reject invitation, Revoke invitation, Join, Ban user including with moderation, Unban user, Add all users in domain, Create group, Delete group, Create namespace, Delete namespace, Change info setting, Add info setting, Remove info setting, Add member role, Remove user role, Membership expiration added, Membership expiration removed, Membership expiration updated.

82. *Software vendor employee interaction events:* Event date, Software product name, Software vendor employee email, Software vendor employee home office location, Software vendor employee access justification, Justification tickets, Log ID, Software product resource accessed name.

83. *Login events:* Two-step verification enabled, Two-step verification disabled, Account password change, Account recovery email change, Account recovery phone change, Account recovery secret question change, Account recovery secret answer change, Advanced Protection enroll, Advanced Protection unenroll, Failed login, Government-backed attack attempt, Leaked password detected, Login challenged, Login verification, Logout, Out of domain email forwarding enabled, Successful login, Suspicious Login, Suspicious login blocked, Suspicious login from less secure app blocked, Suspicious programmatic login locked, User suspended, User suspended through spam relay, User suspended through spam, User suspended through suspicious activity.

84. *OAuth Token audit log events:* OAuth event description, OAuth event name, OAuth user, OAuth application name, OAuth client ID, OAuth scope, OAuth event data, OAuth logged activity IP address.

85. *Rules audit log events:* Rule event name, Rule event description, Rule triggering user, Rule name, Rule type, Rule resource name, Resource ID, Resource title, Resource type, Resource owner, Recipients, Data source, Actor IP address, Rule severity, Scan type, Matched trigger, Matched detectors, Triggered actions, Suppressed actions, Date, Device ID, Device type.

86. *SAML audit log events:* SAML event description, SAML Event name, SAML triggering user, SAML application name, SAML user organization name, Initiated by, Failure type, Response status, Second level status, SAML logged activity IP address, SAML event date.

87. *Calendar application audit log events:* Activity name, Activity description, Calendar user, Calendar ID, Event title, Event ID, User agent, Recipient email, Message ID, Remote Exchange Web Server URL, Error code, Requested window start, Requested window end, Date, Calendar logged activity IP address.

88. *Context-Aware Access audit log events:* Event name, Context-Aware access user, Context-Aware access logged activity IP address, Device ID, Access level applied, Context-Aware access event date.

89. *Web browser audit log events:* Web browser event name, Web browser event date, Web browser event reason, Device name, Device user, Web browser profile user name, URL generating event, Operating System of Web Browser, Web browser triggered rule reason, Web browser event result, Web browser content name, Web browser content size, Web browser content hash, Web browser content type, Web browser trigger type, Web browser trigger user, Web browser user agent, Web browser client type.

90. *Data Visualization audit log events:* Asset name, Event description, User, Event name, Date, Asset type, Owner, Asset ID, IP address, Connector type, visibility, Prior visibility.

91. *Devices audit log events:* Device ID, Event description, Date, Event name, User, Device type, Application hash, Serial number, Device model, OS version, Policy name, Policy status code, Windows OS edition, Account registration change, Device action event, Device application change, Device compliance status, Device compromise, Device OS update, Device ownership, Device settings change, Device status changed on Apple portal, Device sync, Failed screen unlock attempts, Sign out user, Suspicious activity, Work profile support.

92. *Cloud-based web storage application audit log events:* Cloud-based web storage application event name, Cloud-based web storage application event description, Cloud-based web storage application item type, Cloud-based web storage application item ID, Cloud-based web storage application item visibility, Cloud-based web storage application item prior visibility, Cloud-based web storage application user, Cloud-based web storage application visitor Boolean value, Cloud-based web storage application file owner, Cloud-based web storage application event date, Cloud-based web storage application event IP address.

93. *Groups audit log events:* Groups event name, Groups event description, Groups event user, Groups event date.

94. *Chat audit log events:* Chat event name, Chat event description, Chat event user, Chat event date.

95. *Whiteboard application audit log events:* Whiteboard application ID Whiteboard application event description, Whiteboard application event name, Whiteboard application event user, Whiteboard application event date.

96. *Note application audit log events:* Note application event name, Note application event description, Note application event user, Note application event note owner, Note application event date, Note application note URI, Note application attachment URI.

97. *Password vault audit log events:* Password vault actor, Password vault event timestamp, Password vault event name, Password vault application username, Password vault application

installation name, Password vault application credential name.

98. *Takeout audit log events:* Takeout event description, Takeout products requested, Takeout Job ID, Takeout event date, Takeout event IP address.

99. *User accounts audit log events:* User account event description, User account event date, User account event IP address, two-step verification disable, two-step verification enroll, Account password change, Account recovery email change, Account recovery phone change, Account recovery secret question change, Account recovery secret answer change.

100. *Voice audit log events:* Voice event name, Voice event description, Voice event date, Voice event user, Voice receiving phone number, Voice placing phone number, Voice call duration, Voice group message status, Voice call cost, Auto Attendant couldn't route to voicemail recipient, Auto attendant deleted, Auto attendant failed to transfer to a user, Auto attendant published, Auto attendant received a voicemail, Auto attendant voicemail failed to deliver, Auto attendant voicemail failed to forward.

101. *User setting changes:* 2-Step Verification Scratch Codes Of User Deleted, New 2-Step Verification Scratch Codes Generated For User, 3-Legged Oauth Device Tokens Revoked, 3-Legged Oauth Token Revoked, Add Recovery Email For User, Add Recovery Phone For User, Admin Privileges Granted For User, Admin Privileges Revoked For User, Application Specific Password Revoked For User, Automatic Contact Sharing Changed For User, Bulk Upload Notification, User Invite Cancelled, Custom Attribute Changed, External Id Changed, Gender Changed, Ims Changed, IP Whitelisted, Keywords Changed, User Location Changed, User Organization Changed, User Phone Numbers Changed, User Recovery Email Changed, User Recovery Phone Changed, User Relation Changed, User Address Changed, User Email Monitor Created, Data Transfer Requested For User, Delegated Admin Privileges Granted, Account Information Dump Deleted, Email Monitor Deleted, Mailbox Dump Deleted, Profile Photo Deleted, First Name Changed, Gmail Account Reset, Last Name Changed, Mail Routing Destination Created, Mail Routing Destination Deleted, Nickname Created, Nickname Deleted, Password Changed, Password Change Required On Next Login, Recovery Email Removed, Recovery Phone Removed, Account Information Requested, Mailbox Dump Requested, User Invite Resent, Cookies Reset For User And Forced Relogin, Security Key Registered For User, Security Key Revoked, User Invite Sent, Temporary Password Viewed, 2-Step Verification Turned Off, User Session Unblocked, Profile Photo Updated, User Advanced Protection Unenroll, User Archived, User Birthdate Changed, User Created, User Deleted, User Downgraded From Social Media Application, User Enrolled In 2-Step Verification, User List Downloaded, User Org Unit Changed, User Put In 2-Step Verification Grace Period, User Renamed, User Strong Auth Unenrolled, User Suspended, User Unarchived, User Undeleted, User Unsuspended, User Upgraded To Social Media Application.

102. *Application Authoring application audit log elements:* App synced, App edited, App added, App deleted, App invocation added, App invocation edited, App invocation deleted, App invocation action performed, App read call made, App bot invocation.

103. *Organizational Administrative Data Elements:* Set Terms and Conditions, Modify Terms and Conditions, Set org custom theme, Edit org custom theme, Add custom policy, Delete custom policy, Create User IdP Profile, Create environment, Delete environment, Rename environment, Edit domain name, Create business group, Edit business group name, Edit business group entitlement, Delete business group.

104. *API audit log elements:* Create API, Delete API, Import API, Update label of API, Update consumer endpoint of API, Update endpoint URI of API, Calendar API kind, Application API client version, Create API version, Delete API version, Import API, Edit name of API version, Edit description of API version, Edit API URL of API version, Add tag to API, Remove tag from API, Deprecate API, Set T&Cs, Create RAML, Modify RAML, Create endpoint, Update existing endpoint, Deploy proxy, Update deployed proxy, Redeploy proxy, Create SLA tier, Modify SLA tier, Deprecate SLA tier, Delete SLA tier, Apply policy, Edit policy, Remove policy, Create project, Delete project, Delete files, Rename project, Clean branch, Create branch, Delete branch, Save branch, Delete file, Move file, Import project, Publish to Exchange, Publish to API Platform, Add dependencies, Remove dependencies, Change dependencies, Reload dependencies, Merge Branch, Share project, Sync with Data Repository, Unsync with Data Repository, Modify organization settings, Rename branch, Modify project settings.

105. *API Metadata:* Create an API instance, Delete an API instance, Update an API instance.

106. *Application Data:* Create application, Delete application, Reset client secret, Request access, Request tier change, Request tier change approval, Approve application, Revoke application, Restore application, Create Mocking Service link, Delete Mocking Service link, Create/modify/delete Object store, Upload file, Delete file, Update file.

107. *Private Portals audit log events:* Create portal, Modify portal association, Delete portal, Add portal page, Make portal page visible, Delete portal page, Edit portal page, Hide portal page, Set portal theme, Modify portal theme, Modify portal security, Create a page, Update a page, Delete a page, Publish a portal.

108. *Public Portals audit log events:* Update a domain, Delete a domain, Create a page, Delete a page, Update a page, Create a portal, Publish a portal, Delete a portal, Update a portal.

109. *Identity Management audit log events:* Create identity provider configuration, Edit identity provider configuration, Delete identity provider configuration, Warning, Create identity management key, Set primary identity management key, Delete identity management key.

110. *Connected App audit log events:* Create Connected Application, Edit Connected Application, Delete Connected Application, Update Scope Assignments, Application Authorization Approved, Application Authorization Denied, Token Retrieval Success, Token Retrieval Failed, Revoke Access/Refresh Tokens.

111. *Team audit log events:* Create Team, Update Team, Move Team, Add Members, Remove Members, Add Permissions, Remove Permissions, Edit External Group Mappings, Delete Team.

112. *Asset Management audit log events:* Create an asset, Update an asset, Delete an asset, Share an asset, Publish an asset to public portal, Remove an asset from public portal, Update an asset icon, Delete an asset icon, Create a managed tag (category), Delete a managed tag (category), Delete an organization, Update tags, Create a tag configuration, Update a tag configuration, Delete a tag configuration.

113. *Asset Review audit log events:* Create a Comment, Delete a comment, Update a comment, Create a review, Delete a review, Update a review.

114. *Runtime Manager audit log events:* Create application, Start application, Restart application, Stop application, Delete application, Change application zip file, Promote application from sandbox, Change application runtime, Change application worker

size, Change application worker number, Enable/disable persistent queues, Enable/disable persistent queue encryption, Modify application properties, Enable/disable insight, Modify log levels, Create/modify/delete alerts, Enable/disable alerts, Create/modify/delete application data, Create/modify schedules, Create/modify/delete tenants, Enable/disable schedules, Clear queues, Enable/Disable static IP, Allocate/release static IP, LoadBalancer Create/modify/delete, Create/modify/delete alerts V2, Create/modify/delete VPC, Create/modify/delete VPN.

115. *Server audit log events:* Add server, Delete server, Rename server, Create server group, Delete server group, Rename server group, Add server to server group, Remove server from server group, Create cluster, Delete Cluster, Rename cluster, Add server to cluster, Remove server from cluster, Deploy application, Delete application, Start application, Stop application, Redeploy application with existing file, Redeploy application with new file.

116. *Private Spaces audit log events:* Create/Modify/Delete private space, Create/Modify/Delete connection, Create/Modify/Delete VPN, Create/Modify/Delete transit gateway, Create/Modify/Delete TLSContext, Create/Modify/Delete routes.

117. *Anypoint MQ audit log events:* Create/modify/delete/purge queue, Create/modify/delete exchange, Create/delete exchange binding, Create/delete/regenerate client.

RECORD SOURCE CATEGORIES:

Employees; contractors; customers.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Standard routine uses 1. through 9. apply. In addition:

(a) To appropriate agencies, entities, and persons when (1) the Postal Service suspects or has confirmed that there has been a breach of the system of records; (2) the Postal Service has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Postal Service (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Postal Service's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Automated database, computer storage media, and paper.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records relating to system administration are retrievable by user ID.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records relating to system administration are retained for twenty-four months.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Paper records, computers, and computer storage media are located in controlled-access areas under supervision of program personnel. Computer access is limited to authorized personnel with a current security clearance, and physical access is limited to authorized personnel who must be identified with a badge.

Access to records is limited to individuals whose official duties require such access. Contractors and licensees are subject to contract controls and unannounced on-site audits and inspections.

Computers are protected by encryption, mechanical locks, card key systems, or other physical access control methods. The use of computer systems is regulated with installed security software, computer logon identifications, and operating system controls including access controls, terminal and transaction logging, and file management software.

RECORD ACCESS PROCEDURES:

Requests for access must be made in accordance with the Notification Procedure above and USPS Privacy Act regulations regarding access to records and verification of identity under 39 CFR 266.5.

CONTESTING RECORD PROCEDURES:

See Notification Procedure and Record Access Procedures above.

NOTIFICATION PROCEDURES:

Customers wanting to know if other information about them is maintained in this system of records must address inquiries in writing to the Chief Information Officer and Executive Vice President and include their name and address.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

May 10th, 2021; 86 FR 24902.

SYSTEM NAME AND NUMBER:

830.000 Customer Service and Correspondence.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

USPS Customer Experience, Headquarters; Integrated Business Solutions Services Centers; the National Customer Support Center (NCSC); districts, Post Offices contractor sites; and detached mailing units at customer sites.

SYSTEM MANAGER(S):

Chief Customer and Marketing Officer and Executive Vice President, United States Postal Service, 475 L'Enfant Plaza SW, Washington, DC 20260.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

39 U.S.C. 401, 403, and 404.

PURPOSE(S) OF THE SYSTEM:

1. To enable review and response services for customer inquiries and concerns regarding USPS and its products and services.
2. To ensure that customer accounts and needs are attended to in a timely manner.
3. To enhance the customer experience by improving the security of Change of Address (COA) and Hold Mail processes.
4. To protect USPS customers from becoming potential victims of mail fraud and identity theft.
5. To identify and mitigate potential fraud in the COA and Hold Mail processes.
6. To verify a customer's identity when applying for COA and Hold Mail services.
7. To support (or facilitate) the administration of Operation Santa, Letters to Santa, or similar programs.
8. To track employee performance and productivity through dashboard metrics and analysis.
9. To set and track employee goals relating to Customer Relationship Management Software metrics.
10. To create competitions to encourage productivity and promote team effectiveness.
11. To provide business customer data to other systems through APIs.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system contains records relating to customers who contact customer service by online and offline channels. This includes customers making inquiries via email, 1–800–ASKUSPS, other toll-free contact centers, or the Business Service Network (BSN), as

well as customers with product-specific service or support issues.

This system also contains records relating to employees who utilize the dashboard analysis and productivity application.

CATEGORIES OF RECORDS IN THE SYSTEM:

1. *Customer information:* Customer and key contact name, mail and email address, phone and/or fax number; customer ID(s); title, role, and employment status; company name, location, type and URL; vendor and/or contractor information.

2. *Identity verification information:* Last four digits of Social Security Number (SSN), username and/or password, DU–N–S Number, mailer ID number, publisher ID number, security level and clearances, and business customer number.

3. *Product and/or service use information:* Product and/or service type, product numbers, technology specifications, quantity ordered, logon and product use dates and times, case number, pickup number, article number, and ticket number.

4. *Payment information:* Credit and/or debit card number, type, and expiration date; billing information; checks, money orders, or other payment method.

5. *Customer preferences:* Drop ship sites and media preference.

6. *Service inquiries and correspondence:* Contact history; nature of inquiry, dates and times, comments, status, resolution, and USPS personnel involved.

7. *Employee scorecard analysis:* Scorecard Metrics, Scorecard Activity Score, Scorecard Objective Score, Scorecard Smart Target, Scorecard Target, Leaderboard Standings, Competition Name, Competition Results, Formula Metrics, Formula Builder Metrics, Accolade Achievements, Goal Name, Goal Description, Goal Category, Goal Visibility, Goal Owner, Goal Category, Workflow Name, Workflow Description, Workflow Hierarchy Level, Workflow Time Group, Competitor Name, Competitor Rank, Competitor Score, Competitor Selection, Group Name, Workflow Metric, Workflow Message, Workflow Image, Workflow Entities, Workflow Action, Workflow Status, Workflow Rank, Workflow Operator, Workflow Value, Workflow Schedule, Workflow Creator, Accolade Name.

8. *Customer Relationship Management Software Metrics:* Opportunity ID, Approval Status, Stage Name, Sales Area, Sales District, Sales Title, Opportunity Owner, Owner Alias, Created Date, Current Stage Entry Date, Opportunity Name, Actual Start Date, Opportunistic Strategy, Product Group, Product Category, Account, Expected State, Lead Source, Lead Source Type, Created By, Amount Year-to-date, User Area, User District, Amount, Account Name, Opportunity Name, Lead Source Category, Age of Opportunity, Company Overview, Business Need, Solution, Results, Point of Entry Area, Point of Entry City State, Alias, Full Name, Title, Year-to-date Revenue, Tear-to-date Target, Over/Under Target, Percentage Over/Under Target, Year-to-date Supply, Over/Under Year-to-date Supply, Percentage Over/Under Year-to-date Supply, Current Quarter to Date Sales Revenue, Current Entire Quarter Target, Remain to Quarter Target, Percentage Over/Under Quarter Target, EAS Level, Number Closed Sales Pending Sales Representative Submission, Number Closed Sales Pending Management Approval, Update Status Message, Company ID, User ID, Service, Action, Service Access ID, Service Response, Account Street, Account City, Account State, Account ZIP Code, Region, Report District, Number of Sales, Dollar Amount, Report Area, Report Title, Registration Match, Product Category, Actual Mailing, Actual Shipping, Actual Total, Interaction Type, Number of Calls, Average Talk Time, Longest Call, Resource Name, Rowlev, Interaction ID, Start Time, End Time, Representative, Call Info, Technical Result, Incoming Phone Number, Sort, Call Type, Start Est, End Est, Status, Result Reason, Talk Time, Est Logout, Est Playback Duration, Customer Relationship Software Link, Priority Mail Number of Sales, Priority Mail Dollar Amount, Parcel/Package Number of Sales, Parcel/Packages Dollar Amount, First Class Mail Number of Sales, First Class Mail Dollar Amount, Closed Sales Area, Closed Sales District, Pricing Category, Contract Status, New Sale, Opportunity Record Type, VP Group, Lead Owner, Days Since Lead was Created, Lead ID Link, Days Owned, Lead Age, Lead Contact, Region/Team, Total Phone Calls, Total In-Person Visits, Total Video Conferences with Customer, Total Emails, Number of Active Reps with Activity, Average Phone Calls Per Rep, Average In-Person Visits Per Rep, Average Video Conferences with Customer, Average Emails Per Rep, Assigned to Area, Assigned to District, Type 2, Task/Event Record, Related To, Subject, Priority, Task, Assignee, Assigned Alias, Description, Seller's Name, Virtual Meetings, Appointment Scheduled Last 14 Days, Appointments Scheduled Next 14 Days, Appointments Kept, Stalled Opportunities, Funnel Health, Stage 4 Opportunity Review, Stage 5 Opportunities Not Submitted, Directed Activities Review, Coachable Moments, Action Items.

RECORD SOURCE CATEGORIES:

For Customer Service and Correspondence: Customers and, for call center operations, commercially available sources of names, addresses, and telephone numbers.

For Employee Dashboard Analysis: Customer Relationship Management Software.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Standard routine uses 1. through 7., 10., and 11. apply.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Automated databases, computer storage media, and paper.

POLICIES OF PRACTICES FOR RETRIEVAL OF RECORDS:

By customer name, customer ID(s), mail or email address, phone number, customer account number, case number, article number, pickup number, last four digits of SSN, ZIP Code, other customer identifier, employee name, employee email.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

1. Customer care records for usps.com products are retained 90 days.

2. Records related to 1–800–ASK–USPS, Delivery Confirmation service, Special Services, and international call centers are retained 1 year.

3. Customer complaint letters are retained 6 months and automated complaint records are retained 3 years.

4. Business Service Network records are retained 5 years.

5. Records related to Operation Santa, Letters to Santa, or similar programs are retained 6 months after the new calendar year.

6. Other records are retained 2 years after resolution of the inquiry.

7. Records relating to Dashboard Metric Analysis are retained for 1 year.

Records existing on paper are destroyed by burning, pulping, or shredding. Records existing on computer storage media are destroyed according to the applicable USPS media sanitization practice.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Paper records, computers, and computer storage media are located in controlled-access areas under supervision of program personnel.

Access to these areas is limited to authorized personnel, who must be identified with a badge.

Access to records is limited to individuals whose official duties require such access. Contractors and licensees are subject to contract controls and unannounced on-site audits and inspections.

Computers are protected by mechanical locks, card key systems, or other physical access control methods. The use of computer systems is regulated with installed security software, computer logon identifications, and operating system controls including access controls, terminal and transaction logging, and file management software. Online data transmissions are protected by encryption.

RECORD ACCESS PROCEDURES:

Requests for access must be made in accordance with the Notification Procedure above and USPS Privacy Act regulations regarding access to records and verification of identity under 39 CFR 266.5.

CONTESTING RECORD PROCEDURES:

See Notification Procedure and Record Access Procedures above.

NOTIFICATION PROCEDURES:

Customers wanting to know if information about them is maintained in this system of records must address inquiries to the system manager in writing. Inquiries should include name, address, and other identifying information.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

December 12, 2018, 83 FR 63912; June 27, 2012, 77 FR 38342; April 29, 2005, 70 FR 22516.

Sarah Sullivan,

Attorney, Ethics & Legal Compliance.

[FR Doc. 2023–19812 Filed 9–13–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* September 14, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on September 5, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 48 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–258, CP2023–261.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–19830 Filed 9–13–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* September 14, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on September 6, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 50 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–261, CP2023–264.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–19832 Filed 9–13–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* September 14, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on September 7, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 52 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–263, CP2023–266.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–19827 Filed 9–13–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* September 14, 2023.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on September 1, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 47 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–257, CP2023–260.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–19826 Filed 9–13–23; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Express, Priority Mail, and USPS Ground Advantage® Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* September 14, 2023.

FOR FURTHER INFORMATION CONTACT: Sean C. Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on September 7, 2023, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage® Contract 7 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–264, CP2023–267.

Sean C. Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2023–19833 Filed 9–13–23; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98337; File No. SR–ICEEU–2023–020]

Self-Regulatory Organizations; ICE Clear Europe Limited; Order Approving Proposed Rule Change Relating to Amendments to Recovery Plan

September 8, 2023.

I. Introduction

On July 10, 2023, ICE Clear Europe Limited (''ICE Clear Europe'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4,[2] a proposed rule change to amend its Recovery Plan (the ''Plan''). The proposed rule change was published for comment in the **Federal Register** on July 26, 2023.[3] The Commission did not receive comments regarding the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

A. Background

ICE Clear Europe is registered with the Commission as a clearing agency for the purpose of clearing security-based swaps. In its role as a clearing agency for security-based swaps, ICE Clear Europe maintains the Plan.[4] The Plan provides the relevant information, the steps to take, and the options available to restore ICE Clear Europe to normal operation and recover in the event of severe financial stress and losses. The Plan describes, among other things, the following information: (i) ICE Clear Europe's critical services, service providers, and interdependencies; (ii) scenarios in which ICE Clear Europe may need to use the Plan, triggers for invoking the Plan in those scenarios, and early indicators of those scenarios; (iii) options for recovering from severe financial stress and losses; and (iv) decision-making, governance, and communications processes relevant to ICE Clear Europe's recovery.

The proposed rule change would make various updates and amendments to the Plan. ICE Clear Europe is making these changes to implement the results of internal and external reviews of the Plan. These changes are described below according to the section of the Plan in which they appear.

A. Section 1, Executive Summary

Section 1 summarizes the Plan. Among other things, Section 1 gives an overview of (i) ICE Clear Europe's options for recovery as well as (ii) how it governs, tests, and reviews the Plan.

Options for Recovery

ICE Clear Europe's options for recovery include tools that it could use to recover losses, such as powers of assessment,[5] reduced gains distribution,[6] and partial tear-ups.[7] Currently, the Plan also lists as a recovery option ICE Clear Europe's Capital Replenishment Framework. The proposed rule change would keep the reference to capital replenishment, but would rename it as the Capital Replenishment Plan, instead of Framework. ICE Clear Europe is making this particular change because it changed the name of the Capital Replenishment Framework to the Capital Replenishment Plan.[8]

Section 1 of the Plan also describes the coverage of ICE Clear Europe's recovery options. Section 1 explains why ICE Clear Europe would be able to fully cover default losses, liquidity shortfalls, and investment losses, should it need to do so. With respect to default losses in particular, the Plan currently explains that with the use of partial tear-ups, ICE Clear Europe can eliminate variation margin obligations by, in effect, cancelling any remaining positions, and therefore default losses can be fully covered. The proposed rule change would keep this explanation, but it would delete the statement, ''Therefore default losses can be fully covered.'' ICE Clear Europe is deleting this statement because it believes the statement is redundant considering the overall explanation that ICE Clear Europe would be able to fully cover default losses.[9]

Similar to the description of partial tear-ups, Section 1 of the Plan also describes the coverage of ICE Clear Europe's powers of assessment. The Plan currently explains that under powers of assessment for its Futures and Options clearing service, ICE Clear Europe would have sufficient capital to cover all Clearing Members defaulting simultaneously under extreme but plausible market scenarios, meaning the maximum exposures from all Clearing Members with same directional positions defaulting simultaneously. Moreover, for its Credit Default Swap clearing service, the Plan currently describes the scenario in which ICE Clear Europe would exhaust its

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing of Proposed Rule Change Relating to Amendments to Recovery Plan, Exchange Act Release No. 97955 (July 20, 2023); 88 FR 48273 (July 26, 2023) (SR–ICEEU–2023–020) (''Notice'').

[4] Capitalized terms not otherwise defined herein have the meanings assigned to them in the Plan or the ICE Clear Europe Clearing Rules.

[5] Following the default of a Clearing Member, and if certain other conditions are satisfied, ICE Clear Europe Rule 909 allows ICE Clear Europe to assess Clearing Members for additional amounts as needed to resolve any shortfall resulting from the default.

[6] Following the default of a Clearing Member, and if certain other conditions are satisfied, ICE Clear Europe Rule 914 allows ICE Clear Europe to reduce variation margin payments, as needed to retain cash and resolve any shortfall resulting from the default.

[7] Following the default of a Clearing Member, and if certain other conditions are satisfied, ICE Clear Europe Rule 915 allows ICE Clear Europe to terminate open contracts that offset the defaulting Clearing Member's open contracts.

[8] *See* Self-Regulatory Organizations; ICE Clear Europe Limited; Order Approving Proposed Rule Change Relating to the Capital Replenishment Plan, Exchange Act Release No. 97018 (Mar. 2, 2023); 88 FR 14412 (Mar. 8, 2023) (SR–ICEEU–2022–027).

[9] Notice, 88 FR at 48273.

prefunded resources and powers of assessment.

The proposed rule change would delete this description of ICE Clear Europe's powers of assessment and replace it with a more concise explanation. The revised description would state that, under ICE Clear Europe's powers of assessment, it can immediately recover losses that exceed the pre-funded resources to cover the default of the largest Clearing Members under extreme but plausible stress scenarios because ICE Clear Europe has the authority to collect resources from non-defaulting Clearing Members intraday and in cash. The revised description also would explain that ICE Clear Europe can confirm the capacity of its powers of assessment using reverse stress testing. Although the proposed rule change would not amend ICE Clear Europe's powers of assessment, ICE Clear Europe does not believe it is necessary to specify the expected coverage of assessment powers in the Plan.[10]

Governance, Testing, and Review

As mentioned above, Section 1 also provides an overview of how ICE Clear Europe governs, tests, and reviews the Plan. With respect to governance under the existing Plan, ICE Clear Europe's President must attempt to convene the ICE Clear Europe Board for approval in advance of making each material decision under the Plan. If the Board cannot be convened in advance of making the decision, however, it must be convened afterwards. The proposed rule change would clarify that the Board must be convened afterwards ''as soon as reasonably possible'' and updated on steps taken.

Section 1 currently explains that in exercising its options under the Plan, ICE Clear Europe does not need the approval of Clearing Members or any other external stakeholders. The proposed rule change would maintain this statement but would add a further caveat to explain that ICE Clear Europe would seek to communicate its plans and/or intentions to relevant external stakeholders where possible, and as soon as reasonably practicable, to ensure appropriate transparency.

Section 1 also explains how ICE Clear Europe conducts testing of the Plan. Currently, Section 1 states that the Plan is tested annually through a tabletop exercise. The proposed rule change would amend this description to provide that the Plan is tested *at least* annually. Moreover, the proposed rule change would delete the phrase ''tabletop exercise'' and replace it with a more detailed description of how ICE Clear Europe would test the Plan. Specifically, ICE Clear Europe would test at least one default and one non-default scenario each year, with all recovery options tested over a three-year cycle. ICE Clear Europe's Executive Risk Committee would approve the testing schedule and review the results of the testing. ICE Clear Europe's testing strategy would use tabletop exercises, including simulated tabletop exercises where possible.

Moreover, Section 1 currently provides that where appropriate, elements of the Plan are included in ICE Clear Europe's annual default fire drills. The proposed rule change would retain this statement but would add further description of the elements that ICE Clear Europe could test in the fire drills. Specifically, ICE Clear Europe could test default-related recovery scenarios, including coordination with other covered clearing agencies.

Section 1 currently provides that a key focus of the annual test of the Plan is to work through specific scenarios as they might develop and to consider, among other things, how ICE Clear Europe would implement recovery options and which communication pathways it would use. The proposed rule change would retain this description but would revise it slightly. Under the proposed rule change, ICE Clear Europe would consider which communication and governance pathways to use, instead of just communication pathways. Moreover, the proposed rule change would add another consideration: whether all services can continue to be provided, including those provided to affiliates.

Finally, Section 1 currently includes a statement that ICE Clear Europe will review the Plan after each test. The proposed rule change would retain this statement but would further add that any proposed changes would follow the relevant governance schedule for the Plan.

B. Section 2, Critical Services, Service Providers, and Interdependencies

Section 2 of the Plan describes (i) ICE Clear Europe's Critical Services; (ii) entities that rely on ICE Clear Europe's Critical Services; (iii) providers of services to ICE Clear Europe; (iv) how ICE Clear Europe mitigates its dependencies on these service providers; (v) ICE Clear Europe's technology infrastructure that supports its Critical Services; (vi) and interdependencies between ICE Clear Europe and other entities in the financial markets.

Critical Services

The Plan currently identifies three services as ICE Clear Europe's Critical Services: (i) futures and options clearing; (ii) credit-default swap clearing; and (iii) treasury and banking services. The proposed rule change would not alter this description, but it would add further explanation of the meaning of the term ''Critical Services.'' Specifically, the proposed rule change would add a footnote to explain that ''Critical Services'' are defined at the highest level for the purposes of the Plan and should not be confused with ''Important Business Services,'' which form part of the Operational Resilience framework and are defined within the Operational Risk and Resilience Policy.

Moreover, the proposed rule change would revise a description of the products that ICE Clear Europe clears. Currently, Section 2 provides that ICE Clear Europe clears certain financial instruments including CDS instruments, futures contracts, and options on futures contracts. The proposed rule change would revise the description of the last category, from options on futures contracts to just options contracts.

Finally, Section 2 currently contains a table that identifies the markets and exchanges for each of ICE Clear Europe's Critical Services. For example, futures and options clearing applies to contracts on soft commodities and covers exchanges such as ICE Futures Europe and ICE Futures US. The proposed rule change would update the names of the exchanges in this table, changing ICE Futures US to ICE Futures US (Energy Division). The proposed rule change also would add ICE Futures Abu Dhabi to the list of exchanges.

Entities That Rely on Critical Services

Section 2 describes in further detail how market participants and exchanges depend on ICE Clear Europe's Critical Services. For example, if ICE Clear Europe were unable to provide its Critical Services, market participants would be unable to manage their positions with ICE Clear Europe. Moreover, the Plan notes that in stressed market conditions, when Clearing Members themselves may already be under additional financial stress, actions that ICE Clear Europe takes to recover from losses may increase the stresses on Clearing Members' capital and liquidity resources. Given that, the Plan currently states that capital and liquidity impacts on market participants (including Clearing Members and their clients) would be taken into account when assessing which recovery options to use. The proposed rule change would

[10] Notice, 88 FR at 48273.

maintain this provision but would add a caveat that impacts on market participants would be taken into account as far as reasonably possible when assessing which recovery options to use.

Service Providers

Section 2 further describes the entities upon which ICE Clear Europe relies when providing its Critical Services. ICE Clear Europe relies on both affiliates and third parties when providing its Critical Services. For example, ICE Clear Europe relies on third-party banks in providing its treasury and banking services, and it relies on affiliates, such as other ICE Clearing Houses and Exchanges, for settlement prices and intraday margin collection. With respect to services provided by ICE affiliates, the Plan currently states that these services are contractually governed by master outsourcing agreements. The proposed rule change would revise the name of these agreements to inter-company service agreements.

Section 2 currently contains a table that lists categories of service providers, identifies the Critical Services they support, and describes the services that they provide. This table currently identifies investment agents as supporting treasury and banking services. The proposed rule change would expand this category to include both investment agents and repo counterparties. The proposed rule change also would add another category to the table to cover default brokers. Default brokers support all three of ICE Clear Europe's Critical Services. Default brokers do so by hedging the positions of a defaulting Clearing Member and liquidating the defaulter's non-cash collateral.

Mitigation

Section 2 next describes how ICE Clear Europe mitigates its dependencies on these service providers. ICE Clear Europe mitigates its dependencies with three mechanisms: (i) using multiple service providers, so it is not overly dependent on one provider alone; (ii) engaging with service providers who place high levels of importance on continuity of operations through multiple levels of resilience; and (iii) ensuring its contracts with providers do not have provisions that allow the providers to alter or terminate the contracts when ICE Clear Europe is under financial stress. With respect to the first point, the proposed rule change would maintain the current provision found in the Plan but would add further explanation as to how ICE Clear Europe confirms it is using multiple service providers. ICE Clear Europe would regularly test its assumptions regarding multiple providers as part of its operational resilience framework.

On the second point, resilience within providers, the proposed rule change would add a similar explanation. ICE Clear Europe would conduct regular testing of its assumptions regarding resilience within services providers as part of its operational resilience framework.

With respect to the third point, contractual provisions, the proposed rule change would amend the description of this mechanism. Currently, the Plan provides that ICE Clear Europe ensures that its contracts with services providers have appropriate termination periods and do not include covenants, material adverse change clauses, or other provisions that would permit service providers to alter or terminate the contracts if it were under financial stress. The proposed rule change would revise this slightly to state that ICE Clear Europe ensures that its contracts do not include covenants, material adverse change clauses, or other provisions that would permit service providers to unduly alter or terminate the contracts. Moreover, the Plan currently provides that ICE Clear Europe has analyzed its contracts in the context of the Plan and has not found any issues that would impact the Critical Services in recovery. The proposed rule change would revise this slightly to state that ICE Clear Europe periodically analyzes the relevant contracts in the context of the Plan (and any other relevant factors).

Section 2 also describes ICE Clear Europe's dependencies on particular service providers. Specifically, the Plan describes ICE Clear Europe's particular dependencies with respect to custodians, physical delivery agents, ICE's exchanges, ICE's other clearing houses, and ICE's technology and operations groups.

In the description of dependencies on custodians, the proposed rule change would revise a reference to the Business Continuity and Disaster Recovery plans to be a general reference to ICE Clear Europe's operational resilience plans.

In the description of ICE Clear Europe's dependencies on physical delivery agents, the Plan currently provides that if there were a significant issue with a Physical Delivery Agent that could not be resolved then ICE Clear Europe could fall back to financial settlement, and therefore it does not ultimately have a dependency on physical delivery agents. The proposed rule change would retain the statement that ICE Clear Europe could fallback to financial settlement but would delete the statement that ICE Clear Europe does not ultimately have a dependency on physical delivery agents. Instead, the proposed rule change would add a statement that ICE Clear Europe for certain markets at this time, regularly tests its ability to perform the functions usually performed by those delivery agents itself under certain disruption scenarios. ICE Clear Europe is making this change to recognize that despite the mitigation of financial settlement, its relationship with physical delivery agents could still be considered a dependency.

With respect to dependencies on ICE's Exchanges, the Plan currently provides that ICE Clear Europe's dependency on ICE's Exchanges for the provision of settlement prices is mitigated through its ability under to generate its own settlement prices if needed, and therefore ICE Clear Europe does not ultimately have a dependency on ICE's Exchanges. The proposed rule change would delete the statement that ICE Clear Europe does not ultimately have a dependency on ICE's Exchanges. Instead, the proposed rule change would add that ICE Clear Europe's dependencies are mitigated via the ICE Exchanges' own resilience testing. Like the dependency on physical delivery agents, ICE Clear Europe is making this change to recognize that despite the mitigation of generating its own settlement prices, its relationship with ICE's Exchanges could still be considered a dependency.

With respect to dependencies on ICE's Clearing Houses, the Plan currently provides that ICE Clear Europe's dependency on ICE's Clearing Houses for operational or risk processes is mitigated through ICE Clear Europe's ability to run the processes itself, if needed, and therefore ICE Clear Europe does not ultimately have a dependency on ICE's Clearing Houses. The proposed rule change would delete the statement that ICE Clear Europe does not ultimately have a dependency on ICE's Clearing Houses. Instead, the proposed rule change would explain that the processes in question are generally the processes that ICE Clear Europe does already perform during business as usual London hours (such as intraday margin calls), which therefore validates the assumption that ICE Clear Europe can run the processes itself, if needed.

With respect to dependencies on ICE's technology and operations groups, the Plan notes that ICE Clear Europe relies on these groups for certain operational processes and for technology infrastructure. Moreover, the Plan provides that ICE Clear Europe's

dependency is mitigated through its ability to run the processes itself, if needed. The proposed rule change would add language to note that ICE Clear Europe periodically tests its ability to run the processes itself as part of its operational resilience framework.

Finally, the Plan identifies certain service providers that ICE Clear Europe does not depend on. Section currently provides the following types of service providers are not considered as dependencies for ICE Clear Europe: Investment Agents, APS Banks, Central Banks, Data Providers. Section 2 provides that these service providers are not dependencies because ICE Clear Europe would be able to substitute the providers as needed. The proposed rule change would delete this provision. ICE Clear Europe is making this particular change to recognize that despite being able to substitute these providers, its relationship with these providers could still be considered a dependency.[11]

Technology Infrastructure

Section 2 also contains a table that describes ICE Clear Europe's technology systems that support its Critical Services. The table identifies and describes each system, identifies which Critical Service it supports, and the entity that provides the system. The proposed rule change would maintain this table largely as it is currently written in the Plan. In certain entries, the proposed rule change would clarify that a specific system relates to either credit-default swap trades or futures and options trades.

After the table, Section 2 describes how ICE Clear Europe mitigates the risks associated with its dependency on these technology systems. For example, the Plan states that ICE Clear Europe ensures that systems are run with multiple live redundancies and there are in place effective business continuity and disaster recovery arrangements. The proposed rule change would revise the description of these mitigation techniques. For example, in addition to ensuring that systems are run with multiple live redundancies, ICE Clear Europe would test these redundancies periodically. Further, the proposed rule change would, going forward, refer to business continuity and disaster recovery arrangements as operational resilience arrangements. Finally, the proposed rule change would note that, given these technology systems are provided by ICE Inc. or ICE Clear Credit, ICE Clear Europe is a direct participant in defining and ensuring operational and regulatory requirements are met when new capabilities are developed.

Interdependencies

Finally, Section 2 describes the interdependencies between ICE Clear Europe and other financial market infrastructures. For example, the Plan states that some of ICE Clear Europe's Clearing Members are participants in other central counterparties. While ICE Clear Europe does not provide interoperability with other central counterparties, default of a Clearing Member at ICE Clear Europe may cause the Clearing Member to default at another central counterparty, and vice versa. The proposed rule change would maintain this description but would add explanation regarding ICE Clear Europe's interdependencies with other ICE, Inc. affiliates. Specifically, ICE Clear Europe provides certain intercompany services to certain affiliates within the ICE group and operates on the assumption that those services will continue to be provided during execution of the Plan. Because the services in question are typically operational or almost fully automated, ICE Clear Europe anticipates having relevant resources available outside of those required for recovery activities to continue the intercompany services. For those services that are not automated, and therefore do require ICE Clear Europe resources even under business-as-usual circumstances, ICE Clear Europe has, and periodically tests, backup arrangements.

C. Section 3, Recovery Scenarios, Triggers, and Early Warning Indicators

Section 3 of the Plan describes the scenarios where ICE Clear Europe is likely to invoke the Plan and triggers for when ICE Clear Europe would invoke the Plan in those scenarios, as well as early warning indicators of when those scenarios might occur.

Recovery Scenarios and Triggers

Currently the Plan describes two scenarios that could lead to recovery (each a ''Recovery Scenario''): (i) losses caused by a defaulting Clearing Member and (ii) all other non-default losses caused by investments, operational incidents, or other business activities. The trigger for the default loss scenario is when ICE Clear Europe's Guaranty Fund is or is likely to be exhausted and there are still losses to cover. The trigger for the non-default loss scenario is when ICE Clear Europe's Base Capital is or is likely to be breached.

The proposed rule change would retain this description but would add explanation with respect to the trigger for the second scenario. The Plan would be triggered in the non-default loss scenario when ICE Clear Europe's Base Capital is or is likely to be breached by holding insufficient EMIR eligible capital.

Section 3 also explains the distinction between business-as-usual risk management and recovery under the Plan. Business-as-usual risk management options, such as the default waterfall, are designed to incentivize effective risk management and participation from Clearing Members and ICE Clear Europe, to maximize the likelihood that losses are managed through business-as-usual processes.

ICE Clear Europe invokes the Plan when it has been unable to cover its losses using business-as-usual risk management. In an appendix to the Plan, ICE Clear Europe describes certain scenarios that would stress its financial and operational resources and analyzes how these stress scenarios could become Recovery Scenarios (in other words, when such stress scenarios could lead ICE Clear Europe to invoke the Plan). The proposed rule change would add a statement to explain that with respect to these scenarios analyzed in Appendix A, each scenario is mapped to key risks contained within ICE Clear Europe's risk appetite statements, ensuring that each key risk type is covered within those scenarios. Also in this section, the proposed rule change would add a footnote to clarify that ICE Clear Europe's Guaranty Fund contribution is otherwise known as ''Skin in the Game.''

Finally, Section 3 explains the distinction between ICE Clear Europe's management of operational risks and recovery under the Plan. ICE Clear Europe has established Business Continuity and Disaster Recovery Plans, which it uses to manage service issues caused by operational or technology problems. Such an operational or technological scenario could still trigger the Plan if it causes ICE Clear Europe to hit the non-default loss trigger. As discussed above, the Plan is triggered in the non-default loss scenario when ICE Clear Europe's Base Capital is or is likely to be breached by holding insufficient EMIR eligible capital.

The proposed rule change would update this description. For example, it would add references to ICE Clear Europe's operational resilience framework. The proposed rule change also would add references to ICE Clear Europe's incident management processes, which are part of its operational resilience framework.

[11] Notice, 88 FR at 48274.

Early Warning Indicators

Section 3 also describes certain early warning indicators. These are qualitative and quantitative metrics that ICE Clear Europe monitors to determine if it might hit the recovery triggers. These indicators are categorized according to whether they relate to the default loss or non-default loss scenarios discussed above.

For the default loss trigger, the early warning indicators are the default management information which is produced if a counterparty is potentially going be called into default. For example, ICE Clear Europe would consider the size of a Clearing Member's positions, its collateral, and market volatility. The proposed rule change would revise this description slightly to state that the early warning is default management information that is produced if a counterparty is potentially going to fail to meet an obligation and may therefore be called into default.

For the non-default loss trigger, ICE Clear Europe monitors its eligible capital against certain target thresholds each day, as an early warning indicator. The proposed rule change would revise this description slightly. The revised language would explain that, in that in order to identify warning indicators for non-default loss scenarios as early as possible, ICE Clear Europe monitors its eligible capital against target thresholds and the continued suitability of the target thresholds each day.

D. Section 4, Recovery Options

Section 4 of the Plan describes and analyzes the tools that ICE Clear Europe could use to recover from losses. The Plan refers to these tools as ICE Clear Europe's Recovery Options. ICE Clear Europe's Recovery Options include, among others, powers of assessment, reduced gains distribution, and allocation of investment losses.

Section 4 of the Plan currently describes these tools in detail, and the proposed rule change would make minor updates to this description. For example, the Plan currently states that ICE Clear Europe can call any amount of assessments up to the maximums and can call assessments multiple times. The proposed rule change would maintain this description but would add a phrase to clarify that if ICE Clear Europe were to call assessments multiple times, it would do so in accordance with the Rules. The proposed rule change also would correct a reference to the Capital Replenishment Framework, changing the name of that document to the Capital Replenishment Plan. In Section 4, the proposed rule change also would delete language that references Appendix A to the Plan. Appendix A to the Plan is a chart showing ICE Clear Europe's committee structure. As discussed further below, the proposed rule change would delete this Appendix A. Accordingly, the proposed rule change would remove a reference to Appendix A that is currently found in Section 4. Finally, the proposed rule change would delete a reference stating that ICE Clear Europe is responsible for the first $90 million of investment losses. This figure is no longer correct, and the amount is subject to change, so ICE Clear Europe believes it should not be set out in the Plan.[12]

Section 4 of the Plan also describes how ICE Clear Europe's Recovery Options are comprehensive and effective. For example, Section 4 currently states that using partial tear-ups, ICE Clear Europe can eliminate any remaining Variation Margin and mark-to-market payment obligations by cancelling any remaining positions. The proposed rule change would delete this description from Section 4 because this language is identical to, and therefore duplicative of, language found in Section 1.

Finally, Section 4 contains a table that lays out all of ICE Clear Europe's Recovery Options, the scope of those Recovery Options, and some decision-making considerations associated with them. In the portion of the table describing the scope of powers of assessment, the proposed rule change would delete a statement that powers of assessment are potentially able to cover all Clearing Members defaulting simultaneously. As discussed above, ICE Clear Europe is making this change because it does not think the Plan should specify the expected coverage of assessment.[13] Finally, in the portion of the table discussing capital replenishment, the proposed rule change would add, as a decision-making consideration, timing and ability of future profits to replenish capital.

E. Section 5, Decision-Making, Governance, and Communications

Section 5 describes the decision-making, governance, and communications process related to the Plan. Generally, when taking actions related to the Plan, ICE Clear Europe's President will attempt to convene the Board for approval in advance of making each material decision provided the Board can be convened in a timely manner. If the Board cannot be convened in advance, then it will be convened afterwards. The proposed rule change would maintain this provision but would explain that if the Board cannot be convened in advance, then it will be convened afterwards as soon as reasonably possible and updated on steps taken.

Moreover, Section 5 currently states that exercising options under the Plan does not require the approval of Clearing Members, Exchanges, or any other external stakeholders. The proposed rule change would maintain this provision largely as is but would change the word ''exercising'' to ''implementing.'' Similarly, the proposed rule change would change the word ''exercising'' to ''implementing'' in another part of Section 5 concerning communication with regulators.

Section 5 also describes how ICE Clear Europe will communicate and coordinate with external stakeholders when taking actions under the Plan. Currently, the Plan provides that ICE Clear Europe's overall communication and coordination objectives in recovery are to (i) provide Clearing Members, regulators, and the wider market with timely and accurate information and (ii) ensure effective coordination and escalation across affiliated ICE exchanges, clearing houses, and other financial market intermediaries. The Plan further provides that ICE Clear Europe manages this communication and coordination by using its Crisis Communication and Management Plan and Major Incident Response Plan. The proposed rule change would maintain these provisions but would change the Crisis Communication and Management Plan to the Communications Plan (or CP) and the Major Incident Response Plan to the Crisis Management Plan (or CMP). In other parts of Section 5, the proposed rule change similarly would update the name of each plan to the Communications Plan/CP and the Crisis Management Plan/CMP, respectively. Finally, the proposed rule change would add language that notes that the CP and CMP should be consulted when using the Plan.

Section 5 contains a table that describes certain personnel at ICE Clear Europe and their responsibilities with respect to communicating with stakeholders. For example, ICE Clear Europe's Head of Regulation and

[12] Notice, 88 FR at 48273. ICE Clear Europe recently adopted a new framework for allocating non-default losses generally and modified its liability with respect to investment losses. For more information, *see* Self-Regulatory Organizations; ICE Clear Europe Limited; Order Granted Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1 and Amendment No. 2, to the ICE Clear Europe Clearing Rules Relating to Non-Default Losses, Exchange Act Release No. 98071 (Aug. 7, 2023); 88 FR 54690 (Aug. 11, 2023) (SR–ICEEU–2023–010).

[13] Notice, 88 FR at 48273.

Compliance and President both serve as a regulatory liaison, responsible for communicating with, and giving status updates to, ICE Clear Europe's regulators. The proposed rule change would update the responsibilities associated with certain personnel at ICE Clear Europe. For example, ICE Clear Europe's Communications Department, along with the Board of Directors, is currently responsible for discussion and approval of decisions. The proposed rule change would replace Communications Department here with ICE Clear Europe's President. The proposed rule change also would remove the Communications Department from the list of ICE Clear Europe departments that are responsible for operational coordination during recovery. The proposed rule change would add ICE Clear Europe's President and Head of Corporate Development to the list of ICE Clear Europe departments that are responsible for giving status updates to ICE Group. In the list of ICE Clear Europe departments that are responsible for communicating with Clearing Members and Customers, the proposed rule change would replace ICE Clear Europe's Exchange Heads of Sales with its President.

Finally, throughout Section 5, the proposed rule change would replace references to ''bridge calls'' with references to ''conference calls.''

F. Section 6, Recovery Playbook

Section 6 of the Plan is a recovery playbook. Section 6 describes how ICE Clear Europe might use the Plan, including how ICE Clear Europe might incur losses and the steps it would take in response to those losses. Section 6 provides this information for both the default loss and non-default loss Recovery Scenarios.

In this section the proposed rule change would make updates and amendments like those discussed above. Specifically, the proposed rule change would update the name of the Capital Replenishment Framework to the Capital Replenishment Plan or CRP. The proposed rule change also would update the name of the Crisis Communications and Management Plan to the Communications Plan/CP and the Major Incident Response Plan to the Crisis Management Plan/CMP, in accordance with the changes discuss above.

The proposed rule change also would revise certain responsibilities of ICE Clear Europe's President. Section 6 describes a number of responsibilities and actions required of ICE Clear Europe's President under the Plan. For example, Section 6 notes that the President, together with the Default Management Committee, must assess whether default losses are, or are likely to, exhaust ICE Clear Europe's Guaranty Fund. Similarly, the President must consult with the Board for their approval of the decision to trigger the Plan, provided they can be convened on a timely basis. Given these responsibilities assigned to the President, the proposed rule change would add a general caveat at the beginning of Section 6 that would apply where the President is unavailable or incapacitated. In that situation, ICE Clear Europe would refer to its Delegation of Authority Framework to determine if another person at ICE Clear Europe could substitute for the President.

The proposed rule change also would clarify when the President would take certain steps under the Plan. For example, the Plan currently provides that if the Board cannot be convened on a timely basis, then the President will decide on whether to trigger the Plan and will convene the Board afterwards. The proposed rule change would maintain this requirement but would add a note to the effect that the President will convene the Board as soon as reasonably possible and update the Board on steps taken. The proposed rule change would add this same explanation to the requirement that if the Board cannot be convened on a timely basis, then the President will decide on which Recovery Options to use and convene the Board afterwards.

The proposed rule change would make similar amendments to certain responsibilities of ICE Clear Europe generally, rather than the President in particular. Section 6 of the Plan currently requires that ICE Clear Europe inform its regulators as to its intention to trigger the Plan and the reasons for triggering, provided that the regulators can be contacted on a timely basis. If its regulators cannot be contacted on a timely basis, then the President will proceed with triggering the Plan. The proposed rule change would maintain this requirement but would add a note that notification to regulators will take place as soon as reasonably possibly thereafter. The proposed rule change would add this same explanation to the requirement that ICE Clear Europe inform its regulators as to its intended use of Recovery Options. In that case, if ICE Clear Europe cannot contact its regulators on a timely basis, then the President will proceed with the chosen Recovery Options, and notification to regulators will take place as soon as reasonably possibly thereafter.

Finally, the proposed rule change would update the description of the non-default loss scenario that is currently found in Section 6. Currently Section 6 describes a non-default loss scenario as significant financial loss that has occurred, or is about to occur, that does not involve the default of any Clearing Members. The proposed rule change would update this description to a significant financial losses that has occurred, or is about to occur, that is not caused by the default of any Clearing Members. Moreover, the Plan currently provides that if a non-default loss event has occurred, then the President, together with the Executive Risk Committee, will assess whether there are, or are likely to be losses that breach ICE Clear Europe's Base Capital, and this assessment will be based on ICE Clear Europe's Regulatory Capital metrics. The proposed rule change would update this slightly. Under the proposed rule change, the President, together with the Executive Risk Committee, will assess whether there are, or are likely to be losses that breach ICE Clear Europe's Base Capital by holding insufficient EMIR eligible capital. In addition, this assessment will be based on relevant management information generally, rather than ICE Clear Europe's Regulatory Capital metrics specifically.

G. Section 7

Section 7 of the Plan describes certain key limitations and assumptions associated with the Plan. In Section 7 the proposed rule change would make a minor typographical change and would change a reference to the Capital Replenishment Framework to the Capital Replenishment Plan, or CRP.

H. New Section 8, Document Governance and Exception Handling

The proposed rule change would add Section 8 to the Plan. Section 8 would be titled Document Governance and Exception Handling. Under this section, the owner of the Plan would be responsible for ensuring that the Plan remains up-to-date and is reviewed in accordance with ICE Clear Europe's governance processes. Such reviews would encompass, at a minimum, regulatory compliance; documentation and purpose; implementation; use; and open items from previous validations or reviews (where appropriate). The results of the review, including any findings, would be reported to ICE Clear Europe's Executive Risk Committee along with the priority of findings, proposed remediations and target due date to remediate the findings.

The document owner also would be responsible for reporting material breaches or unapproved deviations from

the Plan to their Head of Department, the Chief Risk Officer, and the Head of Regulation and Compliance (or, as applicable, their respective delegates). Those individuals together would determine if further escalation should be made to relevant senior executives, the Board, and/or competent authorities.

Finally, under Section 8, exceptions to the Plan would be approved in accordance with ICE Clear Europe's governance process for the approval of changes, and changes to the Plan would have to be approved in in accordance with ICE Clear Europe's governance process. Such changes only would take effect after completion of all necessary internal and regulatory approvals.

I. Appendices

The Plan currently has two appendices. Appendix A is a depiction of ICE Clear Europe's governance structure. The Board of Directors is at the top, followed by Board-level governance committees, and then executive-level governance committees. The proposed rule change would delete Appendix A. ICE Clear Europe believes the committee structure is fully defined in other documentation and does not need to be included in the Plan.[14]

Appendix B is a table that describes certain scenarios that could lead ICE Clear Europe to invoking the Plan. Appendix B describes these scenarios as ''stress scenarios.'' The table contains entries for eleven different stress scenarios, with three related to losses stemming from a Clearing Member's default and eight related to non-default losses. For each scenario, the table summarizes the circumstances leading to losses at ICE Clear Europe, analyzes how such a scenario could trigger the Plan and thus become a Recovery Scenario, and explains how ICE Clear Europe would use the Plan to respond to the scenario. The proposed rule change would maintain the substance of this table while making minor updates to the language. For example, the proposed rule change would change the title of the first column to ''Scenario Category (Key Risk).'' The proposed rule change also would change the title of the last column to ''Scenario Analysis'' from just ''Analysis.''

With respect to each of the scenarios, the proposed rule change would specify which key risk the scenario relates to. For example, the proposed rule change would specify that each of the default loss scenarios relates to financial risk, while the non-default loss scenarios relate to legal, regulatory, operational, information security, and business risk, respectively. ICE Clear Europe is making this change to identify each scenario with the key risks contained within its risk appetite statements, thus ensuring that each key risk type is covered within those scenarios. This is consistent with the change to Section 3 described above.

Finally, the proposed rule change would make a minor typographical correction in one part of the table, by deleting certain duplicative words.

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization.[15] For the reasons discussed below, the Commission finds that the proposed rule change is consistent with section 17A(b)(3)(F) of the Act,[16] Rule 17Ad–22(e)(2)(i) and (v), and Rule 17Ad–22(e)(3)(ii) thereunder.[17]

A. Consistency With Section 17A(b)(3)(F) of the Act

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of ICE Clear Europe be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions.[18] As discussed above, the proposed rule change would amend various sections of the Plan, as well as adding a new Section 8 to the Plan. The Commission believes the proposed rule change would help to improve the governance and communication of actions taken under the Plan; improve testing of the Plan; ensure that information found in the Plan is accurate and current; and make the Plan more concise. Based on its review of the record, and for the reasons discussed below, the Commission therefore believes the proposed rule change would be consistent with the promotion of the prompt and accurate clearance and settlement of securities transactions.

With respect to the governance and communication of actions taken under the Plan, among other things, the proposed rule change would clarify that where the President cannot convene the Board in advance of making a material decision, the Board will be convened afterwards. The proposed rule change also would specify that where the Board cannot be convened on a timely basis prior to deciding which Recovery Options to use, the President will decide on which Recovery Options to use and convene the Board afterwards. With respect to communications, the proposed rule change would, among other things, explain that ICE Clear Europe would seek to communicate its plans and/or intentions to relevant external stakeholders where possible, and as soon as reasonably practicable, to ensure appropriate transparency. The proposed rule change also would require that ICE Clear Europe notify its regulators as soon as reasonably possibly after triggering the Plan and using Recovery Options. The Commission believes that the proposed rule change therefore would help to ensure that ICE Clear Europe's Board is fully apprised of actions taken under the Plan and further that ICE Clear Europe communicates its actions to regulators and other external stakeholders.

The proposed rule change also would amend ICE Clear Europe's testing of the plan, as found in Section 1. Under the proposed rule change, ICE Clear Europe could test default-related recovery scenarios, including coordination with other covered clearing agencies, as part of its annual default fire drill. The proposed rule change also would require that ICE Clear Europe specifically test at least one default and one non-default scenario each year, with all recovery options tested over a three-year cycle. Moreover, the proposed rule change would add, as a key focus for testing, whether all services can continue to be provided, including those provided to affiliates. The Commission believes the proposed rule change therefore would improve testing of the plan and help ensure that ICE Clear Europe tests the plan in its entirety over a three-year cycle. The Commission further believes that testing of the plan can reveal potential errors and other issues, and therefore can help ICE Clear Europe to resolve potential problems prior to entering a Recovery Scenario or engaging its recovery options.

The Commission believes that other changes discussed above would help ensure that information found in the Plan is accurate and current. Among other things, the proposed rule change would correct typographical errors, thereby improving the accuracy of the information found in the Plan. The proposed rule change also would delete internal references to Appendix A because ICE Clear Europe is deleting that appendix. The proposed rule

[14] Notice, 88 FR at 48274.

[15] 15 U.S.C. 78s(b)(2)(C).

[16] 15 U.S.C. 78q–1(b)(3)(F).

[17] 17 CFR 240.17Ad–22(e)(2)(i), (v), and (3)(ii).

[18] 15 U.S.C. 78q–1(b)(3)(F).

change would remove references to the amount of ICE Clear Europe's liability for investment losses, given that ICE Clear Europe recently changed that amount and the amount is subject to further change. The proposed rule change would update the name of the Capital Replenishment Framework to the Capital Replenishment Plan, the Crisis Communication and Management Plan to the Communications Plan, the Major Incident Response Plan to the Crisis Management Plan, and references to business continuity and disaster recovery to operational resilience. The proposed rule change also would update the description of ICE Clear Europe's critical service providers, ICE Clear Europe's dependencies on these providers, and its mitigation of these dependencies. Finally, the proposed rule change would update the description of Recovery Scenarios, the early warning indicators of those scenarios, and note that each scenario is mapped to key risks contained within ICE Clear Europe's risk appetite statements. The Commission believes that these proposed changes would help ensuring those utilizing the Plan have information necessary to carry out recovery. The Commission therefore believes that the proposed rule change would strengthen the Plan by ensuring those utilizing it have information necessary to carry out recovery, which in turn should help ICE Clear Europe to continue promptly and accurately clearing and settling transactions during recovery.

The Commission believes that the proposed rule change also would help make the Plan more concise. For example, the proposed rule change would delete from Section 4 a description of how ICE Clear Europe's Recovery Options are comprehensive and effective because this description duplicates language already found in Section 1. The proposed rule change similarly would remove discussion of the expected coverage of partial tear-ups and powers of assessment. The proposed rule change also would remove Appendix A, given that ICE Clear Europe's committee structure is defined in other documentation and does not need to be included in the Plan. The Commission therefore believes that the proposed rule change, by making the Plan more concise, should improve the usability and readability of the Plan.

Thus, the Commission believes the proposed rule change would strengthen the Plan. Improving governance and communication of actions should help ensure that internal and external stakeholders are fully apprised of actions ICE Clear Europe takes during recovery, therefore enabling these stakeholders to assist in carrying out the actions or otherwise prepare for them. Requiring ICE Clear Europe to test on a three-year cycle should help reveal any potential deficiencies in the Plan ahead of when ICE Clear Europe would need to use it. Updating information should help ensure those utilizing the Plan have current information necessary to carry out recovery. Finally, making the plan more concise should make it easier and more efficient to use, by removing unnecessary or repetitive information. Overall, the Commission believes that the proposed rule change would strengthen the Plan and that in doing so, the proposed rule change should help ICE Clear Europe to continue promptly and accurately clearing and settling transactions during recovery.

Therefore, the Commission finds that the proposed rule change is consistent with section 17A(b)(3)(F) of the Act.[19]

B. Consistency With Rule 17Ad–22(e)(2)(i) and (v) Under the Act

Rule 17Ad–22(e)(2)(i) and (v) require that ICE Clear Europe establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide governance arrangements that, among other things, are clear and transparent and specify clear and direct lines of responsibility.[20]

As discussed above, the proposed rule change would add a new Section 8 regarding document governance. Among other things, Section 8 would make the document owner responsible for ensuring that the Plan remains up-to-date and is reviewed in accordance with ICE Clear Europe's governance processes. The document owner also would be responsible for reporting material breaches or unapproved deviations from the Plan to their Head of Department, the Chief Risk Officer, and the Head of Regulation and Compliance (or, as applicable, their respective delegates). The Commission believes these changes would establish clear and direct responsibilities for the document owner of the Plan consistent with Rule 17Ad–22(e)(2)(v).[21]

The proposed rule change also would add language to clarify what would happen where the ICE Clear Europe President is unavailable or incapacitated. In that situation, ICE Clear Europe would refer to its Delegation of Authority Framework to determine if another person at ICE Clear Europe could substitute for the President. This is an important clarification because, as discussed above, the President is responsible for significant actions under the Plan, such as making material decisions and triggering the Plan. The Commission believes that specifying what ICE Clear Europe would do when the President is incapacitated would therefore help clarify how ICE Clear Europe would use the Plan in such a situation, consistent with Rule 17Ad–22(e)(2)(i).[22]

C. Consistency With Rule 17Ad–22(e)(3)(ii) Under the Act

Rule 17Ad–22(e)(3)(ii) requires that ICE Clear Europe establish, implement, maintain, and enforce written policies and procedures reasonably designed to maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by ICE Clear Europe, which includes plans for the recovery and orderly wind-down of ICE Clear Europe necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.[23]

The Commission believes the proposed change rule, as described above, would strengthen the Plan by adding details regarding the governance and communication processes associated with the Plan. The proposed rule change also would establish a three-year cycle for testing the Plan, update information in the Plan, and otherwise make the Plan more concise. The Commission believes that the proposed rule change, in strengthening the Plan, overall would help ICE Clear Europe to maintain a plan for recovery, consistent with Rule 17Ad–22(e)(3)(ii).[24]

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and in particular, with the requirements of section 17A(b)(3)(F) of the Act,[25] Rule 17Ad–22(e)(2)(i) and (v), and Rule 17Ad–22(e)(3)(ii).[26]

It is therefore ordered pursuant to section 19(b)(2) of the Act[27] that the

[19] 15 U.S.C. 78q–1(b)(3)(F).

[20] 17 CFR 240.17Ad–22(e)(2)(i) and (v).

[21] 17 CFR 240.17Ad–22(e)(2)(v).

[22] 17 CFR 240.17Ad–22(e)(2)(i).

[23] 17 CFR 240.17Ad–22(e)(3)(ii).

[24] 17 CFR 240.17Ad–22(e)(3)(ii).

[25] 15 U.S.C. 78q–1(b)(3)(F).

[26] 17 CFR 240.17Ad–22(e)(2)(i), (v), and (3)(ii).

[27] 15 U.S.C. 78s(b)(2).

proposed rule change (SR–ICEEU–2023–020), be, and hereby is, approved.[28]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[29]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19844 Filed 9–13–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98335.; File No. SR–FICC–2023–013]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Recovery and Wind-Down Plan

September 8, 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 September 1, 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. NSCC filed the proposed rule change pursuant to section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(4) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change consists of amendments to the Recovery and Wind-down Plan to reflect business and product developments that have taken place since the time it was last amended, and make certain changes to improve the clarity of the Plan and make other updates and technical revisions, 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

Executive Summary

The R&W Plan was adopted in August 2018 [6] and is maintained by FICC for compliance with Rule 17Ad–22(e)(3)(ii) under the Act.[7] This section of the Act requires registered clearing agencies to, in short, establish, implement and maintain plans for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses. The Plan is intended to be used by the Board and FICC management in the event FICC encounters scenarios that could potentially prevent it from being able to provide its critical services to the marketplace as a going concern.

The R&W Plan is comprised of two primary sections: (i) the ''Recovery Plan,'' that sets out the tools and strategies to enable FICC to recover, in the event it experiences losses that exceed its prefunded resources, and (ii) the ''Wind-down Plan,'' that describes the tools and strategies to be used to conduct an orderly wind-down of FICC's business in a manner designed to permit the continuation of FICC's critical services in the event that its recovery efforts are not successful.

The purpose of the rule proposal is to amend the R&W Plan to reflect business and product developments that have taken place since the time it was last amended,[8] make certain changes to improve the clarity of the Plan and make other updates and technical revisions.

FICC believes that by helping to ensure that the R&W Plan reflects current business and product developments, providing additional clarity, and making necessary grammatical corrections, that the proposed rule change would help it continue to maintain the Plan in a manner that supports the continuity of FICC's critical services and enables its Members and Limited Members to maintain access to FICC's services through the transfer of its membership in the event FICC defaults or the Wind-down Plan is ever triggered by the Board.

Background

The R&W Plan is managed by the Office of Recovery & Resolution Planning (referred to in the Plan as the ''R&R Team'') of FICC's parent company, the Depository Trust & Clearing Corporation (''DTCC''),[9] on behalf of FICC, with review and oversight by the DTCC Management Committee and the Board. In accordance with the SEC's Approval Order covering the Plan,[10] the Board, or such committees as may be delegated authority by the Board from time to time, is required to review and approve the R&W Plan biennially and would also review and approve any changes that are proposed to the R&W Plan outside of the biennial review. FICC completed its most recent biennial review in 2022. The proposed rule change reflects amendments proposed to the Plans resulting from that review, which are described in greater detail below. None of the proposed changes modify FICC's general objectives and approach with respect to its recovery and wind-down strategy as set forth under the current Plan.

A. Proposed Amendments to the R&W Plan

FICC is proposing the changes to the following sections of the Plan based upon business updates and product

[28] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[29] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(4).

[5] Capitalized terms not defined herein are defined in the FICC Government Securities Division (''GSD'') Rulebook (the ''GSD Rules'') or the FICC Mortgage-Backed Securities Division (''MBSD'') Clearing Rules (the ''MBSD Rules,'' and collectively with the GSD Rules, the ''Rules''), *available at www.dtcc.com/legal/rules-and-procedures,* or in the Recovery & Wind-down Plan of FICC (the ''R&W Plan'' or ''Plan'').

[6] *See* Securities Exchange Act Release Nos. 83973 (Aug. 28, 2018), 83 FR 44942 (Sep. 4, 2018) (SR–FICC–2017–021); and 83954 (Aug. 27, 2018), 83 FR 44361 (Aug. 30, 2018) (SR–FICC–2017–805).

[7] 17 CFR 240.17Ad–22(e)(3)(ii). FICC is a ''covered clearing agency'' as defined in Rule 17Ad–22(a)(5) under the Act and must comply with paragraph (e) of Rule 17Ad–22.

[8] *See* Securities Exchange Act Release No. 91430 (Mar. 29, 2021), 86 FR 17432 (Apr. 2, 2021) (SR–FICC–2021–002).

[9] DTCC operates on a shared service model with respect to FICC and its other affiliated clearing agencies, National Securities Clearing Corporation (''NSCC'') and The Depository Trust Company (''DTC''). Most corporate functions are established and managed on an enterprise-wide basis pursuant to intercompany agreements under which it is generally DTCC that provides relevant services to FICC, NSCC and DTC (collectively, the ''Clearing Agencies'').

[10] *Supra* note 6.

developments that have occurred since the Plan was last amended.[11]

Section 2.3 (MBSD) describes the way in which TBA transactions are processed by FICC. For purposes of completeness, the proposed rule change would augment the existing description to add that the processing consists of the following steps: trade matching, novation, the Do Not Allocate (''DNA'') process, TBA Netting, electronic pool notification (''EPN'') allocation, pool comparison, Pool Netting, pool conversion and settlement. Similarly, in the paragraph of this section that describes the TBA Netting process,[12] the description would be expanded to include that net positions created by the TBA Netting process are referred to as the settlement balance order (''SBO'') position,[13] which constitutes settlement obligations against which Members will submit pool information for the Pool Netting process or offset such SBO position with other SBO position or trade-for-trade transaction, as applicable, through the DNA process.[14]

Section 2.4 (Intercompany Arrangements) describes how corporate support services are provided to FICC from DTCC and DTCC's other subsidiaries, through intercompany agreements under a shared services model. This section includes a table, (Facilities, Table 2–B), that lists each of the DTCC facilities utilized by the Clearing Agencies and indicates whether the facility is owned or leased. FICC proposes to update this table to add Washington DC, London, UK, and McLean, Virginia as additional DTCC facility locations.

Section 2.5 (FMI Links)[15] describes some of the key financial market infrastructures (''FMIs''), both domestic and foreign, that FICC has identified as critical ''links.''[16] As set out in this section of the Plan, the inventory of FICC's links is maintained by DTCC's Systemic Risk Office (''SRO'') and the SRO has set forth a set of practices and protocols for managing and reviewing the various risks and controls associated with clearing agency links. Based on a change to the SRO Clearing Agency Links-Risk Review Procedures, the proposal would clarify that in addition to approval by the Chief Systemic Risk Officer, the inventory of clearing agency links is also subject to the approval of a Deputy General Counsel of the General Counsel's Office.

Section 3 (Critical Services) defines the criteria for classifying certain of FICC's services as ''critical,''[17] and identifies such critical services and the rationale for their classification. The identification of FICC's critical services is important for evaluating how the recovery tools and the wind-down strategy would facilitate and provide for the continuation of FICC's critical services to the markets it serves. Included in this section are two tables (Table 3–B: GSD Critical Services and Table 3–C: MBSD Critical Services) that list each of the services, functions or activities that FICC has identified as ''critical'' based on the applicability of the criteria. The proposed rule change would update Table 3–B to enhance the description of the GSD's ''Sponsored Membership Service'' by adding at the end of the description that this service is comprised of two available offerings, the Sponsored DVP service and the Sponsored GC Service.[18]

Section 5.2.4 (Recovery Corridor and Recovery Phase) outlines the early warning indicators to be used by FICC to evaluate its options and potentially prepare to enter the ''Recovery Phase,'' which phase refers to the actions to be taken by FICC to restore its financial resources and avoid a wind-down of its business. This section contains descriptions of potential stress events that could lead to recovery, and several early warning indicators and metrics that FICC has established to evaluate its options and potentially prepare to enter the Recovery Phase. These indicators, which are referred to in the Recovery Plan as recovery corridor indicators (''Corridor Indicators'' or ''Indicator(s)''),[19] are calibrated against FICC's financial resources and are designed to give FICC the ability to replenish financial resources, typically through business-as-usual tools applied prior to entering the Recovery Phase. Included in this section is a table (Table 5–A: Corridor Indicators) that identifies for each Indicator (i) how it is measured, (ii) the basis for the evaluation of the status of the Indicator, (iii) the type of metrics used for determining the status of the deterioration or improvement of the Indicator, and (iv) ''Corridor Actions & Escalation,'' which are those steps that may be taken to improve the status of the Indicator and the management escalations required to authorize those steps. The proposed rule change would make the following clarifications to Table 5–A.

First, for purposes of providing additional context on the applicable measurement, the proposed rule change would clarify the ''Hedge Effectiveness'' Indicator[20] set out in Table 5–A. Specifically, the language in the measurement column for this Indicator would be revised to clarify that if the hedge effectiveness measures are outside of the designated metrics due to certain types of factors (*e.g.,* mismatch in portfolio profit and loss (''P&L'') and hedge P&L due to timing of initiating the hedge or the portfolio), management would document the performance and only escalate to the Board Risk Committee and Management Risk Committee if the measurement status deteriorates in a material respect. Second, for the ''Retirements/Trade Volume Reductions'' Indicator,[21] a

[11] *Supra* note 8.

[12] *See* MBSD Rule 6 (TBA Netting).

[13] The term ''SBO'' means the settlement balance orders that constitute the net positions of a Clearing Member as a result of the TBA Netting process.

[14] The DNA process gives Members the ability to offset TBA obligations with other TBA obligations meaning that, SBO positions and/or trade-for-trade transactions may be offset with other SBO positions and/or trade for-trade transactions, as applicable, subject to certain restrictions.

[15] For purposes of consistency, under the proposed rule change all references to ''FMI Links'' would be revised to refer to these as ''Clearing Agency Links.''

[16] As defined in Rule 17Ad–22(a)(8) under the Act, a link ''means, for purposes of paragraph (e)(20) of Rule 17Ad–22, a set of contractual and operational arrangements between two or more clearing agencies, financial market utilities, or trading markets that connect them directly or indirectly for the purposes of participating in settlement, cross margining, expanding their services to additional instruments or participants, or for any other purposes material to their business.'' 17 CFR 240.17Ad–22(a)(8).

[17] The criteria that is used to identify a FICC service or function as critical includes consideration as to whether (1) there is a lack of alternative providers or products; (2) the inability of FICC to act as a central counterparty through either Division would increase Members' credit risk and disrupt their ability to initiate new transactions; (3) the failure or disruption of the multilateral netting performed by each FICC Division could materially and negatively impact the volume of financial transactions and the liquidity of the U.S. Fixed Income markets; and (4) the service is interconnected with other participants and processes within the U.S. financial system (for example, with other FMIs, settlement banks, broker-dealers, and exchanges).

[18] FICC's Sponsored DVP service offers eligible clients the ability to lend cash or eligible collateral via FICC-cleared DVP repo transactions in U.S. Treasury and Agency Securities on an overnight and term basis, as well as outright purchases and sales of such securities, to be settled on a Delivery-vs-Payment (DVP) basis. FICC's Sponsored General Collateral service offers eligible clients the ability to execute general collateral repo transactions (in the same asset classes currently eligible for Netting Members to transact in via FICC's existing GCF Repo® Service) with each other and settle such repo transactions on the tri-party repo platform of BNY Mellon.

[19] The majority of the Corridor Indicators, as identified in the Recovery Plan, relate directly to conditions that may require FICC to adjust its strategy for hedging and liquidating a defaulting Member's portfolio, and any such changes would include an assessment of the status of the Corridor Indicators.

[20] Hedging is a risk management strategy that would be employed when executing the liquidation of a defaulting Member's portfolio to potentially help reduce the risk of loss of an existing position.

[21] The Retirements/Transaction Reductions indicator measures Member terminations or

clarification would be made to identify Client Account Management and FICC Global Business Operations as the internal groups responsible for measurement of the applicable deterioration and improvement Indicator metrics.

B. Other Updates, Clarifications and Technical Revisions

FICC is also proposing to make other updates and technical revisions to the Plan. These technical revisions would, for example, make grammatical corrections, update the names of certain FICC internal groups, and clarify the description of internal organizations, without changing the substantive statements being revised.

For example, in Section 2.4, Table 2–A (SIFMU Legal Entity Structure and Intercompany Agreements), for purposes of clarifying the full scope of services provided by FICC's affiliate, DTC, the description of DTC's services would be revised from ''Underwriting, Securities Processing, Corporate Actions,'' to ''Asset Services.'' Some other examples include: (i) a revision would be made throughout the Plan to reflect an internal name change from DTCC's ''Operational Risk Management'' to ''Operational Risk,'' and add a new internal organization, ''Embedded Risk Management,'' [22] (ii) all references to ''FMI Links'' would be revised to refer to these as ''Clearing Agency Links,'' and (iii) in the section covering DTCC facilities, the name of the DTCC legal entity that is the holder of the lease for the Manila location would be changed from ''DTCC'' to ''DTCC Manila.''

FICC believes the proposed updates and technical revisions would improve the clarity and accuracy of the Plan and, therefore, would help facilitate the execution of Plan, if necessary.

2. Statutory Basis

FICC believes that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a registered clearing agency. In particular, FICC believes that the amendments to the R&W Plan are consistent with section 17A(b)(3)(F) of the Act [23] and Rule 17Ad–22(e)(3)(ii) under the Act [24] for the reasons described below.

Section 17A(b)(3)(F) of the Act requires, in part, that the rules of FICC be designed to promote the prompt and accurate clearance and settlement of securities transactions. As described above, the proposed rule change would update the R&W Plan to reflect business and product developments and make certain technical corrections. By helping to ensure that the R&W Plan reflects current business and product developments, and providing additional clarity, FICC believes that the proposed rule change would help it continue to maintain the Plan in a manner that supports the continuity of FICC's critical services and enables its Participants and Pledgees to maintain access to FICC's services through the transfer of its membership in the event FICC defaults or the Wind-down Plan is ever triggered by the Board. Further, by facilitating the continuity of its critical clearance and settlement services, FICC believes the Plan and the proposed rule change would continue to promote the prompt and accurate clearance and settlement of securities transactions. Therefore, FICC believes the proposed amendments to the R&W Plan are consistent with the requirements of section 17A(b)(3)(F) of the Act.

Rule 17Ad–22(e)(3)(ii) under the Act requires FICC to establish, implement, maintain and enforce written policies and procedures reasonably designed to maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by the covered clearing agency, which includes plans for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.[25]

Specifically, the Recovery Plan defines the risk management activities, stress conditions and indicators, and tools that FICC may use to address stress scenarios that could eventually prevent it from being able to provide its critical services as a going concern. Through the framework of the Crisis Continuum, the Recovery Plan addresses measures that FICC may take to address risks of credit losses and liquidity shortfalls, and other losses that could arise from a Participant default. The Recovery Plan also addresses the management of general business risks and other non-default risks that could lead to losses. The Wind-down Plan would be triggered by a determination by the Board that recovery efforts have not been, or are unlikely to be, successful in returning FICC to viability as a going concern. Once triggered, the Wind-down Plan sets forth clear mechanisms for the transfer of FICC's membership and business and is designed to facilitate continued access to FICC's critical services and to minimize market impact of the transfer. By establishing the framework and strategy for the execution of the transfer and wind-down of FICC in order to facilitate continuous access to its critical services, the Wind-down Plan establishes a plan for the orderly wind-down of FICC.

As described above, the proposed rule change would update the R&W Plan to reflect business and product developments and make certain technical corrections. By ensuring that material provisions of the Plan are current, clear, and technically correct, FICC believes that the proposed amendments are designed to support the maintenance of the Plan for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses, and, as such, meets the requirements of Rule 17Ad–22(e)(3)(ii) under the Act.[26] Therefore, the proposed changes would help FICC to maintain the Plan in a way that continues to be consistent with the requirements of Rule 17Ad–22(e)(3)(ii).

(B) Clearing Agency's Statement on Burden on Competition

FICC does not believe that the proposed rule change would have any impact, or impose any burden, on competition. FICC does not anticipate that the proposal would affect its day-to-day operations under normal circumstances, or in the management of a typical Member default scenario or non-default event. The R&W Plan was developed and documented in order to satisfy applicable regulatory requirements, as discussed above. The proposal is intended to enhance and update the Plan to ensure it is clear and remains current in the event it is ever necessary to be implemented. The proposed revisions would not affect any changes to the overall structure or operation of the Plan or FICC's recovery and wind-down strategy as set forth under the current Plan. As such, FICC believes the proposal would not have any impact, or impose any burden, on competition.

---

curtailment of transactions that impact the financial viability of FICC.

[22] The Embedded Risk Management group supports the R&R Team. For example, they may assist in the identification of new initiatives, processes, or product developments that may impact FICC's R&W Plan.

[23] 15 U.S.C. 78q–1(b)(3)(F).

[24] 17 CFR 240.17Ad–22(e)(3)(ii).

[25] *Id.*

[26] *Id.*

(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, FICC will amend this filing to publicly file such comments as an Exhibit 2 to this filing, as required by Form 19b–4 and the General Instructions thereto.

Persons submitting written 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 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) [27] of the Act and paragraph (f) [28] of Rule 19b–4 thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[27] 15 U.S.C. 78s(b)(3)(A).

[28] 17 CFR 240.19b–4(f).

Electronic Comments

• Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include file number SR–FICC–2023–013 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–2023–013. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of NSCC 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–2023–013 and should be submitted on or before October 5, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[29]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19843 Filed 9–13–23; 8:45 am]

BILLING CODE 8011–01–P

[29] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98338; File No. SR–MEMX–2023–19]

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Short Term Option Series Program in Rule 19.5, Interpretation and Policy .05 and a Related Definition in Rule 16.1

September 8, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 6, 2023, MEMX LLC (''MEMX'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Short Term Option Series Program in MEMX Rule 19.5, Interpretation and Policy .05 and a related definition in Rule 16.1. The text of the proposed rule change is provided in Exhibit 5.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Short Term Option Series Program in Rule 19.5, Interpretation and Policy .05, and amend the definition of Short Term Option Series in Rule 16.1.

In August 2022, the Commission approved the Exchange's adoption of rules to govern the trading of options on the Exchange by MEMX Options,[5] which will be a facility of the Exchange. The rules adopted were substantially similar to those of other currently operating options exchanges, in particular, Cboe BZX Exchange, Inc. (''BZX Options''). Since that time, BZX Options and other options exchanges, including Cboe EDGX Exchange, Inc. (''EDGX Options''), have modified certain of those rules[6] and, as such, the Exchange wishes to propose the same modifications in order to conform to those rules at the time trading begins on MEMX Options.[7]

Specifically, the Exchange proposes to amend the Short Term Option Series Program to: (i) limit the number of Short Term Option Expiration Dates for options on SPDR S&P 500 ETF Trust (SPY), the INVESCO QQQ TrustSM, Series 1 (QQQ), and iShares Russell 2000 ETF (IWM) from five to two expirations for Monday and Wednesday expirations; and (ii) expand the Short Term Option Series program to permit the listing and trading of options series with Tuesday and Thursday expirations for options on SPY and QQQ listed pursuant to the Short Term Option Series Program, subject to the same proposed limitation of two expirations. The Exchange also proposes to amend the definition of Short Term Option Series in Rule 16.1.

Curtail Short Term Option Expiration Dates

Currently, after an option class has been approved for listing and trading on the Exchange, the Exchange may open for trading on any Thursday or Friday that is a business day (''Short Term Option Opening Date'') series of options on that class that expire at the close of business on each of the next five Fridays that are business days and are not Fridays on which monthly options series or Quarterly Options Series expire (''Short Term Option Expiration Dates''). The Exchange may have no more than a total of five Short Term Option Expiration Dates not including any Monday or Wednesday SPY, QQQ, and IWM Expirations. Further, if the Exchange is not open for business on the respective Thursday or Friday, the Short Term Option Opening Date will be the first business day immediately prior to that respective Thursday or Friday. Similarly, if the Exchange is not open for business on a Friday, the Short Term Option Expiration Date will be the first business day immediately prior to that Friday.

Today, with respect to Wednesday SPY, QQQ, and IWM Expirations, the Exchange may open for trading on any Tuesday or Wednesday that is a business day series of options on SPY, QQQ, and IWM to expire on any Wednesday of the month that is a business day and is not a Wednesday in which Quarterly Options Series expire (''Wednesday SPY Expirations,'' ''Wednesday QQQ Expirations,'' and ''Wednesday IWM Expirations''). With respect to Monday SPY, QQQ, and IWM Expirations, the Exchange may open for trading on any Friday or Monday that is a business day series of options on the SPY, QQQ, or IWM to expire on any Monday of the month that is a business day and is not a Monday in which Quarterly Options Series expire (''Monday SPY Expirations,'' ''Monday QQQ Expirations,'' and ''Monday IWM Expirations''), provided that Monday SPY Expirations, Monday QQQ Expirations, and Monday IWM Expirations that are listed on a Friday must be listed at least one business week and one business day prior to the expiration. The Exchange may list up to five consecutive Wednesday SPY Expirations, Wednesday QQQ Expirations, and Wednesday IWM Expirations and five consecutive Monday SPY Expirations, Monday QQQ Expirations, and Monday IWM Expirations at one time; the Exchange may have no more than a total of five each of Wednesday SPY Expirations, Wednesday QQQ Expirations, and Wednesday IWM Expirations and a total of five each of Monday SPY Expirations, Monday QQQ Expirations, and Monday IWM Expirations. Monday and Wednesday SPY Expirations, Monday and Wednesday QQQ Expirations, and Monday and Wednesday IWM Expirations will be subject to the provisions of Rule 19.5, Interpretation and Policy .05.

Proposal

At this time, the Exchange proposes to curtail the number of Short Term Option Expiration Dates from five to two[8] for Monday and Wednesday Expirations in SPY, QQQ and IWM, as well as the proposed Tuesday and Thursday Expirations in SPY and QQQ (''Short Term Option Daily Expirations''). The Exchange proposes to create a new category of Short Term Option Expiration Dates called ''Short Term Option Daily Expirations,'' which will only permit two Short Term Option Expiration Dates for each of the Monday, Tuesday, Wednesday, and Thursday expirations at any one time. The Exchange proposes to include a table, labelled ''Table 1'', within Rule 19.5, Interpretation and Policy .05(h), which specifies each symbol which qualifies as a Short Term Option Daily Expiration. The table would note the number of expirations for each symbol as well as expiration days. The Exchange proposes to include Monday and Wednesday expirations for SPY, QQQ, and IWM and Tuesday and Thursday expirations for SPY and QQQ and list the number of expirations as ''2'' for these symbols. The Exchange's proposal to permit Tuesday and Thursday expirations for options on SPY and QQQ listed pursuant to the Short Term Option Series Program is explained below in more detail. In the event Short Term Option Daily Expirations expire on the same day in the same class as a monthly options series or a Quarterly Options Series, the Exchange would skip that week's listing and instead list the following week; the two weeks of Short Term Option Expiration Dates would therefore not be consecutive. Specifically, the Exchange proposes to state within Rule 19.5, Interpretation and Policy .05(h):

> In addition to the above, the Exchange may open for trading series of options on the symbols provided in Table 1 below that expire at the close of business on each of the next two Mondays, Tuesdays, Wednesdays, and Thursdays, respectively, that are business days beyond the current week and are not business days on which monthly options series or Quarterly Options Series expire (''Short Term Option Daily Expirations''). The Exchange may have no more than a total of two Short Term Option Daily Expirations beyond the current week for each of Monday, Tuesday, Wednesday, and Thursday expirations at one time. Short

[5] *See* Securities Exchange Act Release No. 95445 (August 9, 2022), 87 FR 49884 (August 12, 2022) (SR–MEMX–2022–010).

[6] *See* Securities Exchange Act Release Nos. 96313 (November 15, 2022), 87 FR 70869 (November 21, 2022) (SR–CboeBZX–2022–056); 96320 (November 15, 2022), 87 FR 70880 (November 21, 2022) (SR–CboeEDGX–2022–051); *see also* Securities Exchange Act Release No. 96281 (November 9, 2022), 87 FR 68769 (November 16, 2022) (SR–ISE–2022–18).

[7] Currently, the Exchange plans to launch MEMX Options in September 2023.

[8] The Exchange proposes to list the two front months for Short Term Option Daily Expirations.

Term Option Daily Expirations would be subject to this Interpretation and Policy .05.

SPY, QQQ, and IWM Friday expirations and other option symbols expiring on a Friday that are not noted in Table 1 will continue to have a total of five Short Term Option Expiration Dates, provided those Friday expirations are not Fridays on which monthly options series or Quarterly Options Series expire (''Friday Short Term Option Expiration Dates''). These expirations would be referred to as ''Short Term Option Weekly Expirations'' to distinguish them from the proposed expirations that would be subject to Short Term Option Daily Expirations. The Exchange proposes to add rule text to Rule 19.5, Interpretation and Policy .05(h) which states that Monday Short Term Option Expiration Dates, Tuesday Short Term Option Expiration Dates, Wednesday Short Term Option Expiration Dates, and Thursday Short Term Option Expiration Dates, together with Friday Short Term Option Expiration Dates, are collectively ''Short Term Option Expiration Dates.'' [9]

Tuesday and Thursday Expirations

At this time, the Exchange proposes to expand the Short Term Option Series Program for Short Term Option Daily Expirations on Tuesday (''Tuesday Short Term Option Daily Expirations) and Short Term Option Daily Expirations on Thursday (''Thursday Short Term Option Daily Expirations''). No more than a total of two Tuesday Short Term Option Daily Expirations or Thursday Short Term Option Daily Expirations in SPY and QQQ will be listed at any one time beyond the current week. Tuesday and Thursday Short Term Option Daily Expirations would be subject to Rule 19.5, Interpretation and Policy .05.

A Short Term Option Series means a series in an option class that is approved for listing and trading on the Exchange in which the series is opened for trading on any Monday, Tuesday, Wednesday, Thursday, or Friday that is a business day and that expires on the Monday, Wednesday, or Friday of the following business week that is a business day, or, in the case of a series that is listed on a Friday and expires on a Monday, is listed one business week and one business day prior to that expiration. If a Tuesday, Wednesday, Thursday or Friday is not a business day, the series may be opened (or shall expire) on the first business day immediately prior to that Tuesday, Wednesday, Thursday or Friday. For a series listed pursuant to this section for Monday expiration, if a Monday is not a business day, the series shall expire on the first business day immediately following that Monday.

The Exchange proposes to amend this definition in Rule 16.1 to accommodate the listing of options series that expire on Tuesdays and Thursdays. Specifically, the Exchange proposes to add Tuesday and Thursdays to the permitted expiration days, which currently include Monday, Wednesday, and Friday, that it may open for trading.

The Exchange also proposes corresponding changes within Rule 19.5, Interpretation and Policy .05, which sets forth the requirements for SPY and QQQ options that are listed pursuant to the Short Term Option Series Program as Short Term Option Daily Expirations, to accommodate the listing of options series that expire on Tuesdays and Thursdays.

Similar to Monday and Wednesday SPY, QQQ, and IWM Short Term Option Daily Expirations within Rule 19.5, Interpretation and Policy .05, the Exchange proposes that it may open for trading on any Monday or Tuesday that is a business day series of options on the symbols provided in Table 1 that expire at the close of business on each of the next two Tuesdays beyond the current week that are business days and are not business days in which monthly options series or Quarterly Options Series expire (''Tuesday Short Term Option Expiration Date'').

Likewise, the Exchange proposes that it may open for trading on any Wednesday or Thursday that is a business day series of options on symbols provided in Table 1 that expire at the close of business on each of the next two Thursdays that are business days and are not business days in which monthly options series or Quarterly Options Series expire (''Thursday Short Term Option Expiration Date'').

In the event that options on SPY and QQQ expire on a Tuesday or Thursday and that Tuesday or Thursday is the same day that a monthly option series or Quarterly Options Series expires, the Exchange would skip that week's listing and instead list the following week; the two weeks would therefore not be consecutive. Today, Monday and Wednesday Expirations in SPY, QQQ, and IWM skip the weekly listing in the event the weekly listing expires on the same day in the same class as a Quarterly Options Series. Currently, there is no rule text provision that states that Monday and Wednesday Expirations in SPY, QQQ, and IWM skip the weekly listing in the event the weekly listing expires on the same day in the same class as a monthly option series. Practically speaking, Monday and Wednesday Expirations in SPY, QQQ, and IWM would not expire on the same day as a monthly expiration.

The interval between strike prices for the proposed Tuesday and Thursday SPY and QQQ Short Term Option Daily Expirations will be the same as those for the current Short Term Option Series for Monday, Wednesday, and Friday expirations applicable to the Short Term Option Series Program.[10] Specifically, the Tuesday and Thursday SPY and QQQ Short Term Option Daily Expirations will have a $0.50 strike interval minimum.[11] As is the case with other equity options series listed pursuant to the Short Term Option Series Program, the Tuesday and Thursday SPY and QQQ Short Term Option Daily Expiration series will be P.M.-settled.

Pursuant to proposed Rule 19.5, Interpretation and Policy .05, with respect to the Short Term Option Series Program, a Tuesday or Thursday expiration series will expire on the first business day immediately prior to that Tuesday or Thursday, *e.g.,* Monday or Wednesday of that week, respectively, if the Tuesday or Thursday is not a business day.

Currently, for each option class eligible for participation in the Short Term Option Series Program, the Exchange is limited to opening thirty (30) series for each expiration date for the specific class.[12] The thirty (30) series restriction does not include series that are open by other securities exchanges under their respective weekly rules; the Exchange may list these additional series that are listed by other options exchanges.[13] This thirty (30) series restriction would apply to Tuesday and Thursday SPY and QQQ Short Term Option Daily Expiration series as well. In addition, the Exchange will be able to list series that are listed by other exchanges, assuming they file similar rules with the Commission to list SPY and QQQ options expiring on Tuesdays and Thursdays with a limit of two Tuesday Short Term Daily Expirations and two Thursday Short Term Daily Expirations beyond the current week.

Finally, the Exchange is amending Rule 19.5, Interpretation and Policy .05(b) to conform the rule text to the usage of the term ''Short Term Option

[9] Defining the term ''Short Term Option Expiration Dates'' will make clear that this term includes expiration dates for each day Short Term Options are listed.

[10] *See* Rule 19.5, Interpretation and Policy .05(e)

[11] *See id.*

[12] *See* Rule 19.5, Interpretation and Policy .05(a).

[13] *See id.*

Daily Expirations.'' Today, with the exception of Monday and Wednesday SPY Expirations, Monday and Wednesday QQQ Expirations, and Monday and Wednesday IWM Expirations, no Short Term Option Series may expire in the same week in which monthly option series on the same class expire. With this proposal, Tuesday and Thursday SPY Expirations and Tuesday and Thursday QQQ Expirations would be treated similarly to existing Monday and Wednesday SPY, QQQ, and IWM Expirations. With respect to monthly option series,

Short Term Option Daily Expirations will be permitted to expire in the same week in which monthly option series on the same class expire. Not listing Short Term Option Daily Expirations for one week every month because there was a monthly on that same class on the Friday of that week would create investor confusion. Further, as with Monday and Wednesday SPY, QQQ, and IWM Expirations, the Exchange would not permit Tuesday and Thursday Short Term Option Daily Expirations to expire on a business day in which monthly options series or Quarterly Options Series expire.[14] Therefore, all Short Term Option Daily Expirations would expire at the close of business on each of the next two Mondays, Tuesdays, Wednesdays, and Thursdays, respectively, that are business days and are not business days on which monthly options series or Quarterly Options Series expire.

The Exchange believes that it is reasonable to not permit two expirations on the same day in which a monthly options series or a Quarterly Options Series would expire.

The Exchange does not believe that any market disruptions will be encountered with the introduction of P.M.-settled Tuesday and Thursday Short Term Option Daily Expirations, as other Exchanges have already adopted identical rules, and the Exchange will have surveillance programs in place to support and properly monitor trading in Short Term Option Series that expire Monday and Wednesday for SPY, QQQ and IWM.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[15] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[16] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[17] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposal is consistent with the Act as the overall reduction offered by this proposal reduces the number of Short Term Option Expirations to be listed on the Exchange. This reduction would remove impediments to and perfect the mechanism of a free and open market by encouraging Market-Makers to continue to deploy capital more efficiently and improve displayed market quality.[18] Also, the Exchange's proposal curtails the number of Monday, Tuesday, Wednesday, and Thursday expirations in SPY, QQQ, and IWM without reducing the classes of options available for trading on the Exchange. The Exchange believes that despite the proposed curtailment of expirations, Members will be able to expand hedging tools and tailor their investment and hedging needs more effectively in SPY, QQQ, and IWM.

Similar to SPY, QQQ, and IWM Monday and Wednesday Expirations (proposed to be SPY, QQQ and IWM Monday and Wednesday Short Term Daily Expirations), the introduction of SPY and QQQ Tuesday and Thursday Short Term Daily Expirations is consistent with the Act as it will, among other things, expand hedging tools available to market participants and continue the reduction of the premium cost of buying protection. The Exchange believes that SPY and QQQ Tuesday and Thursday expirations (proposed to be SPY and QQQ Tuesday and Thursday Short Term Daily Expirations) will allow market participants to purchase SPY and QQQ options based on their timing as needed and allow them to tailor their investment and hedging needs more effectively. Further, the proposal to permit Tuesday and Thursday Short Term Daily Expirations for options on SPY and QQQ listed pursuant to the Short Term Option Series Program, subject to the proposed limitation of two expirations, would protect investors and the public interest by providing the investing public and other market participants more flexibility to closely tailor their investment and hedging decisions in SPY and QQQ options, thus allowing them to better manage their risk exposure.

In particular, the Exchange believes the Short Term Option Series Program as implemented by other exchanges has been successful to date and that Tuesday and Thursday SPY and QQQ Short Term Daily Expirations should simply expand the ability of investors to hedge risk against market movements stemming from economic releases or market events that occur throughout the month in the same way that the Short Term Option Series Program has expanded the landscape of hedging. Similarly, the Exchange believes Tuesday and Thursday SPY and QQQ Short Term Daily Expirations should create greater trading and hedging opportunities and flexibility and will provide customers with the ability to tailor their investment objectives more effectively.

Today, with the exception of Monday and Wednesday SPY Expirations, Monday and Wednesday QQQ Expirations, and Monday and Wednesday IWM Expirations, no Short Term Option Series may expire in the same week in which monthly option series on the same class expire. With this proposal, Tuesday and Thursday SPY Expirations and Tuesday and Thursday QQQ Expirations would be treated similarly to existing Monday and Wednesday SPY, QQQ, and IWM Expirations. The Exchange believes that permitting Short Term Option Daily Expirations to expire in the same week that standard monthly options expire on Fridays is consistent with the Act. Not listing Short Term Option Daily Expirations for one week every month because there was a monthly on that same class on the Friday of that week would create investor confusion.

Further, as with Monday and Wednesday SPY, QQQ, and IWM Expirations, the Exchange would not permit Tuesday and Thursday Short Term Option Daily Expirations to expire on a business day in which monthly

[14] While the Exchange proposes to add rule text within Rule 19.5, Interpretation and Policy .05 with respect to Monday Expirations, Tuesday Expirations, and Wednesday Expirations stating that those expirations would not expire on business days on which monthly options series expire, practically speaking this would not occur.

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

[17] *Id.*

[18] Market-Makers are required to quote a specified time in their assigned options series. *See* Rule 22.6.

options series or Quarterly Options Series expire. Therefore, all Short Term Option Daily Expirations would expire at the close of business on each of the next two Mondays, Tuesdays, Wednesdays, and Thursdays, respectively, that are business days and are not business days in which monthly options series or Quarterly Options Series expire. The Exchange believes that it is consistent with the Act to not permit two expirations on the same day in which a monthly options series or a Quarterly Options Series would expire similar to Monday and Wednesday SPY, QQQ, and IWM Expirations.

There are no material differences in the treatment of Wednesday SPY and QQQ expirations for Short Term Option Series as compared to the proposed Tuesday and Thursday SPY and QQQ Short Term Daily Expirations. Given the similarities between Wednesday SPY, QQQ and IWM Expirations and the proposed Tuesday and Thursday SPY and QQQ Short Term Daily Expirations, the Exchange believes that applying the provisions in Rule 19.5, Interpretation and Policy .05 that will apply to Wednesday SPY, QQQ and IWM Expirations to Tuesday and Thursday SPY and QQQ Short Term Daily Expirations is justified.

The Exchange further represents that it has an adequate surveillance program in place to detect manipulative trading in the proposed Tuesday and Thursday SPY and QQQ Short Term Daily Expirations, in the same way that it monitors trading in the current Short Term Option Series and trading in Monday and Wednesday SPY, QQQ, and IWM Expirations. The Exchange also represents that it has the necessary systems capacity to support the new options series.

Finally, as previously noted, the proposed rule change is substantively the same as a rule change proposed by BZX Options and EDGX Options, which the Commission approved in 2022.[19]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposal will provide an overall reduction in the number of Short Term Option Expirations to be listed on the Exchange. The Exchange believes this reduction will not impose an undue burden on competition, rather, it should encourage Market- Makers to continue to deploy capital more efficiently and improve displayed market quality.[20] Also, the Exchange's proposal curtails the number of weekly expirations in SPY, QQQ, and IWM without reducing the classes of options available for trading on the Exchange. The Exchange believes that despite the proposed curtailment of weekly expirations, Members will be able to expand hedging tools and tailor their investment and hedging needs more effectively in SPY, QQQ, and IWM.

Similar to SPY, QQQ and IWM Monday and Wednesday Expirations, the Exchange believes the introduction of SPY and QQQ Tuesday and Thursday Short Term Daily Expirations will not impose an undue burden on competition. The Exchange believes that it will, among other things, expand hedging tools available to market participants and continue the reduction of the premium cost of buying protection. The Exchange believes that SPY and QQQ Tuesday and Thursday Short Term Daily Expirations will allow market participants to purchase SPY and QQQ options based on their timing as needed and allow them to tailor their investment and hedging needs more effectively. The Exchange does not believe the proposal will impose any burden on intermarket competition, as other options exchanges have already adopted similar rules to list and trade Short-Term Option Series with Tuesday and Thursday Short Term Daily Expirations. Additionally, the Commission recently approved a substantively identical proposal of another exchange and other exchanges have filed to modify their rules in a similar fashion.[21] Further, the Exchange does not believe the proposal will impose any burden on intramarket competition, as all market participants will be treated in the same manner under this proposal.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A) of the Act[22] and Rule 19b–4(f)(6) thereunder.[23]

A proposed rule change filed under Rule 19b–4(f)(6)[24] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[25] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposed rule change may become operative upon filing. The proposed rule change is substantially similar to those of other currently operating options exchanges.[26] The Exchange states that it intends to launch MEMX Options on September 13, 2023 and that waiver of the 30-day operative delay would allow the Exchange to implement the proposed change to amend its rules as set forth above prior to launch, thus ensuring consistency of rules between the Exchange and other options exchanges. For these reasons, and because the proposed rule change does not raise any novel legal or regulatory issues, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[27]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if

[19] *See supra* note 6.

[20] *See supra* note 18.

[21] *See* Securities and Exchange Act Release No. 96281 (November 9, 2022) (SR–ISE–2022–18); *See also* Securities Exchange Act Release Nos. 96313 (November 15, 2022), 87 FR 70869 (November 21, 2022) (SR–CboeBZX–2022–056) and 96320 (November 15, 2022), 87 FR 70880 (November 21, 2022) (SR–CboeEDGX–2022–051).

[22] 15 U.S.C. 78s(b)(3)(A).

[23] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[24] 17 CFR 240.19b–4(f)(6).

[25] 17 CFR 240.19b–4(f)(6)(iii).

[26] *See supra* note 6.

[27] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–MEMX–2023–19 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–MEMX–2023–19. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. 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–MEMX–2023–19 and should be submitted on or before October 5, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19845 Filed 9–13–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98332; File No. SR–NYSEAMER–2023–43]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change To Modify the NYSE American Options Fee Schedule

September 8, 2023.

Pursuant to section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on August 29, 2023, NYSE American LLC (''NYSE American'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify the NYSE American Options Fee Schedule (''Fee Schedule'') to provide for certain temporary fee changes in connection with the Exchange's migration to the Pillar trading platform. The Exchange proposes to implement the fee changes effective August 29, 2023. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing to amend the Fee Schedule to provide for certain temporary changes in connection with the Exchange's migration to a new trading platform known as Pillar. Currently, the Exchange conducts options trading on an electronic platform known as ''the Exchange System,'' which refers to the Exchange's electronic order delivery, execution, and reporting system for designated option issues through which orders and quotes of users are consolidated for execution and/or display.[4] On or about October 23, 2023, the Exchange anticipates beginning the migration of its options trading to the Pillar technology platform.[5]

---

[28] 17 CFR 200.30–3(a)(12), (59).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* NYSE American Rule 900.2NY Definitions.

[5] The Exchange has announced that, pending regulatory approval, it will begin migrating Exchange-listed options to Pillar on October 23, 2023, *available here: https://www.nyse.com/trader-update/history#110000530919. See also, e.g.,* Securities Exchange Act Release Nos. 97297 (April 13, 2023), 88 FR 24225 (April 19, 2023) (SR–NYSEAMER–2023–16) (Notice of Filing and Immediate Effectiveness of Proposed Change to Modify Rule 900.2NY and to Adopt New Rules 964NYP, 964.1NYP, and 964.2NYP); 97739 (June 15, 2023), 88 FR 40893 (June 22, 2023) (SR–NYSEAMER–2023–17) (Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Adopt New Exchange Rule 980NYP and Amend Exchange Rule 935NY); 97869 (July 10, 2023), 88 FR 45730 (July 17, 2023) (SR–NYSEAMER–2023–34) (Notice of Filing and Immediate Effectiveness of Proposed New Rules 900.3NYP, 925.1NYP, 928NYP, 928.1NYP, and 952NYP and Amendments to Rules 900.3NY, 925NY, 925.1NY, 928NY, 952NY, 953.1NY, 967NY, 967.1NY, and 985NY); 97938 (July 18, 2023), 88 FR 47536 (July 24, 2023) (NYSEAMER–2023–35) (Notice of Filing and Immediate Effectiveness of Proposed Change for New Rule 971.1NYP).

Specifically, the Exchange proposes to (1) provide ATP Holders and ATP Firms (collectively, ''ATP Holders'') with certainty regarding their eligibility for certain tiers, incentives, and discounts during the migration to Pillar; (2) waive Monthly Excessive Bandwidth Utilization Fees (''EBUF'') during the migration to Pillar and for a six-month period thereafter; and (3) cap certain port fees during the migration to Pillar. The Exchange proposes to implement the rule changes on August 29, 2023.

Tiers, Incentives, and Discounts

The Exchange currently offers various volume- and performance-based incentives and discounts to encourage ATP Holders to use the Exchange as their primary venue for order routing and execution and for market making activity. Many of these incentive and discount programs include multiple tiers, which are intended to encourage greater participation in the programs and to incent ATP Holders to continually grow their business on the Exchange in order to qualify for the benefits offered in a higher tier.

In advance of the Exchange's migration to the Pillar platform, the Exchange has noted concern among ATP Holders regarding their ability to achieve various volume qualifications and thresholds during the migration. Specifically, because ATP Holders may choose to moderate their order flow and quotation sizes to reduce risk as they familiarize themselves with the new trading platform, they may not achieve the tier(s), incentive(s), and discount(s) they qualified for pre-migration. Accordingly, the Exchange believes that providing ATP Holders with certainty with respect to certain pricing they would receive during the transition to Pillar would provide ATP Holders with an opportunity to adjust to new functionality and new order handling mechanisms without taking on an additional financial burden.

To this end, the Exchange proposes to amend Section I of the Fee Schedule to provide that, for the month during which the Exchange commences its migration to the Pillar platform (the ''Migration Month''), ATP Holders will receive the tier(s), incentive(s), and discount(s) they achieved in the month prior to the Migration Month or the tier(s), incentive(s), and discount(s) achieved during the Migration Month, whichever are better. Specifically, the Exchange will compare an ATP Holder's performance in each of the programs set forth below during the Migration Month and during the month prior (currently anticipated to be September 2023) and will bill the ATP Holder for the Migration Month at the most favorable rates based on each qualification level achieved.[6]

The following tiers, incentives, and discount programs would be covered by the proposed change: [7]

- NYSE American Options Market Maker Sliding Scale—Electronic
- American Customer Engagement (''ACE'') Program
- QCC Billable Bonus rebate
- CUBE Auction Fees and Credits
- Professional Step-Up Incentive
- BOLD Mechanism Fees & Credits

The Exchange also proposes the same modification to Section III.E. of the Fee Schedule,[8] which would apply to the Manual Billable Rebate Qualification, the QCC Billable Bonus Rebate Qualification, and the Floor Broker Manual Billable Incentive Program for Floor Brokers.

The Exchange believes that, to the extent ATP Holders choose to modify their trading activity during the Migration Month, the proposed change would mitigate the impact of potential pricing disruption by providing ATP Holders with certainty regarding the tier(s), incentive(s), and discount(s) they would be eligible for in the Migration Month, which would in turn encourage ATP Holders to continue to send orders and quotes to the Exchange during the transition to Pillar.

In addition, by offering ATP Holders the better pricing of the month before the Migration Month or the Migration Month, the Exchange believes ATP Holders will be incented to take full advantage of new Pillar functionality and possibly even increase their volume and participation during the migration.

The Exchange is not proposing any changes to the underlying tiers, incentives, or discounts covered by the proposed change described above.

Monthly Excessive Bandwidth Utilization Fees

Section II of the Fee Schedule describes two alternative fees that are charged for exceeding the ratio of orders or messages sent to the Exchange compared to the number of executions or contracts traded and are intended to deter ATP Holders from submitting an excessive number of orders that are not executed.[9]

The Exchange proposes to amend Section II of the Fee Schedule to specify that the Monthly Excessive Bandwidth Utilization Fees (''EBUF'') assessed to ATP Holders will be waived for the duration of the migration and for six months after the completion of the migration.[10] Specifically, the Exchange proposes that the waiver of the EBUF take effect for the month during which the migration begins and remain in effect for six months following the month in which the migration is completed (the ''Waiver Period''). The Exchange believes that waiving EBUF during the Waiver Period will give both ATP Holders and the Exchange an opportunity to adjust to new functionality and new order handling mechanisms without imposing a financial burden on ATP Holders based on their order to execution ratios or messages to contracts traded ratios during the Pillar transition. In addition, during the Waiver Period, the Exchange intends to work closely with ATP Holders to monitor traffic rates and their order and message to execution ratios as they adapt to trading on the Pillar platform.

Cap on Port Fees

The Exchange proposes to adopt a cap on the monthly fees assessed for the use of certain ports connecting to the Exchange, which will go into effect on the day the Exchange commences its migration to the Pillar platform and remain in effect until the end of the month in which the migration is completed (the ''Migration Period'').

Specifically, the Exchange proposes to cap the monthly fees charged to an ATP Holder for the use of Order/Quote Entry Ports, Quote Takedown Ports, and Drop Copy Ports (collectively, the ''Port Fees'') during the Migration Period (the ''Migration Cap''). The Migration Cap will be based on the number of ports an ATP Holder is billed for in the month preceding the beginning of the Exchange's migration to the Pillar platform, except that if an ATP Holder reduces the number of ports used during the Migration Period (*i.e.,* incurs Port Fees below the Migration Cap), the ATP

[6] The Exchange notes that its affiliated exchange NYSE Arca Options implemented a similar fee change in connection with its migration to the Pillar technology platform in 2022. *See* Securities Exchange Act Release No. 94125 (February 1, 2022), 87 FR 6910 (February 7, 2022) (SR–NYSEArca–2022–05) (providing for continuity of OTP Holders' eligibility for certain tiers, incentives, and discounts in connection with NYSE Arca Options Pillar migration).

[7] *See* Fee Schedule, Sections I.C.; I.E. through I.H.; and I.M.

[8] *See* Fee Schedule, Section III.E. ((Floor Broker Incentive and Rebate Programs).

[9] *See* Fee Schedule, Section II. Monthly Excessive Bandwidth Utilization Fees.

[10] The Exchange notes that its affiliated exchange NYSE Arca Options adopted a similar cap in connection with its migration to the Pillar technology platform in 2022. *See* Securities Exchange Act Release No. 94095 (January 28, 2022), 87 FR 6216 (February 3, 2022) (SR–NYSEArca-2022–04) (providing for a temporary waiver of the Ratio Threshold Fee in connection with the NYSE Arca Options Pillar migration).

Holder would only be billed for the actual number of ports used.

Without this proposed rule change, the Fee Schedule provides that ATP Holders would be charged for the use of both legacy Exchange System platform ports and new Pillar platform ports, which could significantly increase costs to ATP Holders during the Migration Period. Thus, the proposed Migration Cap is intended to encourage ATP Holders to maintain the same levels of interaction with Exchange during the Migration Period, as well as promptly migrate to the more efficient Pillar technology platform, without incurring additional Port Fees as a result of the transition.[11]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,[12] in general, and furthers the objectives of sections 6(b)(4) and (5) of the Act,[13] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Proposed Rule Change Is Reasonable

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [14]

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[15] Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in July 2023, the Exchange had less than 8% market share of executed volume of multiply-listed equity & ETF options trades.[16]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue or reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain options exchange transaction fees.

The Exchange believes that the proposed change is reasonable because it is intended to encourage ATP Holders to maintain active participation on the Exchange during the Pillar migration by offering ATP Holders pricing at each of the tier(s), incentive(s), and discount(s) they qualify for during either the Migration Month or in the month prior to the Migration Month, whichever is more favorable to the ATP Holder, and to maintain sufficient active connections to the Exchange during its migration to Pillar by providing for the Migration Cap. Similarly, the Exchange believes that the proposed EBUF waiver is reasonable because it is intended to encourage ATP Holders to maintain active participation on the Exchange during and after its migration to Pillar. The Exchange further believes that the proposed change would lessen the impact of the migration on ATP Holders by enabling them to adapt their trading activity as needed to transition to Pillar functionality during the migration and ensure they have sufficient data connections and would thus encourage ATP Holders to promptly transition to the more efficient Pillar platform.

To the extent the proposed rule change encourages ATP Holders to migrate to the new platform while maintaining their level of trading activity, the Exchange believes the proposed change would sustain the Exchange's overall competitiveness and its market quality for all market participants. In the backdrop of the competitive environment in which the Exchange operates, the proposed rule change is a reasonable attempt by the Exchange to mitigate the impact of the migration without affecting its competitiveness.

The Proposed Rule Change Is an Equitable Allocation of Credits and Fees

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits because the more favorable tier, incentive, and discount eligibility, Migration Cap, and EBUF waiver would be available to all ATP Holders. In addition, the proposed change relating to tiers, incentives, and discounts is based on each ATP Holder's activity levels before and during the Migration Month, just as the Migration Cap is based on each ATP Holder's use of ports before and during the Pillar migration. Accordingly, all ATP Holders would have the opportunity to adapt their trading activity and moderate their order flow and use of ports as needed to transition to Pillar functionality. Thus, the Exchange believes the proposed rule change would facilitate a smooth transition to the Pillar technology platform for all market participants on the Exchange by encouraging ATP Holders to continue to participate actively on the Exchange during the transition period, thereby promoting continued market-wide quality.

The Proposed Rule Change Is not Unfairly Discriminatory

The Exchange believes the proposed rule change is not unfairly discriminatory because it would be available to all similarly-situated market participants on an equal and non-discriminatory basis.

All ATP Holders would be eligible for the more favorable tier(s), incentive(s), and discount(s) they achieve in either the Migration Month or the preceding month, the Migration Cap, and the EBUF waiver. Moreover, the proposed change is based on each ATP Holder's achievement of tiers, incentives, and discounts prior to and during the Migration Month use of ports. The proposed change would thus allow ATP Holders to adjust their interactions with Exchange systems during the migration as needed and take advantage of the new functionality offered by Pillar by mitigating the impact of potential pricing disruptions. To the extent the proposal encourages ATP Holders to maintain or increase their current level of activity on the Exchange, such activity would result in trading opportunities for all market participants

[11] The Exchange notes that its affiliated exchange NYSE Arca Options adopted a similar fee cap in connection with its migration to the Pillar technology platform in 2022. *See* Securities Exchange Act Release No. 94017 (January 20, 2022), 87 FR 4095 (January 26, 2022) (SR–NYSEArca-2022–03) (providing for a temporary cap on monthly fees for use of ports in connection with the NYSE Arca Options Pillar migration).

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(4) and (5).

[14] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7–10–04) (''Reg NMS Adopting Release'').

[15] The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, *available here: https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Monthly-Weekly-Volume-Statistics.*

[16] Based on a compilation of OCC data for monthly volume of equity-based options and monthly volume of ETF-based options, *see id.,* the Exchange's market share in equity-based options decreased from 7.26% for the month of July 2022 to 7.09% for the month of July 2023.

and thus would promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, protect investors and the public interest.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with section 6(b)(8) of the Act, the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed changes would encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for all market participants. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [17]

Intramarket Competition. The Exchange does not believe the proposed rule change would impose any burden on intramarket competition that is not necessary or appropriate because it would apply equally to all ATP Holders. All ATP Holders would be eligible to receive the rates under each of the tier(s), incentive(s), and discount(s) they achieved in the Migration Month or in the month prior to the Migration Month, whichever are better, and all ATP Holders would be eligible for the Migration Cap and EBUF waiver.

Intermarket Competition. The Exchange operates in a highly competitive market in which market participants can readily favor one of the 16 competing option exchanges if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and to attract order flow to the Exchange. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[18] Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in July 2023, the Exchange had less than 8% market share of executed volume of multiply-listed equity and ETF options trades.[19]

The Exchange does not believe the proposed rule change would impose any burden on intermarket competition that is not necessary or appropriate because the Exchange operates in a highly competitive market in which market participants can readily choose to send their orders to other exchanges if they deem fee levels at those other venues to be more favorable. The Exchange believes that its fees are constrained by the robust competition for order flow among exchanges and thus believes that the proposed change is reasonably designed to encourage ATP Holders to transition to the Pillar platform while mitigating the risk of a significant change to the fees they would be subject to during the migration. Accordingly, the Exchange believes that the proposed change would continue to make the Exchange a competitive venue for order execution by enabling ATP Holders to maintain their current levels of interaction with the Exchange (or make adjustments as needed) during the migration, thus encouraging prompt migration to the newer, more efficient Pillar technology platform and sustained activity on the Exchange during the Pillar transition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to section 19(b)(3)(A) [20] of the Act and subparagraph (f)(2) of Rule 19b–4 [21] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under section 19(b)(2)(B) [22] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–NYSEAMER–2023–43 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–NYSEAMER–2023–43. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available

[17] *See* Reg NMS Adopting Release, *supra* note 14, at 37499.

[18] *See* note 15, *supra.*

[19] *See* note 16, *supra.*

[20] 15 U.S.C. 78s(b)(3)(A).

[21] 17 CFR 240.19b–4(f)(2).

[22] 15 U.S.C. 78s(b)(2)(B).

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–NYSEAMER–2023–43 and should be submitted on or before October 5, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19842 Filed 9–13–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98330; File No. SR–DTC–2023–008]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Recovery and Wind-Down Plan

September 8, 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 September 1, 2023, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the clearing agency. DTC filed the proposed rule change pursuant to section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(4) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change consists of amendments to the Recovery and Wind-down Plan to reflect business and product developments that have taken place since the time it was last amended, and make certain changes to improve the clarity of the Plan and make other updates and technical revisions, 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

Executive Summary

The R&W Plan was adopted in August 2018 [6] and is maintained by DTC for compliance with Rule 17Ad–22(e)(3)(ii) under the Act.[7] Rule 17Ad–22(e)(3)(ii) requires registered clearing agencies to, in short, establish, implement and maintain plans for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses. The Plan is intended to be used by the Board and DTC management in the event DTC encounters scenarios that could potentially prevent it from being able to provide its critical services to the marketplace as a going concern.

The R&W Plan is comprised of two primary sections: (i) the ''Recovery Plan,'' which sets out the tools and strategies to enable DTC to recover, in the event it experiences losses that exceed its prefunded resources, and (ii) the ''Wind-down Plan,'' which describes the tools and strategies to be used to conduct an orderly wind-down of DTC's business in a manner designed to permit the continuation of DTC's critical services in the event that its recovery efforts are not successful.

The purpose of the rule proposal is to amend the R&W Plan to reflect business and product developments that have taken place since the time it was last amended,[8] and make certain changes to improve the clarity of the Plan and make other updates and technical revisions. Some of the business and product-related amendments included in the proposed rule change are as follows (and described in more detail below):

- Changes to reflect the discontinuation of the Canadian dollar (''CAD'') settlement feature of the Canadian-Link Service.[9]
- Removal of DTC's inbound link with the Peruvian central securities depository, based on its voluntary termination.
- The addition of The Bank of New York Mellon as a DTC Pledgee Bank.

DTC believes that by helping to ensure that the R&W Plan reflects current business and product developments, providing additional clarity, and making necessary grammatical corrections, that the proposed rule change will help DTC continue to maintain the Plan in a manner that supports the continuity of DTC's critical services and enables Participants and Pledgees to maintain access to DTC's services through the transfer of its membership in the event DTC defaults or the Wind-down Plan is ever triggered by the Board.

Background

The R&W Plan is managed by the Office of Recovery & Resolution Planning (referred to in the Plan as the ''R&R Team'') of DTC's parent company, the Depository Trust & Clearing Corporation (''DTCC''),[10] on behalf of

[23] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(4).

[5] Capitalized terms not defined herein are defined in the Rules, By-Laws and Organization Certificate of DTC (the ''Rules''), *available at www.dtcc.com/-/media/Files/Downloads/legal/rules/dtc_rules.pdf,* or in the Recovery & Wind-down Plan of DTC (the ''Recovery & Wind-down Plan,'' ''R&W Plan'' or ''Plan'').

[6] *See* Securities Exchange Act Release Nos. 83972 (Aug. 28, 2018), 83 FR 44964 (Sep. 4, 2018) (SR–DTC–2017–021); and 83953 (Aug. 27, 2018), 83 FR 44381 (Aug. 30, 2018) (SR–DTC–2017–803).

[7] 17 CFR 240.17Ad–22(e)(3)(ii). DTC is a ''covered clearing agency'' as defined in Rule 17Ad–22(a)(5) under the Act and must comply with paragraph (e) of Rule 17Ad–22.

[8] *See* Securities Exchange Act Release No. 91429 No. (Mar. 29, 2021), 86 FR 17421 (Apr. 2, 2021) (SR–DTC–2021–004).

[9] The Canadian-Link Service provides Participants with a single depository interface for CAD transactions. The link facilitates Participants' ability to maintain U.S. and Canadian Security positions in their DTC accounts for Securities listed in both Canada and the United States (*i.e.,* dually listed). In recent years, activity at DTC in CAD has accounted for less than 0.20 percent of DTC's average daily valued settlement volume. While Participants continue to use the Canadian-Link Service for custody purposes to position securities inventory at CDS Clearing and Depository Services Inc., (''CDS'') through DTC's CDS account and receive related distribution payments, no Participants have effectuated a DVP of Securities through the Canadian-Link Service since 2018. For DTC to continue to maintain access to CDS's CAD settlement services, it would have been necessary for DTC to perform systems development in order to be able to continue to use this aspect of the Canadian-Link service. In DTC's judgement, it would be impractical for DTC to incur the costs to undertake such changes, including incurring development costs, due to the lack of demand by its Participants to use the valued aspect of the Canadian Link Service. *See* Securities Exchange Act Release No. 34–91429 (Mar. 29, 2021), 86 FR 17421 (Apr. 2, 2021) (SR–DTC–2021–004).

[10] DTCC operates on a shared service model with respect to DTC and its other affiliated clearing

Continued

DTC, with review and oversight by the DTCC Management Committee and the Board. In accordance with the SEC's Approval Order covering the Plan,[11] the Board, or such committees as may be delegated authority by the Board from time to time, is required to review and approve the R&W Plan biennially and would also review and approve any changes that are proposed to the R&W Plan outside of the biennial review. DTC completed its most recent biennial review in 2022. The proposed rule change reflects amendments proposed to the Plans resulting from that review, which are described in greater detail below. None of the proposed changes modify DTC's general objectives and approach with respect to its recovery and wind-down strategy as set forth under the current Plan.

Proposed Amendments

A. Proposed Changes To Reflect Business or Product Developments

DTC is proposing changes to the following sections of the Plan based upon business updates that have occurred since the Plan was last amended.[12]

Section 2.2 (DTC Settlement) currently states that DTC is the primary U.S. central securities depository (''CSD'') and Securities Settlement System for eligible securities and that Fedwire book entry securities (U.S. Treasuries and Federal Agencies) are also eligible for deposit at DTC. This section also includes a bullet point list of the primary services performed by DTC. The proposal would clarify that U.S. Treasuries and Federal Agencies securities are eligible for all activity at DTC (not deposit activity only). It would also clarify the fact that DTC provides a platform to support the book entry transfer of eligible security positions and an end-of-day net funds settlement relating to eligible securities transfers and the processing of principal and interest distributions.

Section 2.4 (Intercompany Arrangements) describes how corporate support services are provided to DTC from DTCC and DTCC's other subsidiaries, through intercompany agreements under a shared services model. This section includes a table, (Facilities, Table 2–B), that lists each of the DTCC facilities utilized by the Clearing Agencies and indicates whether the facility is owned or leased. DTC proposes to update this table to add Washington DC, London, UK, and McLean, Virginia as additional DTCC facility locations.

Section 2.5 (FMI Links)[13] describes some of the key financial market infrastructures (''FMIs''), both domestic and foreign, that DTC has identified as critical ''links.''[14] As set out in this section of the Plan, the inventory of DTC's links is maintained by DTCC's Systemic Risk Office (''SRO'') and the SRO has set forth a set of practices and protocols for managing and reviewing the various risks and controls associated with clearing agency links. Based on a change to the SRO Clearing Agency Links-Risk Review Procedures, the proposal would clarify that in addition to approval by the Chief Systemic Risk Officer, the inventory of clearing agency links is also subject to the approval of a Deputy General Counsel of the General Counsel's Office.

This section of the Plan also includes two tables (Table 2–C, Links and Table 2–D: Schedule A Relationships)[15] that sets out a brief description of DTC's FMI links and Schedule A Relationships. The rule proposal would make the following updates to Table 2–C: (i) remove (x) Peru CSD, Cavali S.A.I.C.L.V., due to its voluntary termination from DTC,[16] and (y) Canadian Derivatives Clearing Corporation (''CDCC'') due to termination of their Pledgee Account, (ii) in entries describing DTC's inbound and outbound links with CDS, remove the description of the Settlement Link Service because this service was discontinued and would be revised to state that DTC settles corporate action entitlements in Canadian dollars,[17] (iii) in the entry describing DTCs inbound link, with Euroclear Bank SA/NV (''EB''), remove the reference to DTC Rule 34 (EB Collateral Positioning) because the rule and associated service were terminated,[18] (iv) in the entry describing the NSCC/DTC Interface,[19] add that this link is also used for NSCC's Securities Financing Transaction (''SFT'') clearing service,[20] this entry would be revised to state that EB (which refers to the link described in (iii) above) maintains an in-bound DVP Link with DTC,[21] (v) in the entry describing S.D. Indeval, S.A. de C.V, the Mexico CSD, clarify that this link is a DVP account, and (v) in the entry describing Depósito Central de Valores, the Chile CSD, clarify that this link is a DVP account. Additionally, for purposes of consistency with SRO's inventory, (i) Table 2–D would be updated to broaden the description of JPMorgan Chase (''JPM'') as Corporate Actions Concentration Bank to reflect that JPM collects and disburses funds for various types of corporate action events, including profit and loss amounts, and (ii) The Bank of New York Mellon (''BNYM''), in its role as a Pledgee bank would be added. BNYM maintains repurchase Pledgee and other Pledgee accounts at DTC in order to facilitate the

agencies, National Securities Clearing Corporation (''NSCC'') and Fixed Income Clearing Corporation (''FICC''). Most corporate functions are established and managed on an enterprise-wide basis pursuant to intercompany agreements under which it is generally DTCC that provides relevant services to DTC, NSCC and FICC (collectively, the ''Clearing Agencies'').

[11] *Supra* note 6.

[12] *Supra* note 8.

[13] For purposes of consistency, under the proposed rule change all references to ''FMI Links'' would be revised to refer to these as ''Clearing Agency Links.''

[14] As defined in Rule 17Ad–22(a)(8) under the Act, a link ''means, for purposes of paragraph (e)(20) of Rule 17Ad–22, a set of contractual and operational arrangements between two or more clearing agencies, financial market utilities, or trading markets that connect them directly or indirectly for the purposes of participating in settlement, cross margining, expanding their services to additional instruments or participants, or for any other purposes material to their business.'' 17 CFR 240.17Ad–22(a)(8).

[15] DTC has identified certain critical external service providers that, as determined by DTC's management, do not meet the specified criteria of ''link'' but nevertheless are subject to the same review process as is conducted for links, referred to within DTC as ''Schedule A Relationships.''

[16] See DTC Important Notice issued to Participants on May 26, 2021 *www.dtcc.com/-/media/Files/pdf/2021/5/26/15230-21.pdf.*

[17] *Supra* note 9.

[18] *See* Securities Exchange Act Release No. 34–93442 (Oct. 28, 2021), 86 FR 60721 (Nov. 3, 2021) (SR–DTC–2021–015).

[19] DTC maintains an interface with NSCC for the book-entry movement of securities to settle NSCC Continuous Net Settlement (''CNS'') transactions. As part of the interface, DTC and NSCC have established certain limited cross-guarantees and arrangements to permit transactions to flow smoothly between DTC and NSCC in a collateralized environment.

[20] The Securities Financing Transaction (SFT) Clearing service is a National Securities Clearing Corporation (NSCC) product offering central clearing and settlement services for overnight borrows and loans of equity securities (collectively ''SFTs''). The SFT Clearing service: (i) supports central clearing of equity SFTs intermediated by Sponsoring Members or Agent Clearing Members, (ii) supports central clearing of equity SFTs between NSCC full-service members, and (iii) maximizes capital efficiency and mitigates systemic risk by introducing more membership and cleared transaction opportunities for market participants. NSCC novates and guarantees the off-leg/return of an SFT (i) when delivery of underlying SFT security completes at DTC, (ii) at the point of validation in the case of a bilaterally settled SFT or an SFT with a Sponsored Member client or (iii) when the daily pair-off occurs, in the case of a rolled SFT. *See* Securities Exchange Act Release No. 34–95011 (May 31, 2022), 87 FR 34339 (Jun. 6, 2022) (SR–NSCC–2022–003); and Securities Exchange Act Release No. 34–95012 (May 31, 2022), 87 FR 34325 (Jun. 6, 2022) (SR–DTC–2022–002).

[21] A ''DVP Link'' refers to a link that is a delivery vs payment account. This in-bound link enables non-U.S. investors to buy and hold DTC eligible securities abroad, while custody is maintained at DTC in the U.S.

free payment of pledges of collateral by Participants that elect to do so.

Section 5 (Participant Default Losses through the Crisis Continuum) of the Plan is comprised of multiple subsections that identify the risk management surveillance, tools, and governance that DTC may employ across an increasing stress environment, referred to as the ''Crisis Continuum.'' [22] This section identifies, among other things, the tools that can be employed by DTC to mitigate losses, and mitigate or minimize liquidity needs, as the market environment becomes increasingly stressed. One of those subsections, Section 5.2.4 (Recovery Corridor and Recovery Phase), outlines the early warning indicators to be used by DTC to measure the potential need to enter the ''Recovery Phase'' of the Plan.[23] Included in this section are descriptions of potential stress events that could lead to recovery, and several early warning indicators and metrics that DTC has established. These indicators, which are referred to in the Recovery Plan as recovery corridor indicators (''Corridor Indicators''),[24] are listed in an associated table (Table 5–A, Corridor Indicators). The table provides a brief description of each Corridor Indicator, along with columns reflecting how the indicator is measured, evaluated, how its status (*i.e.,* deteriorating or improving) is determined, and the escalation process if triggered. The proposed rule change would update this table to add to the ''hedging'' [25] indicator entry that it is the Financial Risk Management group (''FRM'') that is responsible for measuring hedging status with input from DTC's investment advisor. Also, the entry covering Retirements/ Transaction Reductions indicator [26] would be corrected to state that its status is measured by the Client Account Services and Global Business Operations team, and not FRM and the general manager of DTC.

B. Other Updates, Clarifications and Technical Revisions

DTC is also proposing to make other updates and technical revisions to the Plan. These technical revisions would, for example, make grammatical corrections, update the names of certain DTC internal groups, and clarify the description of internal organizations, without changing the substantive statements being revised.

For example, in Section 2.4, Table 2–A (SIFMU Legal Entity Structure and Intercompany Agreements), for purposes of clarifying the full scope of DTC's services. the description of DTC's services would be revised from ''Underwriting, Securities Processing, Corporate Actions,'' to ''Asset Services.'' Some other examples include: (i) a revision would be made throughout the Plan to reflect an internal name change from DTCC's ''Operational Risk Management'' to ''Operational Risk,'' and add a new internal organization, ''Embedded Risk Management,'' [27] (ii) all references to ''FMI Links'' would be revised to refer to these as ''Clearing Agency Links,'' and (iii) in the section covering DTCC facilities the name of the DTCC legal entity that is the holder of the lease for the Manila location would be changed from ''DTCC'' to ''DTCC Manila.''

DTC believes the proposed updates and technical revisions would improve the clarity and accuracy of the Plan and, therefore, would help facilitate the execution of Plan, if necessary.

2. Statutory Basis

DTC believes that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a registered clearing agency. In particular, DTC believes that the amendments to the R&W Plan are consistent with section 17A(b)(3)(F) of the Act [28] and Rule 17Ad–22(e)(3)(ii) under the Act,[29] for the reasons described below.

Section 17A(b)(3)(F) of the Act requires, in part, that the rules of DTC be designed to promote the prompt and accurate clearance and settlement of securities transactions. As described above, the proposed rule change would update the R&W Plan to reflect business and product developments and make certain technical corrections. By helping to ensure that the R&W Plan reflects current business and product developments, and providing additional clarity, DTC believes that the proposed rule change would help it continue to maintain the Plan in a manner that supports the continuity of DTC's critical services and enables its Participants and Pledgees to maintain access to DTC's services through the transfer of its membership in the event DTC defaults or the Wind-down Plan is ever triggered by the Board. Further, by facilitating the continuity of its critical clearance and settlement services, DTC believes the Plan and the proposed rule change would continue to promote the prompt and accurate clearance and settlement of securities transactions. Therefore, DTC believes the proposed amendments to the R&W Plan are consistent with the requirements of section 17A(b)(3)(F) of the Act.

Rule 17Ad–22(e)(3)(ii) under the Act requires DTC to establish, implement, maintain and enforce written policies and procedures reasonably designed to maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by the covered clearing agency, which includes plans for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.[30]

Specifically, the Recovery Plan defines the risk management activities, stress conditions and indicators, and tools that DTC may use to address stress scenarios that could eventually prevent it from being able to provide its critical services as a going concern. Through the framework of the Crisis Continuum, the Recovery Plan addresses measures that DTC may take to address risks of credit losses and liquidity shortfalls, and other losses that could arise from a Participant default. The Recovery Plan also

[22] As set forth in the Recovery Plan, the phases of the ''Crisis Continuum'' include (1) a stable market phase, (2) a stressed market phase, (3) a phase commencing with DTC's decision to cease to act for a Participant or Affiliated Family of Participants (The Plan refers to an ''Affiliated Family'' of Participants as a number of affiliated entities that are all Participants of DTC), and (4) a recovery phase.

[23] The ''Recovery Phase'' refers to the actions to be taken by DTC to restore its financial resources and avoid a wind-down of its business.

[24] The majority of the Corridor Indicators, as identified in the Recovery Plan, relate directly to conditions that may require DTC to adjust its strategy for hedging and liquidating collateral securities, and any such changes would include an assessment of the status of the Corridor Indicators. Corridor Indicators include, for example, the effectiveness and speed of DTC's efforts to liquidate Collateral securities, and an impediment to the availability of DTC's resources to repay any borrowings due to any Participant Default. For each Corridor Indicator, the Recovery Plan identifies (1) measures of the indicator, (2) evaluations of the status of the indicator, (3) metrics for determining the status of the deterioration or improvement of the indicator, and (4) ''Corridor Actions,'' which are steps that may be taken to improve the status of the indicator, as well as management escalations required to authorize those steps.

[25] Hedging is a risk management strategy that would be employed when executing the liquidation of a defaulting participant's portfolio to potentially help reduce the risk of loss of an existing position.

[26] The Retirements/Transaction Reductions indicator measures Participant terminations or curtailment of transactions that impact the financial viability of DTC.

[27] The Embedded Risk Management group supports the R&R Team. For example, they may assist in the identification of new initiatives, processes, or product developments that may impact DTC's R&W Plan.

[28] 15 U.S.C. 78q–1(b)(3)(F).

[29] 17 CFR 240.17Ad–22(e)(3)(ii).

[30] *Id.*

addresses the management of general business risks and other non-default risks that could lead to losses. The Wind-down Plan would be triggered by a determination by the Board that recovery efforts have not been, or are unlikely to be, successful in returning DTC to viability as a going concern. Once triggered, the Wind-down Plan sets forth clear mechanisms for the transfer of DTC's membership and business and is designed to facilitate continued access to DTC's critical services and to minimize market impact of the transfer. By establishing the framework and strategy for the execution of the transfer and wind-down of DTC in order to facilitate continuous access to its critical services, the Wind-down Plan establishes a plan for the orderly wind-down of DTC.

As described above, the proposed rule change would update the R&W Plan to reflect business and product developments and make certain technical corrections. By ensuring that material provisions of the Plan are current, clear, and technically correct, DTC believes that the proposed amendments are designed to support the maintenance of the Plan for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses, and, as such, meets the requirements of Rule 17Ad–22(e)(3)(ii) under the Act.[31] Therefore, the proposed changes would help DTC to maintain the Plan in a way that continues to be consistent with the requirements of Rule 17Ad–22(e)(3)(ii).

(B) Clearing Agency's Statement on Burden on Competition

DTC does not believe that the proposed rule change would have any impact, or impose any burden, on competition. DTC does not anticipate that the proposal would affect its day-to-day operations under normal circumstances, or in the management of a typical Participant default scenario or non-default event. The R&W Plan was developed and documented in order to satisfy applicable regulatory requirements, as discussed above. The proposal is intended to enhance and update the Plan to ensure it is clear and remains current in the event it is ever necessary to be implemented. The proposed revisions would not affect any changes to the overall structure or operation of the Plan or DTC's recovery and wind-down strategy as set forth under the current Plan. As such, DTC believes the proposal would not have any impact, or impose any burden, on competition.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

DTC has not received or solicited any written comments relating to this proposal. If any written comments are received, DTC will amend this filing to publicly file such comments as an Exhibit 2 to this filing, as required by Form 19b–4 and the General Instructions thereto.

Persons submitting written 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 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.

DTC 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)[32] of the Act and paragraph (f)[33] of Rule 19b–4 thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–DTC–2023–008 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to file number SR–DTC–2023–008. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of DTC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). 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–DTC–2023–008 and should be submitted on or before October 5, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[34]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19841 Filed 9–13–23; 8:45 am]

BILLING CODE 8011–01–P

[31] *Id.*

[32] 15 U.S.C. 78s(b)(3)(A).

[33] 17 CFR 240.19b–4(f).

[34] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–381, OMB Control No. 3235–0434]

Proposed Collection; Comment Request; Extension: Rule 15g–2

Upon Written Request, Copies Available From: U.S. Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (''PRA''), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information provided for in Rule 15g–2 (17 CFR 240.15g–2) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Exchange Act''). The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

Rule 15g–2 (The ''Penny Stock Disclosure Rule'') requires broker-dealers to provide their customers with a risk disclosure document, as set forth in Schedule 15G, prior to their first non-exempt transaction in a ''penny stock.'' As amended, the rule requires broker-dealers to obtain written acknowledgement from the customer that he or she has received the required risk disclosure document. The amended rule also requires broker-dealers to maintain a copy of the customer's written acknowledgement for at least three years following the date on which the risk disclosure document was provided to the customer, the first two years in an accessible place. Rule 15g–2 also requires a broker-dealer, upon request of a customer, to furnish the customer with a copy of certain information set forth on the Commission's website.

The risk disclosure documents are for the benefit of the customers, to assure that they are aware of the risks of trading in ''penny stocks'' before they enter into a transaction. The risk disclosure documents are maintained by the broker-dealers and may be reviewed during the course of an examination by the Commission.

The Commission estimates that approximately 175 broker-dealers are engaged in penny stock transactions and that each of these firms processes an average of three new customers for penny stocks per week. The Commission further estimates that half of the broker-dealers send the penny stock disclosure documents by mail, and the other half send them through electronic means such as email. Because the Commission estimates the copying and mailing of the penny stock disclosure document takes two minutes, this means that there is an annual burden of 27,456 minutes, or 457 hours, for this third-party disclosure burden of mailing documents. Additionally, because the Commission estimates that sending the penny stock disclosure document electronically takes one minute, the annual burden is 13,728 minutes, or 229 hours, for this third-party disclosure burden of emailing documents.

Broker-dealers also incur a recordkeeping burden of approximately two minutes per response when filing the completed penny stock disclosure documents as required pursuant to the Rule 15g–2(c), which means that the respondents incur an aggregate recordkeeping burden of 54,600 minutes, or 910 hours.

Furthermore, Rule 15g–2(d) requires a broker-dealer, upon request of a customer, to furnish the customer with a copy of certain information set forth on the Commission's website, which takes a respondent no more than two minutes per customer. Because the Commission estimates that a quarter of customers who are required to receive the Rule 15g–2 disclosure document will request that their broker-dealer provide them with the additional microcap and penny stock information posted on the Commission's website, the Commission therefore estimates that each broker-dealer respondent processes approximately 39 requests for paper copies of this information per year or an aggregate total of 78 minutes per respondent, which amounts to an annual burden of 13,650 minutes, or 228 hours. There was an overall decrease in the total burden hours because the number of registered broker-dealers the Commission estimates will be engaged in penny stock transactions decreased from 182 to 175.

The Commission does not maintain the risk disclosure document. Instead, it must be retained by the broker-dealer for at least three years following the date on which the risk disclosure document was provided to the customer, the first two years in an accessible place. The collection of information required by the rule is mandatory. The risk disclosure document is otherwise governed by the internal policies of the broker-dealer regarding confidentiality, etc.

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 November 13, 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: September 8, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19853 Filed 9–13–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98331; File No. 4–809]

Notice of Filing and Request for Comment on ICE Clear Europe Limited's Request To Withdraw From Registration as a Clearing Agency

September 8, 2023.

I. Introduction

Pursuant to section 19(a)(3) of the Securities Exchange Act of 1934 (''Exchange Act'' or ''Act''),[1] on August 10, 2023, ICE Clear Europe Limited (''ICE Clear Europe'') filed with the Securities and Exchange Commission (''Commission'') a written request (the ''Written Request'') [2] to withdraw from registration as a clearing agency under section 17A of the Exchange Act.[3] The Commission is publishing this notice to solicit comments from interested persons concerning ICE Clear Europe's Written Request.

[1] 15 U.S.C. 78s(a)(3).

[2] *See* Letter from Hester Serafini, President, ICEEU, to Vanessa Countryman, Secretary, Securities and Exchange Commission (dated August 10 2023).

[3] 15 U.S.C. 78q–1.

II. Description

The statements in this Item II concerning the background of ICE Clear Europe's request for withdrawal from registration as a clearing agency and its reasons for making the request have been submitted by ICE Clear Europe in its Written Request. ICE Clear Europe is registered with the Commission as a clearing agency under section 17A of the Exchange Act.[4] In its Written Request, ICE Clear Europe represents that it intends to terminate its credit default swap clearing business as of October 27, 2023 and, on that basis, seeks to withdraw its registration as a clearing agency pursuant to section 19(a)(3) of the Act on that date or as soon thereafter as is practicable.[5]

A. Background

ICE Clear Europe states in the Written Request that it is a clearing agency registered with the Commission that is based in London, United Kingdom (''UK'') and incorporated as a private limited company under English law.[6] ICE Clear Europe is an indirect wholly owned subsidiary of Intercontinental Exchange, Inc (''ICE''). ICE Clear Europe provides clearing and settlement services for two primary categories of derivative contracts: (1) exchange-traded futures and options contracts traded on the ICE Futures Europe, ICE Futures U.S., ICE Endex, and ICE Futures Abu Dhabi markets (the ''F&O Business''); and (2) over-the-counter index and single-name credit default swap (''CDS'') contracts (the ''CDS Business'').

In addition to its registration as a clearing agency under the Act, ICE Clear Europe further states in the Written Request that it is: authorized as a recognized clearing house under UK law;[7] recognized as a third-country central counterparty under the European Market Infrastructure Regulation;[8] registered as a derivatives clearing organization (''DCO'') under the Commodity Exchange Act;[9] recognized as a foreign central counterparty under the Swiss Financial Market Infrastructure Act;[10] and recognized as a remote clearing house in the Abu Dhabi Global Market.[11]

In addition, on July 23, 2009, the Commission granted ICE Clear Europe a temporary conditional exemption from the requirement to register as a clearing agency under section 17A of the Act solely to perform the functions of a clearing agency for ''Cleared CDS.''[12]

Section 763(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act'')[13] added section 17A(*l*) to the Exchange Act,[14] which provides, in relevant part, that a DCO registered with the CFTC that is required to register under section 17A is deemed to be registered under section 17A solely for the purpose of clearing SBS to the extent that, before the date of enactment of section 17A(*l*), the DCO cleared swaps pursuant to an exemption from registration as a clearing agency. Pursuant to section 17A(*l*) of the Act,[15] ICE Clear Europe was deemed registered as a clearing agency for the purpose of clearing security-based swaps, specifically single-name CDS.[16] Effective July 16, 2011, ICE Clear Europe became a registered clearing agency for purposes of clearing single-name CDS.[17] ICE Clear Europe constitutes a ''covered clearing agency'' for purposes of Commission Rule 17Ad–22.[18]

Subsequently, in connection with the proposed merger of ICE Clear Europe's indirect parent company, Intercontinental Exchange, Inc., and NYSE Euronext, ICE Clear Europe requested from the Commission an exemption from clearing agency registration under section 17A(b) of the Act and Rule 17Ab2–1 thereunder in connection with ICE Clear Europe's clearing of certain futures and options contracts on underlying U.S. equity securities, which contracts were traded on the LIFFE Administration and Management Market (and subsequently have been traded on the ICE Futures Europe market), as part of ICE Clear Europe's F&O Business.[19] By order dated June 27, 2013, the Commission granted ICE Clear Europe's request (the ''Securities Product Exemption'').[20] ICE Clear Europe states that activity is unrelated to ICE Clear Europe's CDS Business.

B. Planned Termination of the CDS Business

As it has publicly announced, ICE Clear Europe has determined to cease acting as a clearing agency for all classes of CDS contracts, thus terminating its CDS Business in its entirety.[21] ICE Clear Europe Clearing Rules provide a procedure for the termination of clearing services in this product category and set out the rights and obligations of Clearing Members and ICE Clear Europe in connection with the termination, including ICE Clear Europe's obligation to provide advance notice of the termination by Circular.[22]

By Circular, ICE Clear Europe has designated October 27, 2023 as the date on which it will terminate all services

---

[4] 15 U.S.C. 78q–1.

[5] *See* 15 U.S.C. 78s(a)(3).

[6] ''Clearing agency'' is defined in section 3(a)(23)(A) of the Act as, in relevant part, ''any person who acts as an intermediary in making payments or deliveries or both in connection with transactions in securities or who provides facilities for comparison of data respecting the terms of settlement of securities transactions, to reduce the number of settlements of securities transactions, or for the allocation of securities settlement responsibilities.'' 15 U.S.C. 78c(a)(23)(A).

[7] *See* UK Financial Services and Markets Act of 2000 c. 8, available at *https://www.legislation.gov.uk/ukpga/2000/8/contents*.

[8] *See* Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

[9] *See* 7 U.S.C. 7a–1.

[10] *See* Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 19 June 2015.

[11] *See* Abu Dhabi Global Market Financial Services and Markets Regulations 2015, available at *https://en.adgm.thomsonreuters.com/rulebook/financial-services-and-markets-regulations-2015-0*.

[12] *See* Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection with Request on Behalf of Ice Clear Europe Limited Related to Central Clearing of Credit Default Swaps, and Request for Comments, Securities Exchange Act Release No. 60372 (July, 23, 2009), 74 FR 37748 (July 29, 2009) (''Original Registration Exemption''). The Original Registration Exemption was extended on November 29, 2010. Order Extending Temporary Conditional Exemptions Under The Securities Exchange Act of 1934 in Connection with Request on Behalf of Ice Clear Europe, Limited Related to Central Clearing of Credit Default Swaps and Request for Comment, Securities Exchange Act Release No. 63389 (Nov. 29, 2010), 75 FR 75520 (Dec. 3, 2010).

[13] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[14] 15 U.S.C. 78q–1(1).

[15] Section 17A(*l*) of the Act was added by section 763(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[16] *See* Amendment to Rule Filing Requirements for Dually-Registered Clearing Agencies, Securities Exchange Act Release No. 69284, 78 FR 21046, 21047 & n.20 (Apr. 9, 2013) (File No. S7–29–11). ICE Clear Europe does not clear security-based swaps other than single-name CDS.

[17] *See id.*

[18] *See* Definition of ''Covered Clearing Agency,'' Securities Exchange Act Release No. 88616, 85 FR 28853, 28855 n.21 (May 14, 2020) (File No. S7–23–16).

[19] *See* Order Pursuant to section 17A of the Securities Exchange Act of 1934 Granting Exemption from the Clearing Agency Registration Requirement Under section 17A(b) of the Exchange Act for ICE Clear Europe Limited in Connection with its Proposal to Clear Contracts Traded on the LIFFE Administration and Management Market, Exchange Act Release No. 69872 (June 27, 2013), 78 FR 40220 (July 3, 2013).

[20] *Id.*

[21] Cessation of Clearing of CDS Contracts, Circular C22/076 (June 30, 2022), available at *https://www.theice.com/publicdocs/clear_europe/circulars/C22076.pdf*.

[22] *See, e.g.,* ICE Clear Europe Rule 105. Capitalized terms used but not defined herein have the meanings specified in the ICE Clear Europe Clearing Rules (the ''ICE Clear Europe Rules''). In its rules, ICE Clear Europe defines the term ''Circular'' to mean a publication issued by ICE Clear Europe for the attention of all Clearing Members and posted on ICE Clear Europe's website in accordance with ICE Clear Europe's Rule 109(g).

related to its CDS Business.[23] This date is defined in ICE Clear Europe's Rule 101 as the ''Withdrawal Date.'' [24] CDS Clearing Members are required under ICE Clear Europe's Rules to use reasonable endeavors to close out all of their open cleared CDS positions by that date.[25] Furthermore, until the Withdrawal Date, CDS Clearing Members are only permitted to submit for clearing new CDS transactions for risk reducing purposes.[26] If a CDS Clearing Member has complied with its obligations to close out all of its cleared CDS positions at ICE Clear Europe by the Withdrawal Date, the ''Termination Date'' for that member's CDS clearing membership under ICE Clear Europe's Rules will occur as soon as practicable thereafter.[27] To the extent any CDS Clearing Member has not closed out all of its own cleared CDS positions by the Withdrawal Date, ICE Clear Europe has the authority under ICE Clear Europe's Rules to terminate and cash settle those contracts [28] and represents in the Written Request that it would expect to do so at that time. Following termination of all CDS positions, ICE Clear Europe's Rules require ICE Clear Europe to calculate a final settlement amount for each CDS Clearing Member reflecting any net amount due to or from the CDS Clearing Member.

ICE Clear Europe states that, as a result of these provisions, effective as of the Withdrawal Date, it will cease to clear any CDS contracts, no additional CDS contracts will be accepted for clearing, and all outstanding CDS transactions will be terminated. Thus, as of the Withdrawal Date, ICE Clear Europe's CDS Business will be terminated. Both ICE Clear Europe and CDS Clearing Members will be obligated to satisfy any respective final settlement amount arising from such termination, including with respect to any final fees and interest payments (for the October 2023 period). ICE Clear Europe represents in the Written Request that the termination of the CDS Business will have no effect on the F&O Business, and that Clearing Members that are both F&O Clearing Members and CDS Clearing Members will continue in their capacities as F&O Clearing Members after the Withdrawal Date.

C. Request for Withdrawal of Clearing Agency Registration

ICE Clear Europe represents in the Written Request that, upon termination of the CDS Business on the Withdrawal Date as described above, ICE Clear Europe would no longer be engaged in any clearing agency activity relating to security-based swaps. As a result, ICE Clear Europe would no longer be required to be registered as a clearing agency under section 17A of the Act. Accordingly, ICE Clear Europe requests withdrawal of its registration as of the Withdrawal Date, or as soon as practicable thereafter.

In support of this request, ICE Clear Europe represents as follows:

1. ICE Clear Europe has notified its CDS Clearing Members, by Circular, that under ICE Clear Europe Rule 105 they are obligated to use reasonable endeavors to close out all open positions in CDS Contracts by the Withdrawal Date of October 27, 2023.

2. At end-of-day (18:00 London time) on October 26, 2023, ICE Clear Europe will be permanently closed for CDS trade submission. Accordingly, effective as of the Withdrawal Date, ICE Clear Europe will no longer accept any CDS Contracts for clearing, and all open positions in CDS Contracts will have been closed out by the CDS Clearing Members holding the positions. To the extent any CDS Clearing Member has not completed the closing out of any open CDS positions as of the Withdrawal Date, ICE Clear Europe will be entitled and expects, pursuant to ICE Clear Europe Rule 105(b), to terminate and cash settle such positions. As a result, all liabilities in respect of the close out and/or termination of any open positions in CDS Contracts will be finally determined by end-of-day (18:00 London time) on the Withdrawal Date.[29]

3. Accordingly, effective as of the Withdrawal Date, ICE Clear Europe will no longer be performing any activities of a clearing agency with respect to security-based swaps that would require registration under the Act.

4. On the next business day following the Withdrawal Date (*i.e.,* October 30, 2023), any remaining Margin or Permitted Cover held by ICE Clear Europe in respect of CDS Contracts will be available to CDS Clearing Members for withdrawal in accordance with standard ICE Clear Europe procedures, either through ''auto-release'' under ICE Clear Europe's banking system or as instructed by the relevant CDS Clearing Member. On that same day (*i.e.,* October 30, 2023), a new Guaranty Fund Period for the CDS Guaranty Fund will start. ICE Clear Europe will set the required CDS Guaranty Fund Contribution to ''zero'' and notify CDS Clearing Members in accordance with ICE Clear Europe Rule 1102 by end-of-day that same day (*i.e.,* 18:00 London Time on October 30, 2023). The next day, on October 31, 2023, the CDS Guaranty Fund Contributions of CDS Clearing Members will be available for withdrawal in accordance with standard ICE Clear Europe procedures, either through ''auto-release'' under ICE Clear Europe's banking system or as instructed by the relevant CDS Clearing Member.

5. On the following Monday, November 6, 2023, ICE Clear Europe will follow its business-as-usual established processes for clearing membership terminations to calculate a final settlement amount reflecting any remaining net amount owed to or by each CDS Clearing Member, including with respect to any final fees and interest payments for the October 2023 period. Any such final amounts will be settled by 09:00 London time on November 7, 2023.

6. ICE Clear Europe, based on the above, believes that all known claims of ICE Clear Europe and CDS Clearing Members relating to the CDS Business will have been determined and settled as of the Withdrawal Date or, if any claims are not yet settled as of the Withdrawal Date, they will be settled on November 7, 2023 pursuant to its business-as-usual established processes described above. Based on ICE Clear

[23] *See* ICE Clear Europe, Circular C22/109, Cessations of clearing of CDS Contracts: Postponement of Withdrawal Date (dated Sep. 26, 2022), available at *https://www.theice.com/publicdocs/clear_europe/circulars/C22109.pdf.*

[24] Under ICE Clear Europe Rule 105(c), the Withdrawal Date, or October 27, 2023, will also be the ''Termination Close-Out Deadline Date'' and the ''Termination Date'' (*i.e.,* the date on which a CDS Clearing Member's membership as such terminates) as those terms are defined in ICE Clear Europe Rule 101 and used in ICE Clear Europe Rule 918.

[25] *See* ICE Clear Europe Rules 105(c), 209(b), and 918(a)(i). As discussed in Circular C22/076, ICE Clear Europe will, upon request of a CDS Clearing Member, facilitate the termination and reestablishment of positions at another clearing house.

[26] *See* ICE Clear Europe Rules 105(c), 209(b), and 918(a)(iii).

[27] The occurrence of the Termination Date for a CDS Clearing Member has a number of consequences under the Rules, including that the CDS Clearing Member is not responsible for replenishment of the CDS Guaranty Fund in respect of Events of Default with respect to other CDS Clearing Members occurring after such date. *See* ICE Clear Europe Rule 918(d).

[28] *See* ICE Clear Europe Rule 105(b).

[29] ICE Clear Europe states in its request letter that, if there were to be an Event of Default with respect to a CDS Clearing Member at or prior to the Withdrawal Date, other CDS Clearing Members would remain liable with respect to losses arising therefrom, to the extent provided in ICE Clear Europe's Rules, through application of their CDS Guaranty Fund Contributions and obligations to pay assessments as necessary. Under ICE Clear Europe Rule 105(a), ICE Clear Europe could also elect to further delay the Withdrawal Date until the completion of the CDS default management process. In such case, ICE Clear Europe would similarly expect to delay its withdrawal from clearing agency registration until the completion of the default management process.

Europe's Rules, ICE Clear Europe expects that claims against it in respect of the CDS clearing business would be limited to those of CDS Clearing Members arising in connection with cleared CDS contracts. Accordingly, once such contracts are terminated and finally settled in accordance with ICE Clear Europe's Rules as described above, and the Margin, Permitted Cover, and CDS Guaranty Fund Contributions of CDS Clearing Members are made available for withdrawal as described above, ICE Clear Europe does not anticipate that there would be any further claims of CDS Clearing Members in respect of the CDS clearing business. ICE Clear Europe further does not believe other persons would have claims against it in respect of cleared CDS contracts [30] and that it has no other known or anticipated claims by or against it that are associated with its CDS Business or clearing agency registration. However, to the extent any valid claims relating to the CDS business may nonetheless be brought against it in the five years following withdrawal from registration (or such longer period as may be required by law), ICE Clear Europe—which will remain a going concern—would expect to pay such claims in the ordinary course of its operations. Finally, ICE Clear Europe will maintain records necessary to evaluate and address any contingent or other claims that be brought against it after withdrawal of its registration, for the period and in the manner discussed in point 7 below.

7. ICE Clear Europe will retain and maintain all documents, books, and records, including correspondence, memoranda, papers, notices, accounts, and other records made or received by it in the ordinary course of its CDS Business and its activities as a registered clearing agency, in accordance with the requirements of Exchange Act Rule 17a–1(a) and (b),[31] for a period of at least five years from the effective date of the withdrawal of registration. ICE Clear Europe further will produce such records and furnish such information at the request of any representative of the Commission, in accordance with Exchange Act Rule 17a–1(c).[32]

8. Following the effectiveness of its withdrawal from registration hereunder, ICE Clear Europe will not seek to engage in securities clearing activity relating to security-based swaps in reliance on any deemed registered status pursuant to section 17A(*l*) of the Act. ICE Clear Europe notes that its affiliate, ICE Clear Credit LLC, will continue to clear security-based swaps as a registered clearing agency. If other affiliates of ICE Clear Europe seek to clear security-based swaps or other securities products in a manner that requires registration with the Commission under the Act, such affiliate would do so after registration with the Commission pursuant to the process set forth in Exchange Act Rule 17Ab2–1.[33]

ICE Clear Europe therefore requests that the Commission issue an order, pursuant to section 19(a)(3) of the Act,[34] that its registration as a clearing agency under section 17A of the Act [35] with respect to security-based swaps be withdrawn as of the Withdrawal Date of October 27, 2023, or as soon as practicable thereafter.

In the Written Request, ICE Clear Europe also requests that, effective as of the withdrawal of its registration hereunder, the Securities Product Exemption be withdrawn. As noted above, ICE Clear Europe requested, and the Commission granted, the Securities Product Exemption in light of the combination of security-based swap clearing activity and securities option clearing activity contemplated by ICE Clear Europe at the time. ICE Clear Europe represents in the Written Request that, upon cessation of security-based swap clearing activity and withdrawal of its clearing agency registration, ICE Clear Europe will fall within the category of foreign clearing agencies for which registration (or an exemption) is not required due to its lack of contact with the U.S.[36] Accordingly, in ICE Clear Europe's view, the Securities Product Exemption will not be necessary for ICE Clear Europe's continued operation of the F&O clearing service following withdrawal of its clearing agency registration. As a result, ICE Clear Europe requests that the Commission terminate the Securities Product Exemption at the same time it approves ICE Clear Europe's request to withdraw from registration as a clearing agency.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the requested withdrawal is consistent with the Exchange 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/other.shtml*), or
- Send an email to *rule-comments@sec.gov*. Please include File No. 4–809 on the subject line.

Paper Comments

- Send paper comments to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC, 20549–1090.

All submissions should refer to File Number 4–809. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Operating conditions may limit access to the Commission's Public Reference Room.

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 4–809 and should be submitted on or before October 5, 2023.

By the Commission.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19847 Filed 9–13–23; 8:45 am]

BILLING CODE 8011–01–P

[30] *See, e.g.,* ICE Clear Europe Rule 111(f).

[31] 17 CFR 240.17a–1(a) and (b).

[32] *See also* 17 CFR 240.17a–1(c).

[33] 17 CFR 240.17Ab2–1.

[34] 15 U.S.C. 78s(a)(3).

[35] 15 U.S.C. 78q–1.

[36] In the Written Request, ICE Clear Europe represents that it does not currently clear any equity options on U.S. securities or single stock futures on U.S. securities. ICE Clear Europe further represents that ICE Clear Europe Rule 207(g) is intended to comprehensively exclude U.S. person Clearing Members for the purpose of clearing contracts that are futures or options on underlying U.S. securities.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98339; File No. SR–MEMX–2023–18]

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 19.5

September 8, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

notice is hereby given that on September 6, 2023, MEMX LLC (''MEMX'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend MEMX Rule 19.5. The text of the proposed rule change is provided in Exhibit 5.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend Rule 19.5, Interpretation and Policy .05. Specifically, the Exchange proposes to amend Rule 19.5, Interpretation and Policy .05(f) to account for conflicts between different provisions within the Short Term Option Series Rules, extend current $0.50 strike price intervals in equity options to short term options with strike prices less than $100, and make other clarifying changes.

In August 2022, the Commission approved the Exchange's adoption of rules to govern the trading of options on the Exchange by MEMX Options,[5] which will be a facility of the Exchange. The rules adopted were substantially similar to those of other currently operating options exchanges, in particular, Cboe BZX Exchange, Inc. (''BZX Options''). Since that time, BZX Options and other options exchanges, including Cboe EDGX Exchange, Inc. (''EDGX Options''), have modified certain of those rules[6] and as such, the Exchange wishes to propose the same modifications in order to conform to those rules at the time trading begins on MEMX Options.[7]

Specifically, the Exchange's current Rule 19.5, Interpretation and Policy .05 limits the intervals between strikes in equity options listed as part of the Short Term Option Series Program, excluding Exchange-Traded Fund Shares and ETNs, that have an expiration date more than twenty-one days from the listing date (''Strike Interval Proposal''). The Strike Interval Proposal paragraph (f) includes a table that specifies the applicable strike intervals that would supersede subparagraph (e)[8] for Short Term Option Series in equity options, excluding options on exchange-traded fund shares and on exchange-traded notes, which have an expiration more than 21 days from the listing date. The Strike Interval Proposal was designed to reduce the density of strike intervals that would be listed in later weeks, within the Short Term Option Series Program, by utilizing limitations for intervals between strikes that have an expiration date more than 21 days from the listing date.

The Exchange proposes to amend Rule 19.5, Interpretation and Policy .05 to clarify the current rule text and amend the application of the table to account for potential conflicts within the Short Term Option Series Rules. Currently, Rule 19.5, Interpretation and Policy .05(f) provides that notwithstanding subparagraph (e),[9] when Short Term Option Series in equity options (excluding options on ETFs and ETNs) have an expiration more than 21 days from the listing date, the strike interval for each option class will be based on the following table, and also states: ''*to the extent there is conflict between applying subparagraph (e) above and the below table, the greater interval would apply.*'' The existing table is as follows:

Tier	Average daily volume	Share price[1]				
		Less than $25	$25 to less than $75	$75 to less than $150	$150 to less than $500	$500 or greater
1	Greater than 5,000	$0.50	$1.00	$1.00	$5.00	$5.00
2	Greater than 1,000 to 5,000	1.00	1.00	1.00	5.00	10.00
3	0 to 1,000	2.50	5.00	5.00	5.00	10.00

[1] The Share Price is the closing price on the primary market on the last day of the calendar quarter. In the event of a corporate action, the Share Price of the surviving company is utilized. The Average Daily Volume is the total number of option contracts traded in a given security for the applicable calendar quarter divided by the number of trading days in the applicable calendar quarter. Beginning on the second trading day in the first month of each calendar quarter, the Average Daily Volume is calculated by utilizing data from the prior calendar quarter based on Customer-cleared volume at OCC. For options listed on the first trading day of a given calendar quarter, the Average Daily Volume is calculated using the quarter prior to the last trading calendar quarter. *See* Rule 19.5, Interpretation and Policy .05(f)(1) and (2).

First, the Exchange proposes to add the phrase ''which specifies the applicable interval for listing'' to the end of the first sentence of paragraph (f). The table within that paragraph provides for the listing of intervals based on certain parameters (average daily volume and share price). The Exchange proposes to add the phrase ''which specifies the applicable interval for listing'' to clarify that the only permitted intervals are as specified in

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 95445 (August 9, 2022), 87 FR 49884 (August 12, 2022) (SR–MEMX–2022–010).

[6] *See* Securities Exchange Act Release Nos. 95406 (August 1, 2022), 87 FR 48051 (August 5, 2022) (SR–CboeBZX–2022–042); 95407 (August 1, 2022), 87 FR 48055 (August 5, 2022) (SR–CboeEDGX–2022–034).

[7] Currently, the Exchange plans to launch MEMX Options in September 2023.

[8] Rule 19.5, Interpretation and Policy .05(e) states if a class does not trade in $1 strike price intervals, the strike price interval for Short Term Option Series may be (i) $0.50 or greater where the strike price is less than $75; (ii) $1.00 or greater where the strike price is between $75 and $150; or (iii) $2.50 or greater for strike prices greater than $150.

[9] The proposed rule change makes a nonsubstantive change to correct the term ''subparagraph'' to ''paragraph'' in the introductory paragraph of Rule 19.5, Interpretation and Policy .05(f) as well as subparagraph (f)(3).

the table within paragraph (f), as proposed to be amended.

Second, the Exchange proposes to delete the final sentence of paragraph (f) which indicates that in the event of a conflict between applying subparagraph (e) and the below table, the greater interval would apply, and amend the table in paragraph (f) to address situations in which there is a conflict between applying the intervals in paragraph (e) and the table in paragraph (f). Today, there are instances where a conflict is presented as between the application of the table within paragraph (f) and the rule text within paragraph (e) with respect to the correct interval. To address these potential conflicts, the Exchange included the final sentence in paragraph (f) that indicates to the extent there is a conflict between applying the current table within paragraph (f) and the rule text within paragraph (e), the greater interval would apply. However, in order to more clearly reflect this within the Rules and maintain consistency with other exchanges [10], the Exchange proposes to amend the table in paragraph (f) to specify what the greater interval would be, and thus the interval the Exchange would apply, in the event of any possible conflict between the two rule provisions. While the substance of the rule does not change by this proposed modification, the Exchange believes that the amended table provides a simpler reference for Options Members. Specifically, the proposed rule change amends the table as follows:

Tier	Average daily volume	Share price				
		Less than $25	$25 to less than $75	$75 to less than $150	$150 to less than $500	$500 or greater
1	Greater than 5,000.	$0.50 for strikes less than $100 in Short Term Option Series Program classes and classes that trade in $1 increments in non-Short Term Option Series. $1.00 for strikes between $100 and $150 for classes that do not otherwise trade in $1.00 increments in non-Short Term Option Series. $2.50 for strikes greater than $150.	$1.00 for strikes less than $150. $2.50 for strikes greater than $150.	$1.00 for strikes less than $150. $2.50 for strikes greater than $150.	$5.00	$5.00
2	Greater than 1,000 to 5,000.	$1.00 for strikes less than $150 $2.50 for strikes greater than $150.	$1.00 for strikes less than $150. $2.50 for strikes greater than $150.	$1.00 for strikes less than $150. $2.50 for strikes greater than $150.	5.00	10.00
3	0 to 1,000	$2.50	$5.00	$5.00	5.00	10.00

Below are some examples to demonstrate the application of the proposed table:

Example 1: Assume a Tier 1 stock that closed on the last day of Q1 with a quarterly share price higher than $75 but less than $150. Therefore, utilizing the current table within paragraph (f), the interval would be $1.00 for strikes added during Q2 even for strikes above $150. However, paragraph (e) provides that the Exchange may list a Short Term Option Series at $2.50 intervals where the strike price is above $150. In other words, there is a potential conflict between the permitted strike intervals above $150 during Q2. In this example, current paragraph (f) would specify a $1.00 interval whereas current paragraph (e) would specify a $2.50 interval. Consistent with selecting the greater interval (from current paragraph (e)), the permissible strike interval in this scenario would be $2.50 as set forth in the proposed table. Therefore, during Q2, the following strikes would be eligible to list: $152.50 and $157.50. For strikes less than $150, the following strikes would be eligible to list during Q2: $149 and $148 because Short Term Option Series with expiration dates more than 21 days from the listing date as well as Short Term Option Series with expiration dates less than 21 days from the listing date would both be eligible to list $1 intervals pursuant to both paragraphs (e) and (f).

Example 2: Assume a Tier 2 stock that closed on the last day of Q1 with a quarterly share price less than $25. Therefore, utilizing the current table within paragraph (f), the interval would be $1.00 for strikes added during Q2 even for strikes above $25. However, paragraph (e), as proposed to be amended, provides that the Exchange may list a Short Term Option Series at $0.50 intervals where the strike is less than $100, at $1.00 intervals where the strike price is between $100 and $150, and at $2.50 intervals where the strike price is above $150. In other words, there is a potential conflict between the permitted strike intervals below $100 and above $150 during Q2. In this example, current paragraph (f) would specify a $1.00 interval for strikes below $100 whereas amended paragraph (e) would specify a $0.50 interval. Consistent with selecting the greater interval (from current paragraph (f)), the permissible strike interval in this scenario for strikes below $100 would be $1.00 as set forth in the proposed table. For strikes between $100 and $150, there is no conflict, as both provisions would provide $1.00 intervals for those strikes. For strikes above $150, current paragraph (f) would specify a $1.00 interval for strikes above $150 whereas current paragraph (e) would specify a $2.50 interval. Consistent with selecting the greater interval (from current paragraph (e)), the permissible strike interval in this scenario for strikes above $150 would be $2.50 as set forth in the proposed table.

Example 3: Assume a Tier 3 stock that closed on the last day of Q1 with a quarterly share price less than $25. Therefore, utilizing the current table within paragraph (f), the interval would be $2.50 for all strikes added during Q2. However, paragraph (e), as proposed to be amended, provides that the Exchange may list a Short Term Option Series at $0.50 intervals where the strike price is less than $100, $1.00 intervals where the strike price is between $100 and $150, and $2.50 intervals where the strike price is above $150. In other words, there is a potential conflict between the permitted strike intervals

[10] *See supra* note 6.

below $150 during Q2 (there is no conflict for strikes above $150, as both provisions provide for a $2.50 strike interval). Consistent with selecting the greater interval (from current paragraph (f)), the permissible strike interval in this scenario for strikes below $150 would be $2.50 as set forth in the proposed table.[11]

Finally, the Exchange proposes to amend Rule 19.5, Interpretation and Policy .05(e) to extend $0.50 strike price intervals in equity options to short-term options with strike prices less than $100 instead of the current $75. This proposed change is intended to conform this provision of the Short Term Option Series Program to that of other options exchanges.[12] With this proposed change, for short term options in equity option classes that do not trade in $1 strike price intervals, the strike price interval for Short Term Option Series may be (i) $0.50 or greater where the strike price is less than $100; (ii) $1.00 or greater where the strike price is between $100 and $150; or (iii) $2.50 or greater for strike prices greater than $150.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[13] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5) [14] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5) [15] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange believes the Strike Proposal continues to limit the intervals between strikes listed in the Short Term Option Series Program that have an expiration date more than twenty-one days.

In particular, the Exchange's proposed addition to the first sentence of Rule 19.5, Interpretation and Policy .05(f) is consistent with the Act because it clarifies that the only permitted intervals are as specified in the table within that subparagraph, as amended.

The Exchange believes this proposed rule change will bring greater transparency to the rule. The proposed rule change to delete the final sentence of the introductory paragraph and amend the table within Rule 19.5, Interpretation and Policy .05(f) to address potential conflicts between that paragraph and paragraph (e) with respect to the correct strike interval is consistent with the Act because it protects investors and the public interest by adding transparency to the manner in which the Exchange implements its listing rules and removes potential uncertainty. The proposed rule text specifies the applicable intervals when there is a conflict between the rule text within paragraphs (e) and (f), thereby providing certainty as to the outcome.

The Strike Interval Proposal was designed to reduce the density of strike intervals that would be listed in later weeks, within the Short Term Option Series Program, by utilizing limitations for intervals between strikes which have an expiration date more than twenty-one days from the listing date. The Exchange's proposal intends to continue to remove certain strike intervals where there exist clusters of strikes whose characteristics closely resemble one another and, therefore, do not serve different trading needs,[16] rendering these strikes less useful. Also, the Strike Interval Proposal continues to reduce the number of strikes listed on the Exchange, allowing Market-Makers to expend their capital in the options market in a more efficient manner, thereby improving overall market quality on the Exchange.

Additionally, by providing more clarity as to which interval would apply between the current rule text within Rule 19.5, Interpretation and Policy .05(e) and (f), the Exchange is reducing the number of strikes listed in a manner consistent with the intent of the Strike Interval Proposal, which was to reduce strikes which were farther out in time. The result of this clarification is to select wider strike intervals for Short Term Option Series in equity options which have an expiration date more than twenty-one days from the listing date. This rule change would harmonize strike intervals as between inner weeklies (those having less than twenty-one days from the listing date) and outer weeklies (those having more than twenty-one days from the listing date) so that strike intervals are not widening as the listing date approaches.

The proposed rule change to extend current $0.50 strike price intervals in equity options to short term options with strike prices less than $100 will remove impediments to and perfect the mechanism of a free and open market and a national market system, because it will conform this portion of the Short Term Option Series Program to that of other options exchanges.[17]

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Strike Interval Proposal continues to limit the number of Short Term Option Series Program strike intervals available for quoting and trading on the Exchange for all Options Members.

The Exchange believes adding clarifying language to the first sentence of Rule 19.5, Interpretation and Policy .05(f) regarding which parameter the table within that provision amends within the Short Term Option Series Program will bring greater transparency to the rules. Amending the table within paragraph (f) to address potential conflicts as between the rule text of Rule 19.5, Interpretation and Policy .05(e) and (f) will bring greater transparency to and reduce potential confusion regarding the manner in which the Exchange implements its listing rules. Deleting the last sentence of the first paragraph of the introductory paragraph of Rule 19.5, Interpretation and Policy .05(f) does not impose an undue burden on competition and will avoid potential confusion because the table within paragraph (f) clarifies which strike intervals will apply in all scenarios. Extending current $0.50 strike price intervals in equity options to short term options with strike prices less than $100 will not impose an undue burden on competition, because it is consistent

[11] The Exchange made similar corresponding changes to the table for tier 1 and tier 2 stocks with prices $25 to less than $75 and $75 to less than $150, with all potential conflicts between current paragraphs (e) and (f) resolved to apply the greater interval.

[12] *See, e.g.,* EDGX Rule 19.6, Interpretation and Policy .05(e).

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(5).

[15] *Id.*

[16] For example, two strikes that are densely clustered may have the same risk properties and may also be the same percentage out-of-the-money.

[17] *See, e.g.,* EDGX Rule 19.6, Interpretation and Policy .05(e).

with the rules of other options exchanges.[18]

While this proposal continues to limit the intervals of strikes listed on the Exchange, the Exchange continues to balance the needs of market participants by continuing to offer a number of strikes to meet a market participant's investment objective. The Exchange's Strike Interval Proposal does not impose an undue burden on intermarket competition as this Strike Interval Proposal does not impact the listings available at another self-regulatory organization.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A) of the Act[19] and Rule 19b–4(f)(6) thereunder.[20]

A proposed rule change filed under Rule 19b–4(f)(6)[21] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[22] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposed rule change may become operative upon filing. The proposed rule change is substantially similar to those of other currently operating options exchanges.[23] The Exchange states that it intends to launch MEMX Options on September 13, 2023 and that waiver of the 30-day operative delay would allow the Exchange to implement the proposed change to amend its rules as set forth above prior to launch, thus ensuring consistency of strike rules between the Exchange and other options exchanges. For these reasons, and because the proposed rule change does not raise any novel legal or regulatory issues, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[24]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–MEMX–2023–18 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–MEMX–2023–18. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. 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–MEMX–2023–18 and should be submitted on or before October 5, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19846 Filed 9–13–23; 8:45 am]

BILLING CODE 8011–01–P

---

[18] *Id.*

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[21] 17 CFR 240.19b–4(f)(6).

[22] 17 CFR 240.19b–4(f)(6)(iii).

[23] *See supra* note 6.

[24] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[25] 17 CFR 200.30–3(a)(12), (59).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98328; File No. SR–NSCC–2023–008]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Recovery and Wind-Down Plan

September 8, 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 September 1, 2023, National Securities Clearing Corporation (''NSCC'') 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. NSCC filed the proposed rule change pursuant to section 19(b)(3)(A)

---

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

of the Act[3] and Rule 19b–4(f)(4) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change consists of amendments to the Recovery and Wind-down Plan to reflect business and product developments that have taken place since the time it was last amended, and make certain changes to improve the clarity of the Plan and make other updates and technical revisions, 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

Executive Summary

The R&W Plan was adopted in August 2018[6] and is maintained by NSCC for compliance with Rule 17Ad–22(e)(3)(ii) under the Act.[7] This section of the Act requires registered clearing agencies to, in short, establish, implement and maintain plans for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses. The Plan is intended to be used by the Board and NSCC management in the event NSCC encounters scenarios that could potentially prevent it from being able to provide its critical services to the marketplace as a going concern.

The R&W Plan is comprised of two primary sections: (i) the ''Recovery Plan,'' that sets out the tools and strategies to enable NSCC to recover, in the event it experiences losses that exceed its prefunded resources, and (ii) the ''Wind-down Plan,'' that describes the tools and strategies to be used to conduct an orderly wind-down of NSCC's business in a manner designed to permit the continuation of NSCC's critical services in the event that its recovery efforts are not successful.

The purpose of the rule proposal is to amend the R&W Plan to reflect business and product developments that have taken place since the time it was last amended,[8] make certain changes to improve the clarity of the Plan and make other updates and technical revisions.

NSCC believes that by helping to ensure that the R&W Plan reflects current business and product developments, providing additional clarity, and making necessary grammatical corrections, that the proposed rule change would help it continue to maintain the Plan in a manner that supports the continuity of NSCC's critical services and enables its Members and Limited Members to maintain access to NSCC's services through the transfer of its membership in the event NSCC defaults or the Wind-down Plan is ever triggered by the Board.

Background

The R&W Plan is managed by the Office of Recovery & Resolution Planning (referred to in the Plan as the ''R&R Team'') of NSCC's parent company, the Depository Trust & Clearing Corporation (''DTCC''),[9] on behalf of NSCC, with review and oversight by the DTCC Management Committee and the Board. In accordance with the SEC's Approval Order covering the Plan,[10] the Board, or such committees as may be delegated authority by the Board from time to time, is required to review and approve the R&W Plan biennially and would also review and approve any changes that are proposed to the R&W Plan outside of the biennial review. NSCC completed its most recent biennial review in 2022. The proposed rule change reflects amendments proposed to the Plans resulting from that review, which are described in greater detail below. None of the proposed changes modify NSCC's general objectives and approach with respect to its recovery and wind-down strategy as set forth under the current Plan.

A. Proposed Amendments to the R&W Plan

NSCC is proposing the changes to the following sections of the Plan based upon business updates and product developments that have occurred since the Plan was last amended.[11]

Section 2.2 (NSCC Guaranteed Services Summary) describes those services in which NSCC in its role as a clearing agency and a central counterparty, provides clearing, netting, and settlement service and a guarantee of completion for broker-to-broker equity, corporate and municipal debt, exchange-traded products and unit investment trust transactions executed on exchanges and other trading venues in the U.S. NSCC proposes to update this section to add a description of a new service, the Securities Financing Transaction (''SFT'') clearing service, which was approved by the Commission in 2022.[12] The SFT service is a central clearing and settlement infrastructure for overnight borrows and loans of equity securities (collectively, securities financing transactions or ''SFTs''). The SFT clearing service supports the central clearing of clients' SFTs intermediated by Sponsoring Members or Agent Clearing Members as well as the central clearing of SFTs between NSCC full-service Members. The SFT clearing service also allows lenders and borrowers to submit pre-established bilaterally-settled SFTs for clearing.

Section 2.4 (Intercompany Arrangements) describes how corporate support services are provided to NSCC

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(4).

[5] Capitalized terms not defined herein are defined in the Rules and Procedures of NSCC (the ''Rules''), *available at www.dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf,* or in the Recovery & Wind-down Plan of NSCC (the ''R&W Plan'' or ''Plan'').

[6] *See* Securities Exchange Act Release Nos. 83974 (Aug. 28, 2018), 83 FR 44988 (Sep. 4, 2018), (SR–NSCC–2017–017); and 83955 (Aug. 27, 2018), 83 FR 44340 (Aug. 30, 2018) (SR–NSCC–2017–805).

[7] 17 CFR 240.17Ad–22(e)(3)(ii). NSCC is a ''covered clearing agency'' as defined in Rule 17Ad–22(a)(5) under the Act and must comply with paragraph (e) of Rule 17Ad–22.

[8] *See* Securities Exchange Act Release No. 91428 (Mar. 29, 2021), 86 FR 17440 Apr. 2, 2021 (SR–NSCC–2021–004).

[9] DTCC operates on a shared service model with respect to NSCC and its other affiliated clearing agencies, Fixed Income Clearing Corporation (''FICC'') and The Depository Trust Company (''DTC''). Most corporate functions are established and managed on an enterprise-wide basis pursuant to intercompany agreements under which it is generally DTCC that provides relevant services to NSCC, FICC and DTC (collectively, the ''Clearing Agencies'').

[10] *Supra* note 6.

[11] *Supra* note 8.

[12] *See* Securities Exchange Act Release No. 95011 (May 31, 2022), 87 FR 34339 (Jun. 6, 2022) (SR–NSCC–2022–003) (Order Approving Proposed Rule Change to Introduce Central Clearing for Securities Financing Transaction Clearing Service). NSCC also filed the proposal as advance notice SR–NSCC–2022–801. See Securities Exchange Act Release No. 94998 (May 27, 2022), 87 FR 33528 (Jun. 2, 2022) (SR–NSCC–2022–801) (Notice of No Objection to Advance Notice to Introduce Central Clearing for Securities Financing Transaction Clearing Service). (Securities Exchange Release No. 34–95011 (May 31, 2022), 87 FR 34339 (Jun. 6, 2022) (SR–NSCC–2022–003).

from DTCC and DTCC's other subsidiaries, through intercompany agreements under a shared services model. This section includes a table, (Facilities, Table 2–B), that lists each of the DTCC facilities utilized by the Clearing Agencies and indicates whether the facility is owned or leased. NSCC proposes to update this table to add Washington DC, London, UK, and McLean, Virginia as additional DTCC facility locations.

Section 2.5 (FMI Links)[13] describes some of the key financial market infrastructures (''FMIs''), both domestic and foreign, that NSCC has identified as critical ''links.''[14] As set out in this section of the Plan, the inventory of NSCC's links is maintained by DTCC's Systemic Risk Office (''SRO'') and the SRO has set forth a set of practices and protocols for managing and reviewing the various risks and controls associated with clearing agency links. Based on a change to the SRO Clearing Agency Links-Risk Review Procedures, the proposal would clarify that in addition to approval by the Chief Systemic Risk Officer, the inventory of clearing agency links is also subject to the approval of a Deputy General Counsel of the General Counsel's Office. In addition, for purposes of completeness, the proposed rule change would add a footnote to the table included in this section of the Plan, (Table 2–C, Links), making clear that under SRO's Clearing Agency Links-Risk Review Procedures, trading market links, such as equity alternative trading systems and regulated securities exchanges are also subject to the links risk review process; however, given the large number of these links, they have not been separately delineated in Table 2–C, Links.

Section 3 (Critical Services) defines the criteria for classifying certain of NSCC's services as ''critical,''[15] and identifies such critical services and the rationale for their classification. The identification of NSCC's critical services is important for evaluating how the recovery tools and the wind-down strategy would facilitate and provide for the continuation of NSCC's critical services to the markets it serves. There is also a table (Table 3–B: NSCC Critical Services) that lists each of the services, functions or activities that NSCC has identified as ''critical'' based on the applicability of the criteria. In addition, there is a table (Table 3–C: Indicative Non-Critical NSCC Services) that identifies indicative non-critical services of NSCC, which list is not exhaustive. The proposed rule change would clarify the description of the Account Information Transmission (''AIT'') service[16] by making clear that AIT can support transmissions for the bulk account transfer initiative, which is an industry effort to prepare carrying broker-dealers for an emergency mass transfer of large quantities of customer accounts and assets from a distressed broker to a financially secure broker-dealer and that in the absence of this service, Members/Limited Members can process and settle their investments manually, as transaction volumes are currently low enough to handle manually, or outside of AIP.

Section 5.2.4 (Recovery Corridor and Recovery Phase) outlines the early warning indicators to be used by NSCC to evaluate its options and potentially prepare to enter the ''Recovery Phase,'' which phase refers to the actions to be taken by NSCC to restore its financial resources and avoid a wind-down of its business. This section contains descriptions of potential stress events that could lead to recovery, and several early warning indicators and metrics that NSCC has established to evaluate its options and potentially prepare to enter the Recovery Phase. These indicators, which are referred to in the Recovery Plan as recovery corridor indicators (''Corridor Indicators'' or ''Indicator(s)''),[17] are calibrated against NSCC's financial resources and are designed to give NSCC the ability to replenish financial resources, typically through business-as-usual tools applied prior to entering the Recovery Phase. Included in this section is a table (Table 5–A: Corridor Indicators) that identifies for each Indicator (i) how it is measured, (ii) the basis for the evaluation of the status of the Indicator, (iii) the type of metrics used for determining the status of the deterioration or improvement of the Indicator, and (iv) ''Corridor Actions & Escalation,'' which are those steps that may be taken to improve the status of the Indicator and the management escalations required to authorize those steps. The proposed rule change would provide the following clarifications to Table 5–A.

First, for purposes of providing additional context on the applicable measurement, the proposed rule change would clarify the entry for the ''Hedge Effectiveness'' Indicator[18] set out in Table 5–A. Specifically, the language in the measurement column for this Indicator would be revised to clarify that if the hedge effectiveness measures are outside of the designated metrics due to certain types of factors (*e.g.,* mismatch in portfolio profit and loss (''P&L'') and hedge P&L due to timing of initiating the hedge or the portfolio), management would document the performance and only escalate to the Board Risk Committee and Management Risk Committee if the measurement status deteriorates in a material respect.

Second, regarding ''Commercial Paper/Extendible Notes,''[19] the description of when the applicable metrics for this Indicator reflect a deterioration would be revised to remove the specific dollar threshold (currently, the inability to source at least $1.0 billion) and replace it with a general statement regarding NSCC's inability to source additional funding via issuance of commercial paper when needed. The description of the improvement metric would be revised similarly to remove the specific dollar threshold (currently, an ability to source at least $2.5 billion) and replace it with a general statement of NSCC's ability to source additional funding via issuance of commercial paper. The dollar thresholds would be removed to provide

[13] For purposes of consistency, under the proposed rule change all references to ''FMI Links'' would be revised to refer to these as ''Clearing Agency Links.''

[14] As defined in Rule 17Ad–22(a)(8) under the Act, a link ''means, for purposes of paragraph (e)(20) of Rule 17Ad–22, a set of contractual and operational arrangements between two or more clearing agencies, financial market utilities, or trading markets that connect them directly or indirectly for the purposes of participating in settlement, cross margining, expanding their services to additional instruments or participants, or for any other purposes material to their business.'' 17 CFR 240.17Ad–22(a)(8).

[15] The criteria that is used to identify an NSCC service or function as critical includes consideration as to whether (1) there is a lack of alternative providers or products; (2) failure of the service could impact NSCC's ability to perform its central counterparty services; (3) failure of the service could impact NSCC's ability to perform its netting services, and, as such, the availability of market liquidity; and (4) the service is interconnected with other participants and processes within the U.S. financial system (for example, with other FMIs, settlement banks, broker-dealers, and exchanges).

[16] As set forth in NSCC Rule 59 (Account Information Transmission Service), AIT enables Members to transmit account related information between themselves on an automated basis in respect of the movement of correspondent accounts between Members, or other material events that result in the bulk movement of accounts between Members.

[17] The majority of the Corridor Indicators, as identified in the Recovery Plan, relate directly to conditions that may require NSCC to adjust its strategy for hedging and liquidating a defaulting Member's portfolio, and any such changes would include an assessment of the status of the Corridor Indicators.

[18] Hedging is a risk management strategy that would be employed when executing the liquidation of a defaulting Member's portfolio to potentially help reduce the risk of loss of an existing position.

[19] The Commercial Paper/Extendible Notes indicator measures the ability of NSCC to roll-over and potentially increase issuance of its commercial paper.

discretion and flexibility to evaluate this indicator and take actions, as needed. Additionally, under ''Corridor Actions'' for purposes of consistency with the language formulation used for the other Indicators, the statement that currently reads ''If this indicator has been triggered, and if less than 50% of overall liquidity resources are available, NSCC would evaluate the liquidation speeds and potential price impacts of increased liquidation speeds—particularly for large positions,'' would be revised to remove the phrase, ''and if less than 50% of overall liquidity resources are available.''

Third, for the ''Retirements/Trade Volume Reductions'' Indicator,[20] a clarification would be made to identify Client Account Management and NSCC Global Business Operations as the internal groups responsible for measurement of the applicable deterioration and improvement Indicator metrics.

Section 5.3 (Liquidity Shortfalls) identifies tools that may be used to address foreseeable shortfalls in NSCC's liquidity resources following a Member default. The goal in managing NSCC's qualifying liquidity resources is to maximize resource availability in an evolving stress situation, to maintain flexibility in the order and use of sources of liquidity, and to repay any third-party lenders of liquidity in a timely manner. This section includes a table (Table 5–C) that lists NSCC liquidity tools and resources.[21] The proposed rule change would make the following clarifications to Table 5–C: (i) under the entry for the ''Unissued Commercial Paper'' liquidity resource, the language would be revised to clarify that unissued commercial paper capacity could be deployed, but remove the existing language that it could be increased within 2 weeks depending on market conditions, since this timeframe could be adjusted depending on the overall circumstances, and (ii) under the description of the NSCC's ''Non-Qualifying Liquid Resources,'' for the current language specifying a one-to two week timeframe for NSCC to enter into new Master Repurchase Agreements would be removed because more flexibility of time is needed for NSCC to establish new agreements. Thus, the updated language would state that ''NSCC would utilize existing Master Repurchase Agreements or establish new Master Repurchase Agreements utilizing standard agreements.''

B. Other Updates, Clarifications and Technical Revisions

NSCC is also proposing to make other updates and technical revisions to the Plan. These technical revisions would, for example, make grammatical corrections, update the names of certain NSCC internal groups, and clarify the description of internal organizations, without changing the substantive statements being revised.

For example, in Section 2.4, Table 2–A (SIFMU Legal Entity Structure and Intercompany Agreements), for purposes of clarifying the full scope of services provided by NSCC's affiliate, DTC, the description of DTC's services would be revised from ''Underwriting, Securities Processing, Corporate Actions,'' to ''Asset Services.'' Some other examples include: (i) a revision would be made throughout the Plan to reflect an internal name change from DTCC's ''Operational Risk Management'' to ''Operational Risk,'' and add a new internal organization, ''Embedded Risk Management,'' [22] (ii) all references to ''FMI Links'' would be revised to refer to these as ''Clearing Agency Links,'' (iii) in the table listing NSCC's liquidity tools (Table 5–C) replacing the terms ''medium-term notes'' and ''term debt'' with ''senior debt'' to more accurately identify the instrument consistent with how DTCC Treasury identifies these, and (iv) in the section covering DTCC facilities, the name of the DTCC legal entity that is the holder of the lease for the Manila location would be changed from ''DTCC'' to ''DTCC Manila.''

NSCC believes the proposed updates and technical revisions would improve the clarity and accuracy of the Plan and, therefore, would help facilitate the execution of Plan, if necessary.

2. Statutory Basis

NSCC believes that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a registered clearing agency. In particular, NSCC believes that the amendments to the R&W Plan are consistent with section 17A(b)(3)(F) of the Act [23] and Rule 17Ad–22(e)(3)(ii) under the Act,[24] for the reasons described below.

Section 17A(b)(3)(F) of the Act requires, in part, that the rules of NSCC be designed to promote the prompt and accurate clearance and settlement of securities transactions. As described above, the proposed rule change would update the R&W Plan to reflect business and product developments and make certain technical corrections. By helping to ensure that the R&W Plan reflects current business and product developments, and providing additional clarity, NSCC believes that the proposed rule change would help it continue to maintain the Plan in a manner that supports the continuity of NSCC's critical services and enables its Members and Limited Members to maintain access to NSCC's services through the transfer of its membership in the event NSCC defaults or the Wind-down Plan is ever triggered by the Board. Further, by facilitating the continuity of its critical clearance and settlement services, NSCC believes the Plan and the proposed rule change would continue to promote the prompt and accurate clearance and settlement of securities transactions. Therefore, NSCC believes the proposed amendments to the R&W Plan are consistent with the requirements of section 17A(b)(3)(F) of the Act.

Rule 17Ad–22(e)(3)(ii) under the Act requires NSCC to establish, implement, maintain and enforce written policies and procedures reasonably designed to maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by the covered clearing agency, which includes plans for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.[25]

Specifically, the Recovery Plan defines the risk management activities, stress conditions and indicators, and tools that NSCC may use to address stress scenarios that could eventually prevent it from being able to provide its critical services as a going concern. Through the framework of the Crisis Continuum, the Recovery Plan addresses measures that NSCC may take to address risks of credit losses and liquidity shortfalls, and other losses that could arise from a Participant default. The Recovery Plan also addresses the management of general business risks

[20] The Retirements/Transaction Reductions indicator measures Member terminations or curtailment of transactions that impact the financial viability of NSCC.

[21] Table 5–C lists the following NSCC liquidity tools: Utilize short-settling liquidating trades, Increase the speed of portfolio asset sales, Credit Facility, Unissued Commercial Paper, Non-Qualifying Liquid Resources, and Uncommitted stock loan and equity repos.

[22] The Embedded Risk Management group supports the R&R Team. For example, they may assist in the identification of new initiatives, processes, or product developments that may impact NSCC's R&W Plan.

[23] 15 U.S.C. 78q–1(b)(3)(F).

[24] 17 CFR 240.17Ad–22(e)(3)(ii).

[25] *Id.*

and other non-default risks that could lead to losses. The Wind-down Plan would be triggered by a determination by the Board that recovery efforts have not been, or are unlikely to be, successful in returning NSCC to viability as a going concern. Once triggered, the Wind-down Plan sets forth clear mechanisms for the transfer of NSCC's membership and business and is designed to facilitate continued access to NSCC's critical services and to minimize market impact of the transfer. By establishing the framework and strategy for the execution of the transfer and wind-down of NSCC in order to facilitate continuous access to its critical services, the Wind-down Plan establishes a plan for the orderly wind-down of NSCC.

As described above, the proposed rule change would update the R&W Plan to reflect business and product developments and make certain technical corrections. By ensuring that material provisions of the Plan are current, clear, and technically correct, NSCC believes that the proposed amendments are designed to support the maintenance of the Plan for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses, and, as such, meets the requirements of Rule 17Ad–22(e)(3)(ii) under the Act.[26] Therefore, the proposed changes would help NSCC to maintain the Plan in a way that continues to be consistent with the requirements of Rule 17Ad–22(e)(3)(ii).

(B) Clearing Agency's Statement on Burden on Competition

NSCC does not believe that the proposed rule change would have any impact, or impose any burden, on competition. NSCC does not anticipate that the proposal would affect its day-to-day operations under normal circumstances, or in the management of a typical Member default scenario or non-default event. The R&W Plan was developed and documented to satisfy applicable regulatory requirements, as discussed above. The proposal is intended to enhance and update the Plan to ensure it is clear and remains current in the event it is ever necessary to be implemented. The proposed revisions would not affect any changes to the overall structure or operation of the Plan or NSCC's recovery and wind-down strategy as set forth under the current Plan. As such, NSCC believes the proposal would not have any impact, or impose any burden, on competition.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

NSCC has not received or solicited any written comments relating to this proposal. If any written comments are received, NSCC will amend this filing to publicly file such comments as an Exhibit 2 to this filing, as required by Form 19b–4 and the General Instructions thereto.

Persons submitting written 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 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.

NSCC 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)[27] of the Act and paragraph (f)[28] of Rule 19b–4 thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–NSCC–2023–008 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–NSCC–2023–008. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10 and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of NSCC 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–NSCC–2023–008 and should be submitted on or before October 5, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[29]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19840 Filed 9–13–23; 8:45 am]

BILLING CODE 8011–01–P

[26] *Id.*

[27] 15 U.S.C. 78s(b)(3)(A).

[28] 17 CFR 240.19b–4(f).

[29] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98327; File No. SR–FICC–2023–010]

Self-Regulatory Organizations; the Fixed Income Clearing Corporation; Order Granting Approval of Proposed Rule Change To Amend and Restate the Cross-Margining Agreement Between FICC and CME

September 8, 2023.

I. Introduction

On July 17, 2023, the Fixed Income Clearing Corporation (''FICC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–FICC–2023–010 (''Proposed Rule Change'') pursuant to section 19(b) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 [2] thereunder to change the terms of its cross-margining arrangement with the Chicago Mercantile Exchange Inc. (''CME'').[3] The Proposed Rule Change was published for public comment in the **Federal Register** on July 28, 2023.[4] The Commission has received no comments regarding the Proposed Rule Change. This order approves the Proposed Rule Change.

II. Background

FICC is a central counterparty (''CCP''), which means it interposes itself as the buyer to every seller and seller to every buyer for the financial transactions it clears. FICC operates two divisions: the Government Securities Division (''GSD'') and the Mortgage-Backed Securities Division (''MBSD''). GSD provides trade comparison, netting, risk management, settlement, and central counterparty services for the U.S. Government securities market. As such, FICC is exposed to the risk that one or more of its members may fail to make a payment or to deliver securities.

A key tool that FICC uses to manage its credit exposures to its members is the daily collection of margin from each member. A member's margin is designed to mitigate potential losses associated with liquidation of the member's portfolio in the event of that member's default. The aggregated amount of all GSD members' margin constitutes the GSD Clearing Fund, which FICC would be able to access should a defaulted member's own margin be insufficient to satisfy losses to FICC caused by the liquidation of that member's portfolio. Each member's margin consists of a number of applicable components, including a value-at-risk (''VaR'') charge (''VaR Charge'') designed to capture the potential market price risk associated with the securities in a member's portfolio. The VaR Charge is typically the largest component of a member's margin requirement. The VaR Charge is designed to cover FICC's projected liquidation losses with respect to a defaulted member's portfolio at a 99 percent confidence level.

Margin requirements are typically designed, in part, to recognize the potential relationship between products in a member's portfolio (*e.g.,* some products may naturally gain value when others lose value). Members may, however, hold assets or enter into transactions that reduce risk, but are not visible to the CCP. For example, a market participant might purchase a debt security, and at the same time, contract to sell the same security in the future. The risk to the market participant is combination of these two offsetting transactions as opposed to the risk of each added together because it is unlikely that both positions would lose value at the same time under normal market conditions.

To recognize potential offsets in the risk presented by related products, FICC has an ongoing cross-margining arrangement with CME, which acts as a CCP for futures related to the debt instruments that FICC clears.[5] The cross-margining arrangement is governed by a contract (the ''Existing Agreement'') that, among other things, defines the methodology by which FICC and CME determine offsets between cleared products that could reduce the margin requirement of an FICC member.[6] FICC and CME have negotiated a new agreement (the ''Restated Agreement'') that FICC proposes to adopt to govern the cross-margining arrangement between FICC and CME.

III. Description of the Proposed Rule Change

The proposed changes to the cross-margining arrangement are primarily designed to (i) expand the scope of CME products eligible for cross-margining, (ii) replace the methodology for calculating the margin reductions available to FICC's members;[7] and (iii) improve the default management and loss sharing processes that FICC and CME would engage in if a common member were to default. FICC also proposes relocating certain timing and operational aspects of the cross-margin arrangement to a supporting service level agreement (the ''SLA'').[8] For example, the SLA would cover operational issues such as the creation and maintenance of special accounts for managing settlement and liquidation of a defaulting common member's cross margin positions as well as the operational steps involved in managing the default of a common member. The SLA would also define the times by which FICC and CME would be expected to exchange certain information and reports.

The following sections describe the proposed changes to the cross-margining arrangement in more detail.

A. Products Eligible for Cross-Margining

The margin reductions provided by FICC and CME to common members are based on the relationship between the products that each CCP clears. Only products specified in the Existing Agreement currently may be considered when determining margin reductions (the ''Eligible Products''). As noted above, in the Restated Agreement, FICC proposes to expand the scope of CME products eligible for cross-margining.[9] FICC also proposes to reduce the scope of products it clears that would be eligible for cross-margining.[10] The

---

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Notice of Filing *infra* note 4, at 88 FR 48926.

[4] Securities Exchange Act Release No. 97969 (July 24, 2023), 88 FR 48926 (July 28, 2023) (File No. SR–FICC–2023–010) (''Notice of Filing'').

[5] CME provides central counterparty services for futures, options, and swaps. *See* Financial Stability Oversight Council (''FSOC'') 2012 Annual Report, Appendix A, *https://home.treasury.gov/system/files/261/here.pdf* (last visited July 17, 2023).

[6] The Existing Agreement is incorporated in the GSD Rules *available at www.dtcc.com/legal/rules-and-procedures.aspx.* Unless otherwise specified, capitalized terms not defined herein shall have the meanings ascribed to them in the GSD Rules, which includes the Existing Agreement.

[7] FICC provided data demonstrating that the proposal would likely increase the range of potential reduction in margin related to cross-margining positions. FICC provided its analysis of the potential effects on margin requirements to the Commission in a confidential Exhibit 3 to File No. SR–FICC–2023–010.

[8] FICC provided the SLA in a confidential Exhibit 3 to File No. SR–FICC–2023–010.

[9] The following CME products would become eligible for cross-margining: CBT 3YR 3-year T-Notes Futures, CBT TN Ultra Ten-Year T-Note Futures, CBT UBE Ultra U.S. Treasury Bond Futures, CBT TWE 20-Year U.S. Treasury Bond Futures, CBT 41 30 Day Federal Funds Futures, CME SR1 One-Month SOFR Futures, and CME SR3 Three-Month SOFR Futures. *See* Notice of Filing, 88 FR at 48928, n.14. At the same time, certain CME products would no longer be eligible due to lack of use under the current arrangement. *Id.*

[10] The following FICC products will no longer be eligible for cross-margining with CME products: Treasury bills (maturity of one year or less) and Treasury Inflation-Protected Securities (TIPS). *See* Notice of Filing, 88 FR at 48929, n.29. U.S. Treasury notes and bonds cleared by FICC would continue to be eligible for cross-margining. *See* Notice of Filing, 88 FR at 48929.

combined effect of the proposed changes to products eligible for cross-margining would expand the potential reductions members could receive through cross-margining program.[11] The new set of products eligible for cross-margining would be listed in exhibits to the Restated Agreement.[12]

B. Methodology for Margining Cross-Margin Portfolios

In addition to changing the set of products eligible for cross-margining, FICC proposes replacing the methodology for calculating margin requirements for cross-margined positions. The proposed methodology is designed to more accurately estimate the risk presented by the cross-margined positions. Margin requirements set by the proposed methodology would allow for, on average, a wider range of margin reductions;[13] however, because of the increased accuracy, the proposed methodology would not reduce FICC's ability to cover the credit risk posed by its members.[14]

The proposed methodology is also less complex than the current methodology. FICC proposes to calculate the margin reduction from cross-margining based on the combined portfolio of eligible products of a common member (*i.e.,* both the products cleared at FICC and the related products cleared at CME) with a VaR methodology. The proposed methodology calculates portfolio margin reductions based on correlations at the security level. FICC and CME would separately calculate the potential margin reduction resulting from offsetting positions in a common member's portfolio using their respective margin methodologies and agree to reduce the member's margin requirement by the more conservative amount (*i.e.,* the smaller reduction). Further, FICC proposes to apply such a margin reduction only if it exceeds a minimum threshold.[15]

Conversely, the current methodology involves a series of steps to allow FICC and CME to separately consider offsets for their respective products. Such steps include the conversion of products into other products to facilitate comparison of a common member's Treasury and futures contracts (*e.g.,* FICC would convert CME products into equivalent FICC products). The current methodology also requires FICC and CME to group products by maturity into ''Offset Classes'' to facilitate the calculation of a member's margin reduction. As noted above, the current process is complex and produces less accurate offsets that could negatively affect FICC's ability to cover the exposures presented by its members.

C. Default Management and Loss Sharing

FICC proposes to strengthen its default management coordination with CME and to simplify the sharing of losses arising out of a common member default. The Restated Agreement would provide three potential default management paths and would favor joint action by FICC and CME as a first, best option. In contrast, the Existing Agreement merely seeks to align the time at which the CCPs liquidate a common member's positions. With regard to loss sharing, the Restated Agreement provides for a relatively simple division of gains and losses. Further, the Restated Agreement would align cashflows through the exchange of variation margin, which is not contemplated by the Existing Agreement.

Default Management Coordination: The proposed changes would simplify the scenario in which only one of the CCPs suspends a common member by requiring the common member to repay the margin reduction realized under the cross-margin arrangement.[16] If the common member fails to pay back the margin reduction, then the CCPs must both suspend and liquidate the member's portfolio.[17] In the event that both FICC and CME suspend a common member, the Restated Agreement is designed to facilitate joint liquidation of common member's cross-margin portfolio. The Existing Agreement requires only that FICC and CME make reasonable efforts to coordinate when off-setting positions are closed out and to report losses to each other. In contrast, the Restated Agreement would require in the first instance a good faith attempt to jointly transfer, liquidate, or close-out positions. The Restated Agreement would further describe alternatives where joint liquidation is either infeasible or inadvisable, including separate liquidation similar to what is contemplated under the Existing Agreement.[18]

Loss Sharing. The Restated Agreement would simplify loss sharing in the event of a common member default and would introduce a new feature to align cashflows during default management. As stated above, the Restated Agreement is designed to facilitate joint default management by FICC and CME. In the event the CCPs jointly transfer, liquidate, or close-out the common member's cross-margin positions, if one CCP faces a loss greater than (or gain less than) their share of total losses (or gains), the other CCP would pay the difference to ensure that each CCP was responsible for its respective portion of losses or gains.[19]

In the case of a joint liquidation, the Restated Agreement would also provide for an exchange of variation margin.

[11] FICC provided data demonstrating that the proposed change in eligible products would have reduced the average daily margin requirements by approximately 1.33 percent for the small set of members who participated in the cross-margining program. FICC provided its analysis of the potential effects on margin requirements to the Commission in a confidential Exhibit 3 to File No. SR–FICC–2023–010.

[12] Future changes to FICC's rules, such as the terms of the Restated Agreement, are outside the scope of this proposal. The Restated Agreement and the SLA provide a mechanism for changing the list of Eligible Products; however, the agreement would not alter FICC's filing obligations pursuant to section 19(b) of the Exchange Act or section 806(e) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. *See* 15 U.S.C. 78s(b) and 12 U.S.C. 5465(e).

[13] For the small set of members involved in cross-margining, the proposed change would widen the potential range of margin reductions. *See* Notice of Filing, 88 FR at 48927. Specifically, the average range of reductions to total margin was 0.1 percent to 17.4 percent under the current methodology, and would have been 0 percent to 36.6 percent under the proposed methodology. *Id.* The overall reduction to margin at FICC would have been significantly smaller because cross-margining related margin requirements account for only small amount of total margin requirements on average. *See* Notice of Filing, 88 FR at 48927, n.10.

[14] Backtesting data showed that, even with the broadened range of margin reductions, FICC's ability to cover exposures presented by members would have improved. FICC provided backtesting data in a confidential Exhibit to File No. SR–FICC–2023–010.

[15] The threshold would initially be set at 1 percent to prevent any negatively correlated portfolios or portfolios with little to no correlation to receive cross-margin benefit because of the operational coordination required to provide such benefit. *See* Notice of Filing, 88 FR at 48930, n.40. Additionally, FICC provided information pertaining to thresholds for the maximum margin reduction allowable under the proposed rule change as well. *See* Notice of Filing, 88 FR at 48927, n.10.

[16] For example, assume that FICC suspends Member A, but CME does not. CME must require Member A to pay both the margin reduction provided by FICC (which CME passes to FICC) and the margin reduction provided by CME (which is retained by CME). Such a payment would provide each CCP with the collateral it would have collected if the common member did not participate in the cross-margining arrangement.

[17] In contrast, the provisions of the Existing Agreement set out a complex series of conditional statements and calculations that flow into further loss sharing provisions in the event that only one CCP suspends a common member.

[18] The Restated Agreement would allow for either FICC or CME to buy-out the other with regard to the cross-margined positions of the defaulter. Failing joint action or buy-out, the Restated Agreement allows for separate liquidation followed by loss sharing, similar to the provisions of the Existing Agreement.

[19] Specifically, FICC and CME would each calculate their respective net gain or loss as well as the overall combined gain or loss across the CCPs to determine their respective allocation of losses or gains arising out the liquidation.

Such an exchange would improve the efficiency of the default management process by aligning cashflows in a scenario in which either CME or FICC has a payment obligation arising out of cross-margin positions that could be covered by the variation margin gains on offsetting cross-margin positions held by the other CCP. The Existing Agreement does not contemplate any exchange of variation margin between FICC and CME.

The Restated Agreement would also simplify the sharing of losses where FICC and CME liquidate the defaulter's cross-margin positions separately. In the case of separate liquidations, if either FICC or CME has a net gain and the other has a net loss, then the CCP with the net gain would make a payment to the CCP with the net loss. Such payment would be the lesser of the net gain or net loss realized by the CCPs.[20]

IV. Discussion and Commission Findings

Section 19(b)(2)(C) of the Exchange Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to such organization.[21] After carefully considering the Proposed Rule Change, the Commission finds that the proposal is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to FICC. More specifically, the Commission finds that the proposal is consistent with section 17A(b)(3)(F) of the Exchange Act,[22] and Rules 17Ad–22(e)(6) and (e)(20) [23] thereunder, as described in detail below.

A. Consistency With Section 17A(b)(3)(F) of the Exchange Act

Section 17A(b)(3)(F) of the Exchange Act requires, among other things, that the rules of a clearing agency be designed to remove impediments to and help perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions; and to foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions.[24]

The Commission has historically supported and approved cross-margining at clearing agencies and has recognized the potential benefits of cross-margining systems, which include freeing capital through reduced margin requirements, reducing clearing costs by integrating clearing functions, reducing clearing agency risk by centralizing asset management, and harmonizing liquidation procedures.[25] The Commission has encouraged cross-margining arrangements as a way to promote more efficient risk management across product classes.[26] Cross-margining arrangements may be consistent with section 17A(b)(3)(F) in that they may strengthen the safeguarding of assets through effective risk controls that more broadly take into account offsetting positions of participants in both the cash and futures markets, and promote prompt and accurate clearance and settlement of securities through increased efficiencies.[27]

The Commission continues to view cross-margining programs as consistent with clearing agency responsibilities under section 17A of the Exchange Act.[28] Cross-margining programs enhance member liquidity and systemic liquidity both in times of normal trading and in times of market stress by reducing margin requirements for members, which could prove crucial in maintaining member liquidity during periods of market volatility, and enhancing market liquidity as a whole.[29] By enhancing market liquidity, cross-margining arrangements remove impediments to and help perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions.[30] Based on a review of the record, and for the reasons described below, the Commission believes that the Proposed Rule Change is consistent with removing of impediments to and helping to perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions as well as fostering cooperation and coordination with persons engaged in the clearance and settlement of securities transactions.

As described above, FICC proposes to expand the set of products accepted as part of its cross-margining arrangement with CME. Expanding the set of Eligible Products will increase the opportunities to reduce member margin requirements, which could support the maintenance of market participants' liquidity during periods of market volatility. The expansion of product eligibility would also support market participants' use of the national system for the prompt and accurate clearance and settlement without being impeded by the market structure in which different CCPs serve different asset classes.

Also as described above, the proposed changes would reduce margin requirements overall by a small amount without reducing FICC's ability to cover the credit risk posed by its members. Although the margin reductions provided by the proposed changes would not diminish FICC's ability to cover the credit risk posed by its members, the link represented by the cross-margining arrangement necessitates cooperation not only during normal operations, but also following the default of a common member. The proposed Restated Agreement details the processes for default management and loss sharing. The Restated Agreement favors joint liquidation by the parties and also contemplates alternative default management scenarios in which a joint liquidation is not feasible or advisable. The Proposed Rule Change would also introduce variation margin sharing across the CCPs to facilitate default management.

The Commission finds, therefore, that the Proposed Rule Change is consistent with the requirements of section 17A(b)(3)(F) of the Exchange Act.[31]

B. Consistency With Rule 17Ad–22(e)(6) Under the Exchange Act

Rule 17Ad–22(e)(6)(v) under the Exchange Act requires that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to cover, if the covered clearing agency provides central counterparty services, its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, uses an appropriate method for measuring credit exposure that accounts for relevant product risk

[20] In the event that either FICC or CME buys out the other's cross-margin positions and related collateral, no loss sharing would occur.

[21] 15 U.S.C. 78s(b)(2)(C).

[22] 15 U.S.C. 78q–1(b)(3)(F).

[23] 17 CFR 240.17Ad–22(e)(6) and 17 CFR 240.17Ad–22(e)(20).

[24] 15 U.S.C. 78q–1(b)(3)(F).

[25] *See* Securities Exchange Act Release No. 63986 (Feb. 28, 2011), 76 FR 12144, 12153 (Mar. 4, 2011) (File No. SR–FICC–2010–09) (approving the introduction of cross-margining for positions held at FICC and New York Portfolio Clearing, LLC) (citations omitted) (''NYPC Order'').

[26] *See id.* (citations omitted).

[27] *See id.*

[28] *See* Securities Exchange Act Release No. 90464 (Nov. 19, 2020), 85 FR 75384, 75386 (Nov. 25, 2020 (File No. SR–OCC–2020–010) (approving a second amended and restated cross-margining agreement between the Options Clearing Corp. and CME); Securities Exchange Act Release No. 38584 (May 8, 1997), 62 FR 26602, 26604–05 (May 14, 1997) (File No. SR–OCC–97–04) (establishing a cross-margining agreement with the Options Clearing Corp., CME, and the Commodity Clearing Corporation).

[29] *See id.*

[30] *See id. See also* NYPC Order at 12153.

[31] 15 U.S.C. 78q–1(b)(3)(F).

factors and portfolio effects across products.[32] In adopting Rule 17Ad–22(e)(6), the Commission provided guidance that a covered clearing agency generally should consider in establishing and maintaining policies and procedures for margin.[33] The Commission stated that a covered clearing should consider, in calculating margin requirements, whether it allows offsets or reductions in required margin across products that it clears or between products that it an another clearing agency clear, if the risk of one product is significantly and reliably correlated with the risk of the other product; and where two or more clearing agencies are authorized to offer cross-margining, whether they have appropriate safeguards and harmonized overall risk management systems.[34]

The Proposed Rule Change would support the continued allowance of margin reductions in recognition of the correlation between products cleared by CME and FICC. Whether the reduced margin represents an appropriate measure of the credit exposure posed to FICC may be viewed in terms of whether such margin is sufficient to cover the potential losses associated with cross-margined positions following a member default. As described above, backtesting data demonstrates that the proposed margin methodology would not reduce FICC's ability to cover the credit risk posed by its members within the context of cleared products eligible for cross-margining under the Restated Agreement.[35] Further, the Restated Agreement includes provisions to safeguard FICC against a scenario in which it ceases to act for a common member, but CME does not. Specifically, the Restated Agreement would require the payment to FICC of the margin reduction granted under the cross-margining arrangement, which would avoid a mismatch between the margin collected and the portfolio to be liquidated.

Accordingly, the Commission finds that the proposed model changes are consistent with Rule 17Ad–22(e)(6)(v) under the Exchange Act.[36]

C. Consistency With Rule 17Ad–22(e)(20) Under the Exchange Act

Rule 17Ad–22(e)(20) under the Exchange Act requires that a covered clearing agency establish, implement, maintain, and enforce written policies and procedures reasonably designed to identify, monitor, and manage risks related to any link the covered clearing agency establishes with one or more other clearing agencies, financial market utilities, or trading markets.[37] The term financial market utility means any person that manages or operates a multilateral system for the purpose of transferring, clearing, or settling payments, securities, or other financial transactions among financial institutions or between financial institutions and the person.[38] For the purposes of Rule 17Ad–22(e)(20), link means, among other things, a set of contractual and operational arrangements between two or more clearing agencies, financial market utilities, or trading markets that connect them directly or indirectly for the purposes of cross margining.[39]

In adopting Rule 17Ad–22(e)(20), the Commission provided guidance that a covered clearing agency generally should consider in establishing and maintaining policies and procedures that address links.[40] Notably, the Commission stated that a covered clearing should consider whether a link has a well-founded legal basis, in all relevant jurisdictions, that supports its design and provides adequate protection to the covered clearing agencies involved in the link.[41] The Commission further stated that, when in a CCP link arrangement, a covered clearing agency should consider whether it is able to cover, at least on a daily basis, its current and potential future exposures to the linked CCP and its participant, if any, fully with a high degree of confidence without reducing the covered clearing agency's own ability to fulfill its obligations to its own participants at any time.[42]

CME is a CCP for futures contracts and also meets the definition of a financial market utility.[43] The cross-margin arrangement between FICC and CME, therefore, is a link for the purposes of Rule 17Ad–22(e)(20), as defined in Rule 17Ad–22(a)(8). As described above, FICC proposes to adopt the Restated Agreement to amend its cross-margining arrangement with CME. The terms of the Restated Agreement, which would replace the Existing Agreement, would continue to specify, among other matters, which members may participate in the arrangement, which products are eligible for consideration under the arrangement, how margin requirements will be set for positions considered under the arrangement, and how FICC and CME would manage the default of member who participates in the arrangement. The Restated Agreement would also address issues of indemnification, information sharing, and other routine terms currently addressed in the Existing Agreement. Further, the Restated Agreement would also provide for the use of an SLA that would provide additional supporting detail with regard to timing and certain operational processes related to the cross-margining arrangement. The Commission believes that the Restated Agreement would continue to support the design of the cross-margin arrangement between FICC and CME by addressing matters currently covered in the Existing Agreement as well as those changes to the structure of the cross-margin arrangement described above (*e.g.,* product eligibility, margin requirements, default management).

Further, the incorporation of certain timing and operational aspects of the cross-margining arrangement in a separate SLA would streamline the language of the Restated Agreement and more clearly present operational details, such as those related to daily settlement procedures. The CCPs would also have the ability to review the service level details separately and modify them without requiring changes to the full agreement. Simplifying the presentation and maintenance of such operational details would serve to reduce risks associated with the link between FICC and CME.

The Proposed Rule Change also addresses margin reductions, default management, and loss sharing. With regard to margin, backtesting data demonstrates that the proposed margin methodology would not reduce FICC's ability to cover the credit risk posed by its members.[44] The Commission believes that such backtesting data suggests that the proposed changes would support FICC's ability to cover its current and potential future exposures to its participants. The Proposed Rule Change would support FICC's ability to meet its obligations by providing for the exchange of variation margin between FICC and CME during the management of a common member default. With regard to default management, the Restated Agreement explicitly

[32] 17 CFR 240.17Ad–22(e)(6)(v).

[33] *See* Standards for Covered Clearing Agencies, Exchange Act Release No. 78961, 81 FR 70786, 70819 (Oct. 13, 2016) (File No. S7–03–14) (''Standards for Covered Clearing Agencies'').

[34] *See id.*

[35] *Supra* note 14.

[36] 17 CFR 240.17Ad–22(e)(6)(v).

[37] 17 CFR 240.17Ad–22(e)(20).

[38] 12 U.S.C. 5462(6)(A).

[39] 17 CFR 240.17Ad–22(a)(8).

[40] *See* Standards for Covered Clearing Agencies, 81 FR at 70841.

[41] *Id.*

[42] *Id.*

[43] *See* FSOC 2012 Annual Report, Appendix A, *https://home.treasury.gov/system/files/261/here.pdf* (last visited July 17, 2023).

[44] *Supra* note 14.

prioritizes coordination and joint management of a common member default. The Commission believes that such default management and loss sharing provisions as those proposed in the Restated Agreement would further support FICC's ability to cover its current and potential future exposures without reducing its ability to fulfill its obligations to its own participants.

Accordingly, the Commission finds that the proposed model changes are consistent with Rule 17Ad–22(e)(20) under the Exchange Act.[45]

V. Conclusion

On the basis of the foregoing, the Commission finds that the Proposed Rule Change is consistent with the requirements of the Exchange Act, and in particular, the requirements of section 17A of the Exchange Act[46] and the rules and regulations thereunder.

It is therefore ordered, pursuant to section 19(b)(2) of the Exchange Act,[47] that the Proposed Rule Change (SR–FICC–2023–010) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[48]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–19839 Filed 9–13–23; 8:45 am]

BILLING CODE 8011–01–P

[45] 17 CFR 240.17Ad–22(e)(20).

[46] In approving this Proposed Rule Change, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[47] 15 U.S.C. 78s(b)(2).

[48] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket # FAA–2023–1261]

Airport Terminal Program; FY 2024 Funding Opportunity

AGENCY: Federal Aviation Administration (FAA).

ACTION: Notice of Funding Opportunity.

SUMMARY: The Department of Transportation (DOT), Federal Aviation Administration (FAA) announces the opportunity to apply for approximately $1 billion in FY 2024 discretionary funds for the Airport Terminal Program (ATP), made available under the Infrastructure Investment and Jobs Act of 2021 (IIJA), Public Law 117–58, herein referred to as the Bipartisan Infrastructure Law (BIL). The purpose of the ATP is to make annual grants available to eligible airports for airport terminal and airport-owned Airport Traffic Control Towers development projects that address the aging infrastructure of our nation's airports.

In addition, ATP grants will align with DOT's Strategic Framework FY2022–2026 at *https://www.transportation.gov/administrations/office-policy/fy2022-2026-strategic-frameworkhttps://www.transportation.gov/administrations/office-policy/fy2022-2026-strategic-framework.* The FY 2024 ATP will be implemented consistent with law and in alignment with the priorities in Executive Order 14052, *Implementation of the Infrastructure Investments and Jobs Act* (86 FR 64355), which are to invest efficiently and equitably; promote the competitiveness of the U.S. economy; improve job opportunities by focusing on high labor standards; strengthen infrastructure resilience to all hazards including climate change; and to effectively coordinate with State, local, Tribal, and territorial government partners.

DATES: Airport sponsors that wish to be considered for FY 2024 ATP discretionary funding should submit an application that meets the requirements of this Notice of Funding Opportunity (NOFO) as soon as possible, but no later than 5:00 p.m. Eastern time, October 16, 2023.

ADDRESSES: Submit applications electronically at *www.faa.gov/bil/airport-terminals* per instructions in this NOFO.

FOR FURTHER INFORMATION CONTACT: Robin K. Hunt, Manager, BIL Branch APP–540, FAA Office of Airports, at (202) 267–3263 or our FAA BIL email address: *9-ARP-BILAirports@faa.gov.*

SUPPLEMENTARY INFORMATION:

A. Program Description

BIL established the ATP, a competitive discretionary grant program, which provides approximately $1 billion in grant funding annually for five years (Fiscal Years 2022–2026) to upgrade, modernize, and rebuild our nation's airport terminals and airport-owned Airport Traffic Control Towers (ATCTs). This includes bringing airport facilities into conformity with current standards; constructing, modifying, or expanding facilities as necessary to meet demonstrated aeronautical demand; enhancing environmental sustainability; encouraging actual and potential competition; and providing a balanced system of airports to meet the roles and functions necessary to support civil aeronautical demand. The FAA is committed to advancing safe, efficient transportation, including projects funded under the ATP. The ATP also supports the President's goals to mobilize American ingenuity to build modern infrastructure and an equitable, clean energy future. In support of Executive Order 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government* (86 FR 7009), the FAA encourages applicants to consider how the project will address the challenges faced by individuals in underserved communities and rural areas, as well as accessibility for persons with disabilities.

The ATP falls under the project grant authority for the Airport Improvement Program (AIP) in 49 United States Code (U.S.C.) § 47104. Per 2 Code of Federal Regulations (CFR) part 200—*Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards,* the AIP Federal Assistance Listings Number is 20.106, with the objective to assist eligible airports in the development and improvement of a nationwide system that adequately meets the needs of civil aeronautics. The FY 2024 ATP will be implemented, as appropriate and consistent with BIL, in alignment with the priorities in Executive Order 14052, *Implementation of the Infrastructure Investments and Jobs Act* (86 FR 64355), which are to invest efficiently and equitably; promote the competitiveness of the U.S. economy; improve opportunities for good-paying jobs with the free and fair choice to join a union by focusing on high labor standards; strengthen infrastructure resilience to all hazards including climate change; and to effectively coordinate with State, local, Tribal, and territorial government partners. Consistent with statutory criteria and Executive Order 14008, *Tackling the Climate Crisis at Home and Abroad* (86 FR 7619), the FAA also seeks to fund projects under the ATP that reduce greenhouse gas emissions and are designed with specific elements to address climate change impacts. Specifically, the FAA is looking to award projects that align with the President's greenhouse gas reduction goals, promote energy efficiency, support fiscally responsible land use and transportation efficient design, support terminal development compatible with the use of sustainable aviation fuels and technologies, increase climate resilience, incorporate sustainable and less emissions-intensive pavement and construction materials as allowable, and reduce pollution.

The FAA will also consider projects that advance the goals of the Executive Orders listed under Section E.2.

B. Federal Award Information

This NOFO announces up to $1,000,000,000, subject to availability of funds, for the Fiscal Year 2024 ATP. The ATP is a $5 billion grant program, distributed as approximately $1 billion annually for five years (Fiscal Years 2022, 2023, 2024, 2025, and 2026), subject to annual allocations limitations based on airport roles found in the published National Plan of Integrated Airport Systems (NPIAS), as updated with current year data. In general, the $5 billion in ATP grant funding is subject to the following annual award allocation limitations: not more than 55 percent shall be for large hub airports, not more than 15 percent shall be for medium hub airports, not more than 20 percent shall be for small hub airports, and not less than 10 percent shall be for nonhub and nonprimary airports.

The FAA will consider projects that increase capacity and passenger access; projects that replace aging infrastructure; projects that achieve compliance with the Americans with Disabilities Act (42 U.S.C. 12101, *et seq.*) and expand accessibility for persons with disabilities; projects that improve airport access for historically disadvantaged populations; projects that improve energy efficiency, including upgrading environmental systems, upgrading plant facilities, and achieving Leadership in Energy and Environmental Design (LEED) accreditation standards; projects that improve airfield safety through terminal relocation; and projects that encourage actual and potential competition. This includes applicable Executive Orders as listed in Section E.2. Additionally, the FAA will provide preference to projects that achieve a complete development objective even if awards for the project must be phased, and priority to projects that have received partial awards.

Projects for relocating, reconstructing, repairing, or improving an airport-owned ATCT will also be considered. In addition to the considerations above, these projects will also be evaluated based on overall impact on the National Airspace System, including age of facility, operational constraints, and nonstandard facilities.

The FAA will publish a NOFO annually to announce additional funding made available, approximately $1 billion per year, for Fiscal Years 2025–2026.

C. Eligibility Information

1. Eligible Applicants

Eligible applicants are those airport sponsors normally eligible for Airport Improvement Program (AIP) discretionary grants as defined in 49 U.S.C. 47115. This includes a public agency, private entity, state agency, Indian Tribe or Pueblo owning a public-use NPIAS airport, the Secretary of the Interior for Midway Island airport, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.

2. Cost Sharing or Matching

The Federal cost share of ATP grants is 80 percent for large and medium hub airports, and 95 percent for the remainder of airports eligible to receive ATP grants, which includes small hub, nonhub, and nonprimary airports.

3. Project Eligibility

All projects funded from the ATP must be:

i. Airport terminal development, defined in 49 U.S.C. 47102(28) as development of an airport passenger terminal building, including terminal gates; access roads servicing exclusively airport traffic that leads directly to or from an airport passenger terminal building; and walkways that lead directly to or from an airport passenger terminal building. Under the ATP, the FAA may consider projects that qualify as ''terminal development'' (including multimodal terminal development), as that term is defined in 49 U.S.C. 47102(28); or

ii. On-airport rail access projects as set forth in Passenger Facility Charge (PFC) Update 75–21 (86 FR 48793, August 31, 2021); or

iii. Airport-owned ATCT that includes relocating, reconstructing, repairing, or improving the ATCT; and

iv. Justified based on civil aeronautical demand.

D. Application and Submission Information

1. Address To Request Application Package

An application for ATP terminal or ATCT projects, FAA Form 5100–144, *Bipartisan Infrastructure Law, Airport Terminal and Tower Project Information,* can be found at: *www.faa.gov/bil/airport-terminals.*

Direct all inquiries regarding applications to the appropriate Regional Office (RO) or Airports District Office (ADO). RO/ADO contact information is available at: *https://www.faa.gov/about/office_org/headquarters_offices/arp/offices/regional_offices.* Or to the BIL Team at: *9-ARP-BILAirports@faa.gov.*

2. Content and Form of Application Submission

Applicants are required to submit FAA Form 5100–144, *Bipartisan Infrastructure Law, Airport Terminal and Tower Project Information.* The applicant should submit Form 5100–144 as a fillable digitally signed PDF document via email. If the applicant cannot provide a digital signature, the application may be submitted as two documents: (1) the completed fillable PDF without a signature and (2) a scanned version of the completed application with a written signature. Applicants should follow the instructions and provide a response to applicable items on the form.

The ''Submit by Email'' button at the bottom of the form will generate an email for the applicant to send to the FAA BIL Team at: *9-ARP-BILAirports@faa.gov.* If the ''Submit by Email'' button does not generate an email the applicant can save the fillable PDF by selecting ''File>Save As'' to save as a fillable PDF. Once saved, the applicant can email the application to the FAA BIL Team at *9-ARP-BILAirports@faa.gov.* The fillable PDF application must contain either a digital signature or the applicant's written signature in accordance with the procedures described above.

Applicants selected to receive an ATP grant will then be required to follow AIP grant application procedures prior to award, which include meeting all prerequisites for funding, and submission of Standard Form SF–424, *Application for Federal Assistance,* and FAA Form 5100–100, *Application for Development Projects.*

Airports covered under the FAA's State Block Grant Program or airports in a channeling act state should coordinate with their associated state agency on the process for who should submit an application, via the procedures listed above.

Applicants must address Administration and Departmental priorities in safety, climate change and sustainability, equity, and workforce development which are further defined in Section E.1 Criteria.

Grant Funds, Sources and Uses of Project Funds: The FAA requests that each project application have a financial plan (or project budget) available for review upon request. Project budgets should show how different funding sources will share in each activity and present those data in dollars and percentages. The budget should identify other Federal funds the applicant is applying for or has been awarded, if any, that the applicant intends to use. Funding sources should be grouped into three categories: non-Federal, ATP, and other Federal with specific amounts from each funding source.

Sharing of Application Information: The FAA may share application

information within the Department or with other Federal agencies if the FAA determines that sharing is relevant to the respective program's objectives.

3. Unique Entity Identifier and System for Award Management (SAM)

Applicants must comply with 2 CFR part 25—*Universal Identifier and System for Award Management.* All applicants must have a unique entity identifier provided by SAM. Additional information about obtaining a Unique Entity Identifier (UEI) and registration procedures may be found at *http://www.sam.gov.* Each applicant is required to: (1) be registered in SAM; (2) provide a valid UEI prior to grant award; and (3) continue to maintain an active SAM registration with current information at all times during which the applicant has an active Federal award or an application or plan under consideration by the FAA. Under the ATP, the UEI and SAM account must belong to the entity that has the legal authority to apply for, receive, and execute ATP grants.

Once awarded, the FAA grant recipient must maintain the currency of its information in SAM until the grantee submits the final financial report required under the grant or receives the final payment, whichever is later. A grant recipient must review and update the information at least annually after the initial registration and more frequently if required by changes in information or another award term.

The FAA may not make an award until the applicant has complied with all applicable UEI and SAM requirements. If an applicant has not fully complied with the requirements by the time the FAA is ready to make an award, the FAA may determine that the applicant is not qualified to receive an award and use that determination as a basis for making a federal award to another applicant.

Non-federal entities that have received a federal award are required to report certain civil, criminal, or administrative proceedings to SAM (currently the Federal Awardee Performance and Integrity Information System (FAPIIS) *www.fapiis.gov*) to ensure registration information is current and complies with federal requirements. Applicants should refer to 2 CFR 200.113 for more information about this requirement.

4. Submission Dates and Times

Airports that wish to be considered for FY 2024 ATP discretionary funding must submit an application that meets the requirements of this NOFO as soon as possible, but no later than 5:00 p.m. Eastern time on October 16, 2023. Submit applications electronically to *9-ARP-BILAirports@faa.gov* per instructions in this NOFO.

5. Intergovernmental Review

Not applicable.

6. Funding Restrictions

All projects funded from the ATP must be airport terminal development or for relocation, reconstruction, repair, or improvement of an airport-owned air traffic control tower, defined under Section C–3 Project Eligibility. ATP funds may not be used to support or oppose union organizing.

Pre-Award Authority: All project costs must be incurred after the grant execution date unless specifically permitted under 49 U.S.C. 47110(c). Certain airport development costs incurred before execution of the grant agreement, but after November 15, 2021, are allowable, only if certain conditions under 49 U.S.C. 47110(c) are met [see Table 3–60 of the AIP Handbook, FAA Order 5100.38 D Change 1, for a specific list of the guidance regarding when project costs can be incurred in relation to section 47110(c)].

7. Other Submission Requirements

Applications will only be accepted on FAA Form 5100–144 fillable PDF via email and must be received on or before October 16, 2023, 5:00 p.m. Eastern time. No other forms of applications will be accepted.

E. Application Review Information

1. Criteria

Applications for FY 2024 ATP will be rated using the following criteria:

i. Projects must meet eligibility requirements under the ATP, which includes terminal development (including multimodal terminal development) as defined in 49 U.S.C 47102(28): on-airport rail access projects: or airport-owned ATCT relocation, reconstruction, repair, or improvements.

ii. The FAA will consider timeliness of implementation, with priority given to those projects, including ''design only'' projects, that can satisfy all statutory and administrative requirements for grant award by June 2024.

iii. Favorable consideration will be given to eligible and justified (based on civil aeronautical demand) terminal development projects (including multimodal terminal development), on-airport rail access projects, and ATCT projects that:

a. *Increase capacity and passenger access:* The applicant should describe the extent to which the project contributes to the functioning and growth of the economy, including the extent to which the project addresses congestion or service gaps in rural areas. The applicant should demonstrate how the proposed project increases capacity, provides ongoing market access to the airport by competing carriers as economic and competitive conditions change (such as by constructing common use gates or updating gates and other areas with common use equipment). The applicant should also demonstrate how the proposed project increases capacity and market access or relieves congestion based on current and/or forecast needs.

b. *Replace aging infrastructure:* Applicants should describe how the project addresses replacing or upgrading facilities that have reached the end of their useful life. This includes information on the current age and condition of the asset that will be affected by the project and how the proposed project will improve asset condition. The applicant should describe how the facility no longer meets the current or forecasted operational needs of the airport. This includes the renovation, expansion, or replacement of a facility that is too small or cannot efficiently meet current or future demand. This also includes projects aimed at terminal modernization or upgrades to meet the changing user or community expectations. This can be met by including multimodal terminal development, climate resiliency, sustainability initiatives and practices incorporated therein, and the incorporation of common-use equipment and practices, all with the goal of providing a terminal that focuses on the most efficient movement of passengers and baggage possible. This also includes projects that address changing environmental conditions and improve resilience to climate change, and that will be constructed consistent with the Federal Flood Risk Management Standard, per the President's January 30, 2015, Executive Order 13690, ''Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input'' to the extent consistent with current law.

c. *Achieve compliance with the Americans with Disabilities Act (ADA), including expand accessibility for persons with disabilities:* Applicants should describe how the project increases mobility, expands access, and improves connectivity for people with disabilities both inside and outside the terminal or ATCT. The information

should demonstrate how the proposed project will meet the requirements under the Americans with Disabilities Act and improve equitable access for people with disabilities.

d. *Improve airport access for historically disadvantaged populations:* Applicants should describe how the project increases mobility, expands access, and improves connectivity for historically disadvantaged populations. The information should demonstrate how the proposed project provides a significant local and regional impact and benefits historically disadvantaged populations. The applicant should include a description of public engagement on a local and regional level that has occurred, demonstrates proactive inclusivity of historically disadvantaged communities, and the degree to which public comments and commitments have been integrated into the project. DOT is providing a list of communities that meet the definition of Historically Disadvantaged Communities, *available at https://adip.faa.gov/agis/public/#/disadvantagedCommunities.*

e. *Improve energy efficiency, including upgrading environmental systems, upgrading plant facilities, and achieving Leadership in Energy and Environmental Design (LEED) accreditation standards:* Applicants should provide information demonstrating how the proposed project will reduce air pollution and greenhouse gas emissions from a reduction in energy consumption through energy-efficient design. This includes how the project may facilitate the airport in achieving LEED or similar accreditation standards through reliance on alternative energy, water use reduction, sustainable site selection and development, responsible materials selection and waste management, incorporating lower-carbon pavement and construction materials, enhanced indoor environmental quality, use of terminal facility for renewable energy production, or other sustainability efforts (*e.g.,* vehicle charging stations attached to the terminal) that further reduce long-term impact on the climate. A proposed project, including utility support facilities, should be part of an overall plan that sets targets to lower carbon emissions, working toward a carbon-neutral airport by 2050.

f. *Improve airfield safety through terminal relocation:* Applicants should describe how the proposed terminal project is improving airfield safety through the relocation of the terminal building or its components. This could also include a project to relocate a terminal that assists in addressing nonstandard airfield configurations.

g. *Encourage actual and potential competition:* The applicant should describe the extent to which the project promotes competition in air service by providing greater ability to accommodate new entrants; increasing the ability of competing air carriers to access constrained facilities on an ongoing basis; and facilitating the efficient and reliable movement of passengers and cargo. The applicant should describe the extent to which the project leads to common use gates and software (*e.g.,* common use software updates, construction of common use gates versus preferential use by a specific carriers). The applicant may also wish to describe how the project will offer regional and national impacts by improving the economic strength of regions and cities; increase opportunities for tourism; result in long-term job creation by supporting good-paying jobs with the free and fair choice to join a union directly related to the project; and help the United States compete in a global economy by encouraging the location of important industries and future innovations and technology in the United States.

iv. ATCT projects that relocate, reconstruct, repair, or improve an airport-owned ATCT will also be evaluated based on overall impact on the National Airspace System, including age of facility, operational constraints, and nonstandard facility conditions.

v. The FAA will provide a preference to projects that achieve a complete development objective, even if awards for the project must be phased; and prioritize projects that have received partial awards.

vi. The applicant should describe whether and how project delivery and implementation create good-paying jobs with the free and fair choice to join a union to the greatest extent possible; the use of demonstrated strong labor standards, practices and policies (including for direct employees, contractors, sub-contractors, and service workers on airport property); use of project labor agreements; distribution of workplace rights notices; union neutrality agreements; wage and/or benefit standards; safety and health standards; the use of Local Hire Provisions; [1] registered apprenticeships; joint-labor management partnerships; or other similar standards or practices. The applicant should describe how planned methods of project delivery and implementation (for example, use of Project Labor Agreements and/or Local Hire Provisions,[2] training, placement, and the provision of supportive services for underrepresented workers) provide opportunities for all workers, including workers underrepresented in construction jobs to be trained and placed in good-paying jobs directly related to the project. The FAA will consider this information in evaluating the application.

Applicants are encouraged to submit projects that meet as many of the above criteria as possible, but do not need to meet all criteria to be considered.

2. Review and Selection Process

Federal awarding agency personnel will evaluate applications based on how well the projects meet the criteria in E.1, including project eligibility, justification, readiness, impact on the National Airspace System, and the availability of matching funds. The FAA will also consider how well projects advance the goals of the following Executive Orders, which are incorporated into the criteria under E.1.: the President's January 20, 2021, Executive Order 13990, ''*Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*''*;* the President's January 20, 2021, Executive Order 13985, ''*Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*''*;* the President's January 27, 2021, Executive Order 14008, ''*Tackling the Climate Crisis at Home and Abroad*''*;* the President's May 20, 2021, Executive Order 14030, ''*Climate Related Financial Risk*''*;* and the President's July 9, 2021, Executive Order 14036, ''*Promoting Competition in the American Economy.*''

Applications are first reviewed for eligibility, justification, and timeliness of implementation consistent with the requirements of this NOFO and the intent of the ATP. Applications are then reviewed for how well the proposed project(s) meets the criteria in E.1. and ranked by field and Regional office staff. The top projects for each airport category (as outlined in BIL) are then evaluated by a National Control Board (NCB). The NCB has representatives from each Region and Headquarters management. The NCB recommends project and funding levels to senior leadership.

[1] IIJA div. B Section 25019 provides authority to use geographical and economic hiring preferences, including local hire, for construction jobs, subject to any applicable State and local laws, policies, and procedures.

[2] Project labor agreement should be consistent with the definition and standards outlined in Executive Order 14063.

3. Integrity and Performance Check

Prior to making a Federal award with a total amount of Federal share greater than the simplified acquisition threshold, the FAA is required to review and consider any information about the applicant that is in the designated integrity and performance system accessible through SAM (currently FAPIIS) (see 41 U.S.C. 2313). An applicant, at its option, may review information in the designated integrity and performance systems accessible through SAM and comment on any information about itself that a federal awarding agency previously entered. The FAA will consider any comments by the applicant, in addition to the other information in the designated integrity and performance system, in making a judgment about the applicant's integrity, business ethics, and record of performance under Federal awards when completing the review of risk posed by applicants as described in 2 CFR 200.206.

F. Federal Award Administration Information

1. Federal Award Notices

BIL awards are announced through a Congressional notification process and a DOT Secretary's Notice of Intent to Fund. The FAA RO/ADO representative will contact the airport with further information and instructions. Once all pre-grant actions are complete, the FAA RO/ADO will offer the airport sponsor a grant for the announced project. This offer may be provided through postal mail or by electronic means. Once this offer is signed by the airport sponsor, it becomes a grant agreement. Awards made under this program are subject to conditions and assurances in the grant agreement.

2. Administrative and National Policy Requirements

i. Grant Requirements

All grant recipients are subject to the grant requirements of the AIP, found in 49 U.S.C. chapter 471. Grant recipients are subject to requirements in the FAA's *AIP Grant Agreement* for financial assistance awards; the annual Certifications and Assurances required of applicants; and any additional applicable statutory or regulatory requirements, including nondiscrimination requirements and 2 CFR part 200, *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.* Grant requirements include, but are not limited to, approved projects on an airport layout plan; compliance with federal civil rights laws; Buy American requirements under 49 U.S.C. 50101; Build America, Buy America requirements in sections 70912(6) and 70914 in Public Law 117–58; the *Department of Transportation's Disadvantaged Business Enterprise (DBE) Program* regulations for airports (49 CFR part 23 and 49 CFR part 26); the Infrastructure Investment and Jobs Act; and prevailing wage rate requirements under the Davis-Bacon Act, as amended (40 U.S.C. 276a–276a–5, and reenacted at 40 U.S.C. 3141–3144, 3146, and 3147).

Domestic Preference Requirements: As expressed in Executive Order 14005, Ensuring the Future Is Made in All of America by All of America's Workers (86 FR 7475), executive branch should maximize, consistent with law, the use of goods, products, and materials produced in, and services offered in, the United States. Funds made available under this notice are subject to the domestic preference requirements in the Buy American requirements under 49 U.S.C. 50101. The FAA expects all applicants to comply with that requirement without needing a waiver. However, to obtain a waiver, a recipient must be prepared to demonstrate how they will maximize the use of domestic goods, products, and materials in constructing their project.

Civil Rights and Title VI: As a condition of a grant award, grant recipients should demonstrate that the recipient has a plan for compliance with civil rights obligations and nondiscrimination laws, including Title VI of the Civil Rights Act of 1964 and implementing regulations (49 CFR 21), the Americans with Disabilities Act of 1990 (ADA), and Section 504 of the Rehabilitation Act, all other civil rights requirements, and accompanying regulations. This should include a current Title VI plan, completed Community Participation Plan, and a plan to address any legacy infrastructure or facilities that are not compliant with ADA standards. DOT's and the applicable Operating Administrations' Office of Civil Rights may work with awarded grant recipients to ensure full compliance with Federal civil rights requirements.

Critical Infrastructure Security, Cybersecurity, and Resilience: It is the policy of the United States to strengthen the security and resilience of its critical infrastructure against all hazards; including both physical and cyber risks, consistent with Presidential Policy Directive 21—Critical Infrastructure Security and Resilience and the President's National Security Memorandum on Improving Cybersecurity for Critical Infrastructure Control Systems. Each applicant selected for Federal funding under this notice must demonstrate, prior to the signing of the grant agreement, effort to consider and address physical and cyber security risks relevant to the transportation mode and type and scale of the project. Projects that have not appropriately considered and addressed physical and cyber security and resilience in their planning, design, and project oversight, as determined by the Department and the Department of Homeland Security, will be required to do so before receiving funds for construction.

Federal Contract Compliance: As a condition of grant award and consistent with E.O. 11246, Equal Employment Opportunity (30 FR 12319, and as amended), all Federally assisted contractors are required to make good faith efforts to meet the goals of 6.9 percent of construction project hours being performed by women, in addition to goals that vary based on geography for construction work hours and for work being performed by people of color.

The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) is charged with enforcing Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974. OFCCP has a Mega Construction Project Program through which it engages with project sponsors as early as the design phase to help promote compliance with non-discrimination and affirmative action obligations. OFCCP will identify projects that receive an award under this notice and are required to participate in OFCCP's Mega Construction Project Program from a wide range of Federally-assisted projects over which OFCCP has jurisdiction and that have a project cost above $35 million. DOT will require project sponsors with costs above $35 million that receive awards under this funding opportunity to partner with OFCCP, if selected by OFCCP, as a condition of their DOT award.

Performance and Program Evaluation: As a condition of grant award, grant recipients may be required to participate in an evaluation undertaken by the DOT, FAA, or another agency or partner. The evaluation may take different forms, such as an implementation assessment across grant recipients, an impact and/or outcomes analysis of all or selected sites within or across grant recipients, or a benefit/cost analysis or assessment of return on investment. DOT may require applicants

to collect data elements to aid the evaluation. As a part of the evaluation, as a condition of award, grant recipients must agree to: (1) make records available to the evaluation contractor or DOT staff; (2) provide access to program records and any other relevant documents to calculate costs and benefits; (3) in the case of an impact analysis, facilitate the access to relevant information as requested; and (4) follow evaluation procedures as specified by the evaluation contractor or DOT staff. Requested program records or information will be consistent with record requirements outlined in 2 CFR 200.334–338 and the grant agreement.

ii. Standard Assurances

Each grant recipient must assure that it will comply with all applicable federal statutes, regulations, executive orders, directives, FAA circulars, and other federal administrative requirements in carrying out any project supported by the ATP grant. The grant recipient must acknowledge that it is under a continuing obligation to comply with the terms and conditions of the grant agreement issued for its project with the FAA. The grant recipient understands that federal laws, regulations, policies, and administrative practices might be modified from time to time and may affect the implementation of the project. The grant recipient must agree that the most recent Federal requirements will apply to the project unless the FAA issues a written determination otherwise.

The grant recipient must submit the Certifications at the time of grant application and Assurances must be accepted as part of the grant agreement at the time of accepting a grant offer. Grant recipients must also comply with the requirements of 2 CFR part 200, which ''are applicable to all costs related to Federal awards,'' and which are cited in the grant assurances of the grant agreements. The Airport Sponsor Assurances are available on the FAA website at: *https://www.faa.gov/airports/aip/grant_assurances.*

3. Reporting

Grant recipients are subject to financial reporting per 2 CFR 200.328 and performance reporting per 2 CFR 200.329. Under the ATP, the grant recipient is required to comply with all Federal financial reporting requirements and payment requirements, including the submittal of timely and accurate reports. Financial and performance reporting requirements are available in the FAA October 2020 Financial Reporting Policy, which is available at *https://www.faa.gov/sites/faa.gov/files/airports/aip/grant_payments/aip-grant-payment-policy.pdf.*

The grant recipient must comply with annual audit reporting requirements. The grant recipient and sub-recipients, if applicable, must comply with 2 CFR part 200, subpart F, *Audit Reporting Requirements.* The grant recipient must comply with any requirements outlined in 2 CFR part 180, *Office of Management and Budget (OMB) Guidelines to Agencies on Governmentwide Debarment and Suspension.*

G. Federal Awarding Agency Contact(s)

For further information concerning this notice, please contact the FAA BIL Branch via email at *9-ARP-BILAirports@faa.gov.* In addition, the FAA will post answers to frequently asked questions and requests for clarifications on the FAA's website at *www.faa.gov/bil/airport-terminals.* To ensure applicants receive accurate information about eligibility of the program, the applicant is encouraged to contact the FAA directly, rather than through intermediaries or third parties, with questions.

All applicants, including those requesting full federal share of eligible projects costs, should have a plan to address potential cost overruns as part of an overall funding plan.

Issued in Washington, DC, on September 11, 2023

Robin K. Hunt,

Manager, FAA Office of Airports BIL Branch.

[FR Doc. 2023–19893 Filed 9–13–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Withdrawal of the Record of Decision for the LaGuardia Airport Access Improvement Project

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Withdrawal of the Record of Decision (ROD) for the LaGuardia Airport (LGA) Access Improvement Project (Project).

SUMMARY: The FAA is withdrawing the July 2021 ROD for the Project. The Port Authority of New York and New Jersey has notified the FAA of its intent to terminate the Project and pursue alternative access improvements to LGA. Accordingly, the components identified in the LGA Access Improvement Project ROD are no longer needed at this time. Following the issuance of the ROD, New York Governor Kathy Hochul tasked the Port Authority of New York and New Jersey with reexamining alternative mass transit options to LGA. The resulting recommendations from the corresponding study identified improvements to an existing bus service and construction of a new non-stop airport shuttle service. On July 20, 2023, the Port Authority of New York and New Jersey, as the airport sponsor, notified the FAA of its intent to officially abandon the Project as approved by the FAA's ROD in favor of pursuing the recommended bus service and shuttle improvements. In response to this decision, the FAA has withdrawn the ROD for the LGA Access Improvement Project. Accordingly, all approvals for FAA actions within the ROD are also withdrawn. The Port Authority of New York and New Jersey must reinitiate any requests for FAA review and approval as necessary for all aspects of the Project contained within the now-withdrawn ROD should it wish to proceed with any component of the Project, in part or as a whole.

DATES: The effective date of the FAA's Withdrawal Order for the LGA Access Improvement Project ROD is September 1, 2023.

FOR FURTHER INFORMATION CONTACT: Andrew Brooks, Environmental Program Manager, Eastern Regional Office, AEA–610, Federal Aviation Administration, 1 Aviation Plaza, Jamaica, NY 11434. Telephone: 718–553–2511.

SUPPLEMENTARY INFORMATION: In 2015, former New York Governor Andrew Cuomo convened an Airport Advisory Panel to address the deficiencies of LGA as a major transportation facility. The resulting report recommended that the redevelopment of LGA include new ways to access the airport, including a future AirTrain.

In 2018, based on recommendations from the Airport Advisory Panel, the Port Authority of New York and New Jersey (Port Authority), as operator of LGA, proposed the Project to construct and operate a new Automated People Mover (APM) system to provide a reliable transit alternative for air passenger and employee access to the Airport. The Project would connect two on-Airport stations with an off-Airport transfer station at Willets Point. The off-Airport station would provide connections to the Mets-Willets Point stations of the Long Island Railroad (LIRR) Port Washington Branch and the New York City Transit (NYCT) Subway Flushing Station (7 Line). The off-Airport station would also provide a connection to a new off-Airport employee parking option located at

Willets Point. After preparing an Environmental Impact Statement (EIS), the FAA signed a ROD approving the Project on July 20, 2021.

Following the issuance of the ROD, New York Governor Kathy Hochul directed the Port Authority to review alternative mass transit options to the Airport. In November 2021, per the governor's request, the Port Authority assembled a 3-person panel to oversee the study and provide recommendations based on the study's results.

In March 2023, the Port Authority released the ''Options for Mass Transit Solutions to LGA'' report, which included the panel's independent analysis of 14 different mass transit options to LGA. The panel recommended that the Port Authority proceed with implementing improvements to the existing Metropolitan Transportation Authority (MTA) Q70 LaGuardia Link bus service and constructing a new non-stop airport shuttle service from Ditmars Boulevard, the terminus of the N/W subway line in Astoria, Queens. Due to foreseeable construction and cost constraints, the expert panel recommended that the Port Authority focus on improving bus services at LGA in the near-term to provide more efficient transit capabilities, and to focus on implementing the shuttle service in the long-term. The Port Authority indicates that improved bus service is projected to serve approximately 5 million passengers annually and cost an estimated $500 million compared to costs ranging from $2.4 billion to $6.2 billion for alternative light rail options (Port Authority Board of Commissioners Approves $30 Million for Planning and Preliminary Design to Improve Mass Transit Access to LaGuardia Airport, *https://www.panynj.gov/port-authority/en/press-room/press-release-archives/2022-press-releases1/port-authority-board-of-commissioners-approves--30-million-for-p.html*). On June 22, 2023, the Port Authority Board of Commissioners approved $30 million in funding to plan and develop preliminary designs for the bus service improvements at LGA as recommended by the panel. On July 20, 2023, the Port Authority notified the FAA of its intent to officially abandon the Project as approved by the FAA's ROD in favor of pursuing the recommended bus service improvements from the ''Options for Mass Transit Solutions to LGA'' report.

Based on consideration of this substantial new information and the changed circumstances concerning the Port Authority's planned access improvements at LGA as discussed above, the July 2021 ROD for the LGA Access Improvement Project has been withdrawn. Accordingly, all approvals for FAA actions within the ROD are also withdrawn. The Port Authority must reinitiate any requests for FAA review and approval as necessary for all aspects of the Project contained within the now-withdrawn ROD should it wish to proceed with any component of the Project, in part or as a whole.

FOR FURTHER INFORMATION CONTACT: Andrew Brooks, Environmental Program Manager, Eastern Regional Office, AEA–610, Federal Aviation Administration, 1 Aviation Plaza, Jamaica, NY 11434. Telephone: 718–553–2511.

Issued in Jamaica, New York, September 8, 2023.

Evelyn Martinez,

Manager, New York Airports District Office, Eastern Region.

[FR Doc. 2023–19850 Filed 9–13–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2023–0190]

Appeal Process for Requests for Data Review

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), U.S. Department of Transportation (DOT).

ACTION: Notice; request for comments.

SUMMARY: FMCSA proposes the development and implementation of a Federal appeals process for Requests for Data Review (RDRs) submitted to the Agency through its DataQs system. DataQs is the online system for motor carriers, commercial motor vehicle drivers and other interested parties to request and track a review of Federal and State crash and inspection data submitted to and stored by FMCSA that the requester believes is incomplete or incorrect. The proposed review process would provide users with an opportunity to have their requests reviewed by FMCSA after the request has been reviewed and denied after reconsideration by the State agency. FMCSA would include requirements for ensuring an independent review of all requests. The outcome of the FMCSA review would be deemed final. FMCSA requests public comments on the proposed process.

DATES: Comments must be received on or before November 13, 2023.

ADDRESSES: You may submit comments identified by docket number FMCSA–2023–0190 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov/docket/FMCSA-2023-0190/document.* Follow the online instructions for submitting comments.
- *Mail:* Dockets Operations, U.S. DOT, 1200 New Jersey Avenue SE, West Building, Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Dockets Operations, U.S. DOT, 1200 New Jersey Avenue SE, West Building, Ground Floor, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.
- *Fax:* (202) 493–2251.

FOR FURTHER INFORMATION CONTACT: Scott Valentine, Data Quality Program Manager, Analysis Division, Office of Analysis, Research and Technology, FMCSA, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, (202) 366–4869, *Scott.Valentine@dot.gov.* If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

FMCSA organizes this notice as follows:

I. Public Participation and Request for Comments
  A. Submitting Comments
  B. Viewing Comments and Documents
  C. Privacy
II. Abbreviations
IV. Background
  A. Overview of FMCSA Data Systems
  B. DataQs
  C. Current Process for Review of Requests in DataQs
  D. The Call for an Independent Appeal Process
V. Proposal for FMCSA Appeal Process
  A. Proposed Process and Acceptance Criteria
VI. Independent Review for RDR Reconsiderations
VII. Comments Sought

I. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA–2023–0190), indicate the specific section of this document to which your 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 FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *https://www.regulations.gov/docket/FMCSA-2023-0190/document*, click on this notice, click ''Comment,'' and type your comment into the text box on the following screen.

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.

Confidential Business Information (CBI)

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 United States Code (U.S.C.) 552, CBI is exempt from public disclosure. If your comments responsive to the 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 the notice, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission that constitutes CBI as ''PROPIN'' to indicate it contains proprietary information. FMCSA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of the notice. Submissions containing CBI should be sent to Brian Dahlin, Chief, Regulatory Evaluation Division, Office of Policy, FMCSA, 1200 New Jersey Avenue SE, Washington, DC 20590–0001 or via email at *brian.g.dahlin@dot.gov.* You do not need to send a duplicate hard copy of your electronic CBI submissions to FMCSA headquarters. Any comments FMCSA receives not specifically designated as CBI will be placed in the public docket for this notice.

B. Viewing Comments and Documents

To view any documents mentioned as being available in the docket, go to *https://www.regulations.gov/docket/FMCSA-2023-0190/document* and choose the document to review. To view comments, click this notice, then 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., 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

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its regulatory process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov.* As described in the System of Records Notices, 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. Abbreviations

A&I Analysis and Information Online
CBI Confidential Business Information
CMV Commercial Motor Vehicle
DOT Department of Transportation
ELD Electronic Logging Device
FMCSRs Federal Motor Carrier Regulations
FOIA Freedom of Information Act
FR Federal Register
FY Fiscal Year
HOS Hours of Service
MCMIS Motor Carrier Management Information System
MCSAP Motor Carrier Safety Assistance Program
OMB Office of Management and Budget
PSP Pre-Employment Screening Program
RDR Request for Data Review
SMS Safety Measurement System
U.S.C. United States Code

IV. Background

A. Overview of FMCSA Data Systems

The foundation of FMCSA's data-driven safety activities is the Motor Carrier Management Information System (MCMIS). MCMIS is a computerized system in which FMCSA maintains a record of the safety performance of motor carriers and hazardous materials shippers that are subject to Federal Motor Carrier Safety Regulations (FMCSRs) and the Hazardous Materials Regulations. MCMIS contains crash, registration, inspection, investigation, and enforcement information. FMCSA is committed to ensuring the integrity of State and Federally reported safety data in MCMIS.

States collect and submit crash and inspection data, including violations documented during such inspections, into State data systems. The State data systems transmit the State-reported crash and inspection data into MCMIS.

The MCMIS data is propagated to other FMCSA data systems, including, but not limited to, the Pre-Employment Screening Program (PSP), the Safety Measurement System (SMS), and Analysis and Information Online (A&I). These data systems provide enforcement personnel, industry, and the public with information on the safety performance of motor carriers and drivers.

B. DataQs

DataQs is the online system for drivers, motor carriers, Federal and State agencies, and others to request and track a review of MCMIS data they believe to be incomplete or incorrect. The DataQs system is available to the public at *https://dataqs.fmcsa.dot.gov.* The DataQs system provides users an opportunity to seek and obtain correction of information maintained and disseminated by FMCSA. It enables all users to improve the accuracy of FMCSA's data-driven safety systems that help prevent crashes, injuries, and fatalities related to CMVs.

The Fiscal Year (FY) 2001 Consolidated Appropriations Act, section 515, Public Law 106–554, required the Office of Management and Budget (OMB) to develop standards for Federal agency data. The OMB Guidelines required Federal agencies to take certain steps to ensure the quality, objectivity, utility, and integrity of data that the agencies publicly disseminate. The agencies were also required to provide ''administrative mechanisms'' for affected persons to seek and obtain correction of data.

The OMB Guidelines on agencies' required mechanisms for correction of data is stated, in relevant part, as follows:

3. To facilitate public review, agencies shall establish administrative mechanisms allowing affected persons to seek and obtain, where appropriate, timely correction of information maintained and disseminated by the agency that does not comply with OMB or agency guidelines. These administrative mechanisms shall be flexible, appropriate to the nature and timeliness of the disseminated information and incorporated into agency information resources management and administrative practices.

i. Agencies shall specify appropriate time periods for agency decisions on whether and how to correct the information. Agencies shall notify the affected persons of the corrections made.

ii. If the person who requested the correction does not agree with the agency's decision (including the corrective action, if any), the person may file for reconsideration within the agency. The agency shall establish an administrative appeal process to review the agency's initial decision, and specify

appropriate time limits in which to resolve such requests for reconsideration.[1]

FMCSA adopted DataQs in response to this legislation and the OMB Guidelines.

As noted, pursuant to 49 CFR 350.201(s), one condition for participation in the Motor Carrier Safety Assistance Program (MCSAP)[2] is that a State establish a program to ensure that accurate and timely motor carrier safety data are collected and reported, and that the State participates in a national motor carrier safety data correction system prescribed by FMCSA. DataQs is that national motor carrier data correction system. Currently, States are responsible for reviewing and resolving all RDRs within DataQs that pertain to the safety data collected and reported in MCMIS by the State.

C. Current Process for Review of Requests in DataQs

DataQs system users may submit an RDR for the review of data within an FMCSA system and, if applicable, may provide supporting documentation. Based on the type of request, the RDR is routed to the appropriate DataQs program office. This program office can be a State agency, FMCSA field office, or FMCSA headquarters. Most RDRs are assigned to the State MCSAP agency for review since that agency most often uploaded the data to MCMIS.

The program office is responsible for investigating the request, communication with the requestor, if needed, and deciding whether a data correction is warranted. If a State agency is the assigned program office, and a data correction is warranted, the program office updates the record locally and uploads corrected data to MCMIS. Program offices are also responsible for updating DataQs with the review results and for notifying the requestor of the outcome. FMCSA provides State DataQs analysts with best practices and guidance for addressing RDRs in the DataQs Analyst Guide.[3]

After a decision is made on the initial review of the RDR, the requestor may request that the RDR be reviewed again (RDR Reconsideration). This RDR Reconsideration may be routed to the same program office as the initial review or follow a different process. State approaches for handling RDR Reconsideration requests vary. Some States address RDR Reconsideration requests within the program office. If the reviewer performing the RDR Reconsideration review is a State agency, they may consult with FMCSA for a recommendation. Some States have implemented review councils or committees. These groups are comprised of members with CMV experience from the State, and at times industry, that can perform an independent review of the request. Decisions on the RDR Reconsiderations are final.

D. The Call for an Independent Appeal Process

Stakeholders from industry, CMV drivers, and the public have expressed concerns regarding the transparency and uniformity of addressing RDRs, and specifically, RDR Reconsiderations. Stakeholders note that program offices do not have a uniform process for initial RDR reviews or for handling RDR Reconsiderations. They have also noted concern that RDR Reconsiderations are, in many instances, reviewed and decided by the same reviewer as the initial request. Users are calling on FMCSA to ensure an opportunity for an independent review, with consistently applied standards, for data correction requests.

V. Proposal for FMCSA Appeal Process

A. Proposed Process and Acceptance Criteria

FMCSA proposes the development and implementation of an independent FMCSA appeal process for RDRs. The Agency expects to use the DataQs system to accept, track, and respond to requests for FMCSA appeal review. For this process, FMCSA proposes that DataQs users would be able to initiate a request for an FMCSA appeal but only after the RDR has been denied through both the initial review and the RDR Reconsideration processes. All information and documents provided to FMCSA would be contained in the DataQs RDR itself. Neither the requestor nor the program office may submit new facts or evidence at the time of this third and final appeal request or during its review.

The Agency proposes to limit RDRs accepted for FMCSA appeal to requests that pertain to significant matters of legal interpretation or implementation of enforcement policies or regulations. Requests involving mere factual dispute between parties would not ordinarily be accepted for review through the FMCSA appeal process. Additionally, RDRs submitted to the Crash Preventability Determination Program and petitions to the Drug and Alcohol Clearinghouse, would not be eligible for an FMCSA appeal. The proposed appeal process would not directly pertain to regulatory procedures external to DataQs, such as requests for safety rating upgrades, or appeals of registration rejections, although decisions from the appeals subsequently could be used by the affected party in such external procedures. If an RDR appeal is accepted by FMCSA, the determination made as a result of the appeal would be final.

Table 1 below contains examples of RDRs that might meet the proposed acceptance criteria for an FMCSA appeal.[4]

TABLE 1—EXAMPLE REQUESTS POSSIBLY ACCEPTABLE FOR FMCSA APPEAL

	RDR type and scenario	Reason for FMCSA appeal acceptance
1.	*Crash—Not Reportable* A CMV was involved in a crash where the other driver left the scene. The other driver was apprehended a short time later and the vehicle had to be towed due to damage sustained during the crash with the CMV.	*Interpretation—Crash Reportability Definition.* Determine whether the crash met FMCSA's definition for reportability of a crash.

[1] See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 FR 8,452 (Feb. 22, 2002).

[2] MCSAP is a Federal grant program that provides financial assistance to States to reduce the number and severity of crashes and hazardous materials incidents involving CMVs. The goal of MCSAP is to reduce CMV-involved crashes, fatalities, and injuries through consistent, uniform, and effective CMV safety programs. MCSAP is FMCSA's largest grant program that supports State and local law enforcement agencies to utilize over 12,000 enforcement officers to increase enforcement and safety activities nationwide.

[3] See *https://dataqs.fmcsa.dot.gov/DataQs/Data/Guide/DataQs_Users_Guide_and_Best_Practices_Manual.pdf.*

[4] The examples cited in Tables 1 and 2 are for illustration purposes only. This notice does not reflect a formal decision by FMCSA on whether specific requests for Agency intervention, to the extent already submitted informally, will or will not be accepted for review on appeal.

TABLE 1—EXAMPLE REQUESTS POSSIBLY ACCEPTABLE FOR FMCSA APPEAL—Continued

	RDR type and scenario	Reason for FMCSA appeal acceptance
2.	*Inspection—Incorrect Violation* The driver was using a portable electronic logging device (ELD), mounted to the center console. The driver was cited for a violation during an inspection because the ELD was not in view of the driver while operating the CMV. The driver claims the violation is in error because ‘‘visible’’ means not hidden and the driver only needs to access it when changing duty statuses.	*Interpretation—ELD and Hours of Service (HOS) Final Rule.* Interpret the ELD and HOS Supporting Documents Final Rule, § 395.22 (g) ‘‘*Portable ELDs.* If a driver uses a portable ELD, the motor carrier shall ensure that the ELD is mounted in a fixed position during the operation of the commercial motor vehicle and visible to the driver when the driver is seated in the normal driving position.’’
3.	*Inspection—Incorrect Violation* A driver was cited roadside with violating HOS regulations after claiming to be operating under a Regional Emergency Declaration in support of hurricane relief efforts. The State contended the commodity being transported was not part of the relief efforts.	*Interpretation—National Emergency Declaration.* Assess whether the State correctly applied the waiver in response to the declared hurricane emergency.
4.	*Inspection—Citation Associated with a Violation* The driver received a speeding violation, and an associated citation, during a traffic enforcement inspection. The citation was dismissed in court and the driver paid court costs. The State contends that the court costs were punitive and the equivalent of a conviction.	*Interpretation—Adjudicated Citations Policy.* Determine the appropriate outcome for a citation dismissed with court costs based on the MCMIS Changes to Improve Uniformity in the Treatment of Inspection Violation Data (Adjudicated Citations Policy).

Table 2 below contains examples of RDRs that would not meet the proposed acceptance criteria for an FMCSA appeal.

TABLE 2—EXAMPLE REQUESTS LIKELY NOT ACCEPTED FOR FMCSA APPEAL

	RDR type and scenario	Reason for FMCSA appeal rejection
1.	*Crash—Not Reportable* A motor carrier provides insurance documents stating that they were found ‘‘not at fault’’ in the crash and wants the crash removed as not reportable.	*Based on Insurance Documents—Not Crash Reportability Definition.* FMCSA crash data is based on vehicle involvement, and fault is not a consideration in the reportability of a crash.
2.	*Inspection—Incorrect Violation* A CMV driver received a violation during an inspection for driving during off-duty hours. The submitter claims that the ELD was malfunctioning, and the inspector was not provided accurate information. The request did not include supporting evidence.	*Disputes Facts—Not Based on ELD Regulations or Policy.* The request disputes facts regarding whether the ELD was working correctly at the time of the inspection. It also does not require an interpretation of regulation or policy.
3.	*Inspection—Incorrect Violation* The driver received a violation for following too closely during a traffic enforcement inspection. Submitter claims that the driver was not in violation of the traffic code. The request did not include supporting evidence.	*Opposing Account—Not Based on Regulations.* The request presents an opposing account of the inspection without concrete evidence. It also does not question the interpretation of the regulation.
4.	*Inspection—Incorrect Violation* The driver received an HOS violation because the log did not properly reflect driving hours. The submitter states that the driver has been retrained in maintaining logs and is requesting the violation be removed.	*Leniency Request—Not Based on HOS Regulations.* The requestor is seeking a data change based on purported corrective action and does not question the interpretation of the regulation.

The outcome of the FMCSA appeal generally will include a clarification of the relevant regulation or policy as applied in such circumstances, and a determination whether correction of the data is warranted. When an FMCSA appeal results in a clarification that precipitates the need for a change to State-reported data, FMCSA proposes to notify the State via DataQs to ensure that the safety data is updated at the source. Some States may not be able to update their source data, and in these cases, FMCSA proposes to update the data in its MCMIS system. Changing data in MCMIS would not update State source systems, but the changes would flow to downstream Federal systems such as PSP, SMS, A&I, and the FMCSA Portal.

VI. Independent Review for State RDR Reconsiderations

In addition to proposing the establishment of an FMCSA appeals process, the Agency wishes to address stakeholder concerns about independent reviews for all RDRs, not just those related to regulations, policy, or standards. As such, FMCSA proposes to issue new requirements for the review of RDR Reconsiderations to program offices. These proposed guidelines may include requirements to ensure and certify that each reconsideration request is addressed by a different reviewer than the person who performed the initial review of the RDR.

VII. Comments Sought

FMCSA seeks comments on the proposals described above. FMCSA seeks comments on the following specific questions.

1. Should FMCSA appeals be considered for RDRs that are not related to the interpretation or understanding of regulations, policy, or standards.

2. If so, what are some examples of RDRs that should be reviewed in an appeal?

3. As mentioned above, some States and program offices have created review boards and panels with processes for managing requests or referrals that occur during the initial RDR review or an RDR Reconsideration. How would the addition of the FMCSA appeal impact these review boards and their processes?

4. What burdens, if any, will States face when updating their source data when notified in DataQs of an FMCSA appeal result that requires a data change?

a. If a State declined to change the violation in its data systems as a result of a decision in an FMCSA appeal, or was unable to, what would be the impact be of having FMCSA update the data in MCMIS directly while the State retained the original data in the its source systems?

5. One purpose of the FMCSA review is to provide clarity on significant regulatory or policy issues. FMCSA appeals may identify instances where this clarity could be helpful for future RDRs and RDR Reconsiderations. Are there recommended practices for disseminating appeal outcomes?

6. Are there any factors that FMCSA should consider relating to its proposed requirement for a separate reviewer, independent from the initial reviewer, for program office review for all RDR Reconsiderations?

Once comments are reviewed and any needed program changes are made, the Agency will respond to comments received to this notice and announce the start of the updated program in the **Federal Register**, under authority delegated in 49 CFR 1.87.

Robin Hutcheson,

Administrator.

[FR Doc. 2023–19904 Filed 9–13–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Extension of Information Collection Request Submitted for Public Comment; Comment Request Concerning Information Reporting for Form 8824

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently, the IRS is soliciting comments concerning Form 8824, *Like-Kind Exchanges.*

DATES: Written comments should be received on or before November 13, 2023 to be assured of consideration.

ADDRESSES: Direct all written comments to Andrés Garcia, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or by email to *pra.comments@irs.gov.* Please include, ''OMB Number: 1545–1190—Public Comment Request Notice'' in the Subject line.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Ronald J. Durbala, at (202) 317–5746, at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Like-Kind Exchanges.

OMB Number: 1545–1190.

Form Project Number: Form 8824.

Abstract: Section 1031 of the Internal Revenue Code allows for the non-recognition of gain or loss on the exchange of business or investment property. Section 1043 allows for the non-recognition of gain from dispositions made by certain members of the executive branch of the Federal government because of a conflict of interest. Form 8824 provides taxpayers with an easy method of determining whether a transaction qualifies for like-kind exchange treatment, the gain or loss, if any recognized because of the exchange, and the basis in the new property received in the exchange.

Current Actions: Substantial changes are being made to the form and instructions, based on Regulations sections 1.1031(a)–1(a)(3) and 1.1031(a)–3 (and IRC 1031 as updated by Pub. L. 115–97 (TCJA), section 13303). These rules limit the property eligible for like-kind exchanges. Under these rules, only property meeting the definition of real property in IRC 1031 is like-kind property for purposes of like-kind exchanges.

Type of Review: Revision of a currently approved collection.

Affected Public: Individuals or households, business or other for-profit organization, and not-for-profit institution.

Estimated Number of Responses: 137,547.

Estimated Time per Respondent: 17 hrs., 11 min.

Estimated Total Annual Burden Hours: 2,364,433.

The following paragraph applies to all the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Desired Focus of Comments: The Internal Revenue Service (IRS) is particularly interested in comments that:

- 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.
- 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.
- 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 using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* by permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the ICR for OMB approval of the extension of the information collection; they will also become a matter of public record.

Approved: September 11, 2023.

Ronald J. Durbala,

IRS Tax Analyst.

[FR Doc. 2023–19888 Filed 9–13–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Privacy Act of 1974; System of Records

AGENCY: Department of the Treasury.

ACTION: Notice of modified systems of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of the Treasury (''Treasury'' or the ''Department'') proposes to modify a current Treasury system of records titled, ''Treasury Fiscal Service Systems.''

DATES: Submit comments on or before October 16, 2023. The modification will be applicable on October 16, 2023 unless Treasury receives comments and determines that changes to the system of records notice are necessary.

ADDRESSES: Comments may be submitted to the Federal eRulemaking Portal electronically at *http://www.regulations.gov.* Comments can also be sent to the Deputy Assistant Secretary for Privacy, Transparency, and Records, Department of the Treasury, 1500 Pennsylvania Avenue NW, Washington, DC 20220, Attention: Revisions to Privacy Act Systems of Records. All comments received, including attachments and other supporting documents, are part of the public record and subject to public disclosure. All comments received will be posted without change to *www.regulations.gov,* including any personal information provided. You should submit only information that you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: For general questions and questions regarding privacy issues, please contact: Ryan Law, Deputy Assistant Secretary for Privacy, Transparency, and Records (202–622–5710), Department of the Treasury, 1500 Pennsylvania Avenue NW, Washington, DC 20220.

SUPPLEMENTARY INFORMATION: In accordance with the Privacy Act of 1974, as amended (5 U.S.C. 552a), the Department of the Treasury (Treasury), proposes to modify a system of records notice, 81 FR 78266, relating to the Treasury system of records titled, ''Department of the Treasury, Treasury Fiscal Service Systems.''

Treasury is modifying its system of records notice referenced in the original notice (81 FR 78266) to add a new authority, the Tax Cuts and Jobs Act, 26 CFR 1.6050X–1(a)(3). This new authority will add a new category of individuals, a new category of records, an additional purpose, and an additional routine use to the SORN. This Act mandates Treasury to collect Tax Identification Numbers (TIN) from those against whom Treasury has assessed certain penalties or fines. Treasury collects TINs to comply with the statutory requirement to file form 1098–F related to certain fines, penalties and other amounts, with payors and the Internal Revenue Service (IRS) in accordance with 26 U.S.C. 6050X and 26 CFR 1.6050X–1(a)(3).

Additionally, Treasury is modifying this SORN to add three new routine uses. Two of these routine uses will allow Treasury to share information with Federal agencies, entities, and persons for suspected, confirmed, or mitigating breaches. The additional routine use is to share information with National Archives and Records Administration (NARA) for use in its records management inspections and its role as an Archivist under the authority of 44 U.S.C. 2904 and 2906.

Treasury has provided a report of this system of records to the Committee on Oversight and Government Reform of the House of Representatives, the Committee on Homeland Security and Governmental Affairs of the Senate, and OMB, pursuant to 5 U.S.C. 552a(r) and OMB Circular A–108, ''Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act,'' dated December 23, 2016.

Ryan Law,

Deputy Assistant Secretary for Privacy, Transparency, and Records.

SYSTEM NAME AND NUMBER:

Department of the Treasury.009—Treasury Fiscal Service Systems.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Department of the Treasury, 1500 Pennsylvania Ave. NW, Washington, DC 20220. The locations at which the system is maintained by Treasury components and their associated field offices are:

(1) *Departmental Offices (DO):*

a. *The Office of Inspector General (OIG):* 740 15th Street NW, Washington, DC 20220.

b. *Treasury Inspector General for Tax Administration (TIGTA):* 1125 15th Street NW, Suite 700A, Washington, DC 20005.

c. *Special Inspector General for the Troubled Asset Relief Program (SIGTARP):* 1801 L Street NW, Washington, DC 20220.

d. *Community Development Financial Institutions Fund (CDFI):* 601 13th Street NW, Suite 200 South, Washington, DC 20005.

e. *Federal Financing Bank (FFB):* 1500 Pennsylvania Avenue NW, South Court One, Washington, DC 20220.

f. *Office of International Affairs (IA):* 1500 Pennsylvania Avenue NW, Room 5441D, Washington, DC 20220.

g. *Treasury Forfeiture Fund:* 740 15th Street NW, Suite 700, Washington, DC 20220.

h. *Treasury Franchise Fund:* Avery Street Building, 320 Avery Street, Parkersburg, WV 26101.

(2) *Alcohol and Tobacco Tax and Trade Bureau (TTB):* 1310 G St. NW, Washington, DC 20220.

(3) *Office of the Comptroller of the Currency (OCC):* 400 7th Street SW, Washington, DC 20024.

(4) *Bureau of Engraving and Printing (BEP):* 14th & C Streets SW, Washington, DC 20228.

(5) *Fiscal Service (FS):* 401 14th Street SW, Washington, DC 20227.

(6) *Internal Revenue Service (IRS):* 1111 Constitution Avenue NW, Washington, DC 20224.

(7) *United States Mint (MINT):* 801 9th Street NW, Washington, DC 20220.

(8) *Financial Crimes Enforcement Network (FinCEN):* Vienna, VA 22183–0039.

SYSTEM MANAGER(S):

(1) *DO:*

a. *OIG:* Assistant Inspector General for Management, 740 15th St. NW, Suite 510, Washington, DC 20220.

b. *TIGTA:* Director, Finance and Accountability, 1125 15th Street NW, Suite 700A, Washington, DC 20005.

c. *SIGTARP:* Chief Financial Officer, 1801 L Street NW, Washington, DC 20220.

d. *CDFI Fund:* Deputy Director for Management/CFO, 601 13th Street NW, Suite 200 South, Washington, DC 20005.

e. *FFB:* Chief Financial Officer, 1500 Pennsylvania Avenue NW, South Court One, Washington, DC 20220.

f. *IA:* Deputy Senior Director, Business Operations, 1500 Pennsylvania Avenue NW, Room 5127A, Washington, DC 20220.

g. *Treasury Forfeiture Fund:* Assistant Director for Financial Management/CFO, 740 15th Street NW, Suite 700, Washington, DC 20220.

h. *Treasury Franchise Fund:* Director, Division of Franchise Services, Bureau of the Public Debt, 320 Avery Street, Parkersburg, WV 26101.

(2) *TTB:* Alcohol and Tobacco Tax and Trade Bureau: 1310 G St. NW, Washington, DC 20220.

(3) *IRS:* Chief Financial Officer, Internal Revenue Service, 1111 Constitution Avenue NW, Room 3013, Washington, DC 20224.

(4) *OCC:*

a. Chief Financial Officer, Comptroller of the Currency, 400 7th Street SW, Washington, DC 20024.

b. Chief Counsel's Office, 400 7th Street SW, Washington, DC 20024.

(5) *BEP:* Chief Financial Officer, Bureau of Engraving and Printing, 14th and C Streets NW, Room 113M, Washington, DC 20228.

(6) *FS:* Chief Financial Officer, Financial Management Service, 3700 East West Highway, Room 106A, Hyattsville, MD 20782.

(7) *Mint:* Chief Financial Officer, United States Mint, 801 9th Street NW, 7th Floor, Washington, DC 20220.

(8) *FinCEN:* Director, P.O. Box 39, Vienna, VA 22183–0039.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

31 U.S.C. 3512, 31 U.S.C. 3711, 31 U.S.C. 3721, 5 U.S.C. 5701 *et seq.,* 5 U.S.C. 4111(b), Public Law 97–365, 26 U.S.C. 6103(m)(2), 5 U.S.C. 5514, 31 U.S.C. 3716, 31 U.S.C. 321, 5 U.S.C. 301, 5 U.S.C. 4101 *et seq.,* 41 CFR parts 301–304, E.O. 11348, E.O. 9397, Treasury Order 140–01 and 26 CFR 1.6050X–1(a)(3).

PURPOSE(S) OF THE SYSTEM:

The Treasury Integrated Financial Management and Revenue System is to account for and control appropriated resources; maintain accounting and financial information associated with the normal operations of government organizations such as billing and follow-up, for paying creditors, to account for goods and services provided and received, to account for monies paid and received, process travel authorizations and claims, process training claims, and process employee claims for lost or damaged property, and for certain tax purposes. The records management and statistical analysis subsystems provide a data source for the production of reports, statistical surveys, documentation and studies required for integrated internal management reporting of costs associated with the Department's operation.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

(1) Current and former Treasury employees, non-Treasury personnel on detail to the Department, current and former vendors, all debtors including employees or former employees; (2) persons paying for goods or services, returning overpayment or otherwise delivering cash; (3) individuals, private institutions and business entities who are currently doing business with, or who have previously conducted business with the Department of the Treasury to provide various goods and services; (4) individuals who are now or were previously involved in tort claims with Treasury; (5) individuals who are now or have previously been involved in payments (accounts receivable/revenue) with Treasury; (6) individuals who have been recipients of awards; and (7) individuals who have been assessed with certain fines or penalties. Only records reflecting personal information are subject to the Privacy Act. The system also contains records concerning corporations, other business entities, and organizations whose records are not subject to the Privacy Act.

CATEGORIES OF RECORDS IN THE SYSTEM:

The financial systems used by the Treasury components to collect, maintain and disseminate information include the following types of records: Routine billing, payment, property accountability, and travel information used in accounting and financial processing; information related to certain fines and penalties for tax reporting purposes; administrative claims by employees for lost or damaged property; administrative accounting documents, such as relocation documents, purchase orders, vendor invoices, checks, reimbursement documents, transaction amounts, goods and services descriptions, returned overpayments, or otherwise delivering cash, reasons for payment and debt, travel-related documents, training records, uniform allowances, payroll information, etc., which reflect amount owed by or to an individual for payments to or receipt from business firms, private citizens and or institutions. Typically, these documents include the individual's name, social security number, address, amounts of fines or penalties, and taxpayer identification number. Records in the system also include employment data, payroll data, position and pay data.

RECORD SOURCE CATEGORIES:

Individuals, private firms, other government agencies, contractors, documents submitted to or received from a budget, accounting, travel, training, or other office maintaining the records in the performance of their duties.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under the Privacy Act of 1974, 5 U.S.C. 552a(b), records and/or information or portions thereof maintained as part of this system may be disclosed outside Treasury as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

(1) To the United States Department of Justice (''DOJ''), for the purpose of representing or providing legal advice to the Department in a proceeding before a court, adjudicative body, or other administrative body before which the Department is authorized to appear, when such proceeding involves:

(a) The Department or any component thereof;

(b) Any employee of the Department in his or her official capacity;

(c) Any employee of the Department in his or her individual capacity where DOJ or the Department has agreed to represent the employee; or

(d) The United States, when the Department determines that litigation is likely to affect the Department or any of its components; and the use of such records by the DOJ is deemed by the DOJ or the Department to be relevant and necessary to the litigation provided that the disclosure is compatible with the purpose for which records were collected.

(2) To appropriate Federal, State, local, or foreign agencies, or other

public authority responsible for investigating or prosecuting the violations of or for enforcing or implementing a statute, rule, regulation, order, or license, where the disclosing agency becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation;

(3) To a Federal, State, local, or other public authority maintaining civil, criminal or other relevant enforcement information or other pertinent information, which has requested information relevant to or necessary to the requesting agency's, bureau's, or authority's hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit;

(4) In a proceeding before a court, adjudicative body, or other administrative body before which the agency is authorized to appear when: (a) The agency, or (b) or any component thereof, or (c) any employee of the agency in his or her official capacity, or (d) any employee of the agency in his or her individual capacity where the Department of Justice or the agency has agreed to represent the employee; or (e) the United States, when the agency determines that litigation is likely to affect the agency, is a party to litigation or has an interest in such litigation, and the use of such records by the agency is deemed to be relevant and necessary to the litigation or administrative proceeding and not otherwise privileged;

(5) To a Congressional office in response to an inquiry made at the request of the individual to whom the record pertains;

(6) To the news media in accordance with guidelines contained in 28 CFR 50.2 which pertain to an agency's functions relating to civil and criminal proceedings;

(7) To third parties during the course of an investigation to the extent necessary to obtain information pertinent to the investigation;

(8) To a public or professional licensing organization when such information indicates, either by itself or in combination with other information, a violation or potential violation of professional standards, or reflects on the moral, educational, or professional qualifications of an individual who is licensed or who is seeking to become licensed;

(9) To a contractor for the purpose of compiling, organizing, analyzing, programming, processing, or otherwise refining records subject to the same limitations applicable to U.S. Department of the Treasury officers and employees under the Privacy Act;

(10) To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings or in response to a court order;

(11) Through a computer matching program, information on individuals owing debts to the Department of the Treasury, or any of its components, to other Federal agencies for the purpose of determining whether the debtor is a Federal employee or retiree receiving payments which may be used to collect the debt through administrative or salary offset;

(12) To other Federal agencies to effect salary or administrative offset for the purpose of collecting debts, except that addresses obtained from the IRS shall not be disclosed to other agencies;

(13) To disclose information to a consumer reporting agency, including mailing addresses obtained from the Internal Revenue Service, to obtain credit reports;

(14) To a debt collection agency, including mailing addresses obtained from the Internal Revenue Service, for debt collection services;

(15) To unions recognized as exclusive bargaining representatives under the Civil Service Reform Act of 1978, 5 U.S.C. 7111 and 7114, the Merit Systems Protection Board, arbitrators, the Federal Labor Relations Authority, and other parties responsible for the administration of the Federal labor-management program for the purpose of processing any corrective actions, or grievances, or conducting administrative hearings or appeals, or if needed in the performance of other authorized duties;

(16) To a public or professional auditing organization for the purpose of conducting financial audit and/or compliance audits;

(17) To a student participating in a Treasury student volunteer program, where such disclosure is necessary to support program functions of Treasury, and

(18) To insurance companies or other appropriate third parties, including common carriers and warehousemen, in the course of settling an employee's claim for lost or damaged property filed with the Department.

(19) To appropriate agencies, entities, and person when (1) the Department of the Treasury suspects or has confirmed that there has been a breach of the system of records; (2) the Department of the Treasury has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Department of the Treasury (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department of the Treasury's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

(20) To another Federal agency or Federal entity, when the Department of the Treasury determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

(21) The National Archives and Records Administration (''NARA'') for use in its records management inspections and its role as an Archivist under the authority of 44 U.S.C. 2904 and 2906.

(22) To the IRS for any applicable tax reporting purposes.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

Disclosures made pursuant to 5 U.S.C. 552a(b)(12): Debt information concerning a government claim against an individual may be furnished in accordance with 5 U.S.C. 552a(b)(12) and section 3 of the Debt Collection Act of 1982 (Pub. L. 97–365) to consumer reporting agencies to encourage repayment of an overdue debt.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Paper, microform, and electronic media.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Name, social security number, vendor ID number, TIN, and document number (travel form, training form, purchase order, check, invoice, etc.).

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Record maintenance and disposal is in accordance with National Archives and Records Administration retention schedules, and any supplemental guidance issued by individual components.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Protection and control of sensitive but unclassified (SBU) records in this system is in accordance with TD P 71–10, Department of the Treasury Security Manual, and any supplemental guidance issued by individual components.

RECORD ACCESS PROCEDURES:

See ''Notification Procedure'' below.

CONTESTING RECORD PROCEDURES:

See ''Notification Procedure'' below.

NOTIFICATION PROCEDURES:

Individuals seeking notification and access to any record contained in this system of records, or seeking to contest its content, may inquire in writing in accordance with instructions appearing at 31 CFR part 1, subpart C, appendices A–M. Requests for information and specific guidance on where to send requests for records may be addressed to: Privacy Act Request, DO, Director, Disclosure Services Department of the Treasury, 1500 Pennsylvania Avenue NW, Washington, DC 20220.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Notice of this system of records was last published in full in the **Federal Register** on November 7, 2016 (81 FR 78266) as the Department of the Treasury .009—Treasury Fiscal Service Systems.

[FR Doc. 2023–19883 Filed 9–13–23; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 88 Thursday,
No. 177 September 14, 2023

Part II

Securities and Exchange Commission

17 CFR Part 275
Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 275

[Release No. IA–6383; File No. S7–03–22]

RIN 3235–AN07

Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'' or ''SEC'') is adopting new rules under the Investment Advisers Act of 1940 (''Advisers Act'' or ''Act''). The rules are designed to protect investors who directly or indirectly invest in private funds by increasing visibility into certain practices involving compensation schemes, sales practices, and conflicts of interest through disclosure; establishing requirements to address such practices that have the potential to lead to investor harm; and restricting practices that are contrary to the public interest and the protection of investors. These rules are likewise designed to prevent fraud, deception, or manipulation by the investment advisers to those funds. The Commission is adopting corresponding amendments to the Advisers Act books and records rule to facilitate compliance with these new rules and assist our examination staff. Finally, the Commission is adopting amendments to the Advisers Act compliance rule, which affect all registered investment advisers, to better enable our staff to conduct examinations.

DATES:

Effective date: These rules are effective November 13, 2023.

Compliance date: See Section IV.

Comments due date: Comments regarding the collection of information requirements within the meaning of the Paperwork Reduction Act of 1995 should be received on or before October 16, 2023.

FOR FURTHER INFORMATION CONTACT: Shane Cox, Robert Holowka, and Neema Nassiri, Senior Counsels; Tom Strumpf, Branch Chief; Adele Murray, Private Funds Attorney Fellow; Melissa Roverts Harke, Assistant Director, Investment Adviser Rulemaking Office; or Marc Mehrespand, Branch Chief, Chief Counsel's Office, at (202) 551–6787 or *IArules@sec.gov*, Division of Investment Management, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–8549.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission is adopting rule 17 CFR 275.206(4)–10 (final rule 206(4)–10), 17 CFR 275.211(h)(1)–1 (final rule 211(h)(1)–1), 17 CFR 275.211(h)(1)–2 (final rule 211(h)(1)–2), 17 CFR 275.211(h)(2)–1 (final rule 211(h)(2)–1), 17 CFR 275.211(h)(2)–2 (final rule 211(h)(2)–2), and 17 CFR 275.211(h)(2)–3 (final rule 211(h)(2)–3) under the Investment Advisers Act of 1940 [15 U.S.C. 80b–1 *et seq.*] (''Advisers Act''); [1] and amendments to 17 CFR 275.204–2 (final amended rule 204–2) and 17 CFR 275.206(4)–7 (final amended rule 206(4)–7) under the Advisers Act.

Table of Contents

I. Introduction
A. Risks and Harms to Investors
B. Rules To Address These Risks and Harms
C. The Commission Has Authority To Adopt the Rules
II. Discussion of Rules for Private Fund Advisers
A. Scope of Advisers Subject to the Final Private Fund Adviser Rules
B. Quarterly Statements
1. Fee and Expense Disclosure
2. Performance Disclosure
3. Preparation and Distribution of Quarterly Statements
4. Consolidated Reporting for Certain Fund Structures
5. Format and Content Requirements
6. Recordkeeping for Quarterly Statements
C. Mandatory Private Fund Adviser Audits
1. Requirements for Accountants Performing Private Fund Audits
2. Auditing Standards for Financial Statements
3. Preparation of Audited Financial Statements
4. Distribution of Audited Financial Statements
5. Annual Audit, Liquidation Audit, and Audit Period Lengths
6. Commission Notification
7. Taking All Reasonable Steps To Cause An Audit
8. Recordkeeping Provisions Related to the Audit Rule
D. Adviser-Led Secondaries
1. Definition of Adviser-led Secondary Transaction
2. Fairness Opinion or Valuation Opinion
3. Summary of Material Business Relationships
4. Distribution of the Opinion and Summary of Material Business Relationships
5. Recordkeeping for Adviser-Led Secondaries
E. Restricted Activities
1. Restricted Activities With Disclosure-Based Exceptions
(a) Regulatory, Compliance, and Examination Expenses
(b) Reducing Adviser Clawbacks for Taxes
(c) Certain Non-Pro Rata Fee and Expense Allocations
2. Restricted Activities With Certain Investor Consent Exceptions
(a) Investigation Expenses
(b) Borrowing
F. Certain Adviser Misconduct
1. Fees for Unperformed Services
2. Limiting or Eliminating Liability
G. Preferential Treatment
1. Prohibited Preferential Redemptions
2. Prohibited Preferential Transparency
3. Similar Pool of Assets
4. Other Preferential Treatment and Disclosure of Preferential Treatment
5. Delivery
6. Recordkeeping for Preferential Treatment
III. Discussion of Written Documentation of All Advisers' Annual Reviews of Compliance Programs
IV. Transition Period, Compliance Date, Legacy Status
V. Other Matters
VI. Economic Analysis
A. Introduction
B. Broad Economic Considerations
C. Economic Baseline
1. Industry Statistics and Affected Parties
2. Sales Practices, Compensation Arrangements, and Other Business Practices of Private Fund Advisers
3. Private Fund Adviser Fee, Expense, and Performance Disclosure Practices
4. Fund Audits, Fairness Opinions, and Valuation Opinions
5. Books and Records
6. Documentation of Annual Review Under the Compliance Rule
D. Benefits and Costs
1. Overview
2. Quarterly Statements
3. Restricted Activities
4. Preferential Treatment
5. Mandatory Private Fund Adviser Audits
6. Adviser-Led Secondaries
7. Written Documentation of All Advisers' Annual Review of Compliance Programs
8. Recordkeeping
E. Effects on Efficiency, Competition, and Capital Formation
1. Efficiency
2. Competition
3. Capital Formation
F. Alternatives Considered
1. Alternatives to the Requirement for Private Fund Advisers To Obtain an Annual Audit
2. Alternatives to the Requirement To Distribute a Quarterly Statement to Investors Disclosing Certain Information Regarding Costs and Performance
3. Alternative to the Required Manner of Preparing and Distributing Quarterly Statements and Audited Financial Statements
4. Alternatives to the Restrictions From Engaging in Certain Sales Practices, Conflicts of Interest, and Compensation Schemes
5. Alternatives to the Requirement That An Adviser To Obtain a Fairness Opinion or

[1] Unless otherwise noted, when we refer to the Advisers Act, or any section of the Advisers Act, we are referring to 15 U.S.C. 80b, at which the Advisers Act is codified. When we refer to rules under the Advisers Act, or any section of those rules, we are referring to title 17, part 275 of the Code of Federal Regulations [17 CFR part 275], in which these rules are published.

Valuation Opinion in Connection With Certain Adviser-Led Secondary Transactions
6. Alternatives to the Prohibition From Providing Certain Preferential Terms and Requirement To Disclose All Preferential Treatment
VII. Paperwork Reduction Act
A. Introduction
B. Quarterly Statements
C. Mandatory Private Fund Adviser Audits
D. Restricted Activities
E. Adviser-Led Secondaries
F. Preferential Treatment
G. Written Documentation of Adviser's Annual Review of Compliance Program
H. Recordkeeping
I. Request for Comment Regarding Rule 211(h)(2)–1
VIII. Final Regulatory Flexibility Analysis
A. Reasons for and Objectives of the Final Rules and Rule Amendments
1. Final Rule 211(h)(1)–1
2. Final Rule 211(h)(1)–2
3. Final Rule 206(4)–10
4. Final Rule 211(h)(2)–1
5. Final Rule 211(h)(2)–2
6. Final Rule 211(h)(2)–3
7. Final Amendments to Rule 204–2
8. Final Amendments to Rule 206(4)–7
B. Significant Issues Raised by Public Comments
C. Legal Basis
D. Small Entities Subject to Rules
E. Projected Reporting, Recordkeeping, and Other Compliance Requirements
1. Final Rule 211(h)(1)–1
2. Final Rule 211(h)(1)–2
3. Final Rule 206(4)–10
4. Final Rule 211(h)(2)–1
5. Final Rule 211(h)(2)–2
6. Final Rule 211(h)(2)–3
7. Final Amendments to Rule 204–2
8. Final Amendments to Rule 206(4)–7
F. Significant Alternatives
Statutory Authority

I. Introduction

The Commission oversees private fund advisers, many of which are registered with the SEC or report to the SEC as exempt reporting advisers. Despite the Commission's examination and enforcement efforts with respect to private fund advisers, such advisers continue to engage in certain practices that may impose significant risks and harms on investors and private funds. Consequently, there is a compelling need for the Commission to exercise its congressional authority for the protection of investors.[2] Based on the Commission's extensive experience overseeing private fund advisers, the Commission is adopting carefully tailored rules to address the risks and harms to investors and funds, while promoting efficiency, competition, and capital formation.[3]

Background

Private funds are privately offered investment vehicles that pool capital from one or more investors and invest in securities and other instruments or investments.[4] Each investor in a private fund invests by purchasing securities (which are generally issued by the fund in the form of interests or shares) and then participates in the fund through the securities that it holds. Private funds are generally advised by investment advisers that are subject to a Federal fiduciary duty as well as the antifraud and other provisions of the Act.[5] A private fund adviser, which often has broad discretion to provide investment advisory services to the fund, uses the money contributed by investors to make investments on behalf of the fund.

Congress expanded the Commission's role overseeing private fund advisers and their relationship with private funds and their investors in the wake of the 2007–2008 financial crisis, when it passed, and the President signed, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act''). While the antifraud provisions of section 206 already applied to private fund advisers and the Commission already had brought enforcement actions against private fund advisers before the enactment of the Dodd-Frank Act, Congress increased the Commission's oversight responsibility of private fund advisers. Among other things, Congress amended the Advisers Act generally to require advisers to private funds to register with the Commission and to authorize the Commission to establish reporting and recordkeeping requirements for advisers to private funds for investor protection and systemic risk purposes.[6] Specifically, Title IV of the Dodd-Frank Act repealed an exemption from registration contained in section 203(b)(3) of the Advisers Act—known as the ''private adviser exemption''—on which many private fund advisers, including those to private equity funds, hedge funds, and venture capital funds,[7] had relied.[8] In addition to eliminating this provision, Congress directed the Commission to adopt more limited exemptions for advisers that solely advise private funds, if the adviser has assets under management in the United States of less than $150 million, or that solely advise venture capital funds.[9] Section 203(b)(3) of the Act, as amended by the Dodd-Frank Act, also provides an exemption from registration for certain foreign private advisers. As a result, private fund advisers outside of these narrow exemptions became subject to the same regulatory oversight and other Advisers Act requirements that apply to other SEC-registered investment advisers.

Increasing Importance of Private Funds and Their Advisers to Investors

Investment advisers' private fund assets under management have steadily increased over the past decade, growing from $9.8 trillion in 2012 to $26.6 trillion in 2022.[10] Similarly, the number of private funds has increased from 31,717 in 2012 to 100,947 in 2022.[11] Additionally, private funds and their advisers play an increasingly important role in the lives of millions of

[2] *See infra* section I.C.

[3] *See infra* section VI.E. *See also* Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, Investment Advisers Act Release No. 5955 (Feb. 9, 2022) [87 FR 16886 (Mar. 24, 2022)] (''Proposing Release''); Reopening of Comment Periods for ''Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews'' and ''Amendments Regarding the Definition of 'Exchange' and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities,'' Investment Advisers Act Release No. 6018 (May 9, 2022) [87 FR 29059 (May 12, 2022)]; Resubmission of Comments and Reopening of Comment Periods for Certain Rulemaking Releases, Investment Advisers Act Release No. 6162 (Oct. 7, 2022) [87 FR 63016 (Oct. 18, 2022)]. The Commission voted to issue the Proposing Release on Feb. 9, 2022. The release was posted on the Commission website that day, and comment letters were received beginning that same date. The comment period closed on Nov. 1, 2022. We have considered all comments received since Feb. 9, 2022.

[4] Section 202(a)(29) of the Advisers Act defines the term ''private fund'' as an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3) (''Investment Company Act''), but for section 3(c)(1) or 3(c)(7) of that Act. We use ''private fund'' and ''fund'' interchangeably throughout this release. Securitized asset funds are excluded from the term ''private funds'' for purposes hereof, unless stated otherwise. *See infra* section II.A (Scope of Advisers Subject to the Final Private Fund Adviser Rules) for a discussion of the application of the final rules to securitized asset funds.

[5] *See, e.g.,* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Investment Advisers Act Release No. 5248 (June 5, 2019) [84 FR 33669 (July 12, 2019)] (''2019 IA Fiduciary Duty Interpretation'').

[6] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, § 403, 404, 124 Stat, 1378, 1571–72 (Jul. 2010), codified at 15 U.S.C. 80b–4(b).

[7] Private equity funds, hedge funds, and venture capital funds are further described below.

[8] *See* Dodd-Frank Act, section 403.

[9] *See* Dodd-Frank Act, sections 407 and 408; Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers, Investment Advisers Act Release No. 3222 (June 22, 2011) [76 FR 39645 (July 6, 2011)] (''Exemptions Adopting Release''). The Dodd-Frank Act also provided the Commission with the ability to require the limited number of advisers to private funds that did not have to register to file reports about their business activities.

[10] *See* Form ADV data (inclusive of assets attributable to securitized asset funds).

[11] *Id.* (inclusive of securitized asset funds).

Americans planning for retirement.[12] While private funds typically issue their securities only to certain qualified investors, such as institutions and high net worth individuals, individuals have indirect exposure to private funds through those individuals' participation in public and private pension plans, endowments, foundations, and certain other retirement plans, which all invest directly in private funds. For example, public service workers, including law enforcement officers, firefighters, public school educators and community service workers, participate in these retirement plans and other vehicles and thus have exposure to private funds. Many pension plans, endowments, and non-profits invest in private funds to meet their internal return targets, to diversify their holdings, and to provide retirement security or other benefits for their stakeholders.[13] In particular, public pension plans face a stark funding gap [14] and many have turned to private funds in an attempt to address underfunding problems.[15] As a result, the 26.7 million working and retired U.S. public pension plan beneficiaries are more likely to have increased exposure to private funds.[16] The Commission staff have also observed a trend of rising interest in private fund investments by smaller investors with less bargaining power, such as the growth of new platforms to facilitate individual access to private investments with small investment sizes, or non-institutional investor groups pooling funds to invest in private funds, or other means by which smaller individual investors can access private investments.[17]

Role of Investment Advisers in Private Fund Structure and Organization

While there are many different ways that private funds are structured and organized, private funds typically rely on an investment adviser (or affiliated entities, such as the fund's general partner or managing member) to provide management, investment, and other services, and such person usually has delegated authority to take actions on behalf of the private fund without the consent or approval of any other person. A private fund rarely has employees of its own—its officers, if any, are usually employed by the private fund's adviser. As a result, it is the adviser or its affiliated entities who generally draft the private fund's private placement memorandum and governing documents,[18] negotiate fund terms with the private fund investors, select and execute investments, charge or allocate fees and expenses to the private fund, and provide information on the private fund's activities and performance to private fund investors. Advisers are also often involved in marketing the private fund to prospective investors, including marketing to current investors in other private funds managed by the adviser.

Investors in a private fund generally pay both fees and expenses to the private fund adviser and/or its related persons. Investors typically, directly or indirectly through the fund interests they hold, pay management fees *and* performance-based compensation to the adviser of the private fund or the adviser's related person (*e.g.,* a general partner or managing member). Additionally, investors directly or indirectly bear the fees and expenses associated with the fund and the fund's investments. It is also not uncommon for a private fund's underlying portfolio investments to pay the adviser (or a related person) monitoring, transaction or other fees and expenses, which can be, but are not always, offset against the management fees paid to the adviser.[19] In certain cases, advisers also negotiate with investors to have investors pay certain of the adviser's own expenses (such as certain compliance costs of the adviser).

There are many different types of private funds. Two broad categories of private funds are hedge funds and private equity funds. Hedge funds tend to invest in more liquid assets and generally allow investors the opportunity to voluntarily withdraw their interests with certain limitations, including for example, restrictions on timing and notice requirements and, for certain funds, the amount that can be redeemed at one time or over a period of time. Private equity funds, on the other hand, tend to invest in illiquid assets and generally do not permit investors to voluntarily withdraw their interests in the fund. Hedge funds engage in trillions of dollars in listed equity and futures transactions each month,[20] while private equity funds tend to focus on private investments, whether through mergers and acquisitions, non-bank lending, restructurings, and other transactions. Hedge funds have over nine trillion dollars in gross asset value and private equity funds have over six trillion.[21] Beyond hedge funds and private equity funds, there are other categories of private funds, some of which overlap with these two. For example, venture capital funds are in many ways structurally similar to private equity funds and provide funding to start-up and early-stage companies. As another example, real estate private funds generally invest in illiquid real estate assets, and as such typically do not permit investors to withdraw their interests in the fund voluntarily. Venture capital and real estate private funds have over one trillion dollars in gross asset value.[22]

---

[12] *See* Division of Investment Management: Analytics Office, Private Funds Statistics Report: Third Calendar Quarter 2022 (April 6, 2023) (''Form PF Statistics Report''), at 15, *available at https://www.sec.gov/files/investment/private-funds-statistics-2022-q3.pdf* (showing beneficial ownership of all funds by category as reported on Form PF). *See also, e.g.,* Public Investors, Private Funds, and State Law, Baylor Law Review, Professor William Clayton (June 15, 2020), at 354 (''Professor Clayton Public Investors Article'') (stating that public pension plans have dramatically increased their investment in private funds).

[13] *See* Form PF Statistics Report, *supra* at footnote 12. *See also, e.g.,* Comment Letter of Healthy Markets Association (Apr. 15, 2022) (''Healthy Markets Comment Letter I'') (discussing the growing number of private funds and increasing allocations that public pension plans and endowments are making to private funds); Comment Letter of Better Markets, Inc. (Apr. 25, 2022) (''Better Markets Comment Letter'') (discussing the growth of the private markets and the exposure of millions of Americans to the private markets, including through pension plans). The comment letters on the Proposing Release are available at *https://www.sec.gov/comments/s7-03-22/s70322.htm.*

[14] States on average have less than 70% of the assets needed to fund their pension liabilities with that figure for some states reaching as low as 34%. *See, e.g.,* Professor Clayton Public Investors Article, *supra* footnote 12; Sarah Krouse, *The Pension Hole for U.S. Cities and States is the Size of Germany's Economy,* Wall Street J. (July 30, 2018), *available at https://www.wsj.com/articles/the-pension-hole-for-u-s-cities-and-states-is-the-size-of-japans-economy-1532972501*; Pew Charitable Trusts, Issue Brief, The State Pension Funding Gap: 2017 (June 27, 2019), *available at https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/06/the-state-pension-funding-gap-2017.*

[15] *See, e.g.,* Healthy Markets Comment Letter I; UBS Wealth Management USA, US Economy: Public Pension Plans Tilt Toward Alternatives (Jan. 12, 2023), *available at https://www.ubs.com/us/en/wealth-management/insights/market-news/article.1582725.html* (discussing State and local pension funds' increasing allocation to private funds over last two decades).

[16] *See National Data,* Public Plans Data, *available at https://publicplansdata.org/quick-facts/national/#:~:text;=Collectively%2C%20these%20plans%20have%3A,members%20and%2011.7%20million%20retirees.*

[17] *See infra* section VI.C.1.

[18] Including the private fund operating agreement to which the adviser or its affiliate and the private fund investors are typically both parties.

[19] Compensation at the underlying ''portfolio investment-level'' is more common for certain private funds, such as private equity, venture capital or real estate funds, and less common for others, such as hedge funds.

[20] *See* Form PF Statistics Report, *supra* at footnote 12, at 31 (showing aggregate portfolio turnover for hedge funds managed by large hedge fund advisers (*i.e.,* advisers with at least $1.5 billion in hedge fund assets under management) as reported on Form PF).

[21] *See id.*

[22] See *id. See infra* section II.A (Scope of Advisers Subject to the Final Private Fund Adviser Rules) for a discussion of securitized asset funds as well.

Need for Further Commission Oversight

With over a decade since the Dodd-Frank Act required private fund advisers to register with us, the Commission now has extensive experience in overseeing and regulating private fund advisers. Form ADV and Form PF reporting have been critical to improving our ability to understand private fund advisers' operations and relationships with funds and investors as private funds continue growing in size, complexity, and number.[23] The information from these forms has enabled us to enhance our assessment of private fund advisers for purposes of targeting examinations and responding to emerging trends. For example, the Commission's Division of Examinations stated in its 2023 examination priorities that it will continue to focus on registered private fund advisers, including such advisers' conflicts of interest and calculations and allocations of fees and expenses.[24] This information has also improved our ability to identify practices that could harm private fund investors and has helped us not only promote compliance but also detect, investigate, and deter fraud and other misconduct.

In the course of this oversight of private fund advisers, we have observed three primary factors that contribute to investor protection risks and harms: lack of transparency, conflicts of interest, and lack of governance mechanisms.[25] We have observed that these three factors contribute to significant investor harm, such as an adviser incorrectly, or improperly, charging fees and expenses to the private fund, contrary to the adviser's fiduciary duty, contractual obligations to the fund, or disclosures by the adviser.[26] The Commission has pursued enforcement actions against private fund advisers for fraudulent practices related to fee and expense charges or allocations that are influenced by the advisers' conflicts of interest.[27] For example, the Commission has brought a settled action alleging private fund advisers misallocated more than $17 million in so-called "broken deal" expenses to an adviser's flagship private equity fund [28] and improperly allocated approximately $2 million of compensation-related expenses to three private equity funds that an adviser managed.[29] Our staff has examined private fund advisers to assess both the issues and risks presented by their business models and the firms' compliance with their existing legal obligations. Despite these enforcement and examination efforts, problematic practices persist.[30] For example, the Commission has brought charges against private fund advisers for failing to disclose material conflicts of interest to a private fund that an adviser managed as well as misleading its investors by misrepresenting an investment opportunity,[31] and for failing to disclose to investors that the adviser periodically made loans to a company owned by the son of the principal of the advisory firm and that the private fund's investment in the company could be used to repay the loans made by the adviser.[32] Additionally, any risks and harms imposed by private fund advisers on private funds and their investors indirectly expose the investors' individual stakeholders and beneficiaries (*e.g.,* public service workers, law enforcement officers, firefighters, public school educators, and community service workers) to the same risks and harms.

Accordingly, we proposed a series of new rules under the Advisers Act to protect investors, promote more efficient capital markets, and encourage capital formation.[33] After considering comments, the Commission is adopting rules with modifications that make the rules less restrictive and more flexible, while still providing investors with the protections to which they are entitled. The adopted rules will help address risks and harms to investors in a carefully tailored way that promotes efficiency, competition, and capital formation, as well as investor protection.

A. Risks and Harms to Investors

These rules and amendments are important enhancements to private fund adviser regulation because they protect the adviser's private fund clients and those who invest in private funds by increasing visibility into certain activities, curbing practices that lead to harm to funds and their investors, and restricting adviser activity that is contrary to the public interest and the protection of investors. The private fund adviser reforms are designed specifically to address the following three factors for risks and harms that are common in an adviser's relationship with private funds and their investors: lack of transparency, conflicts of interest, and lack of effective governance mechanisms for client disclosure, consent, and oversight.

Lack of Transparency. Private fund investments are often opaque, and advisers do not frequently or consistently provide investors with sufficiently detailed information about the terms of the advisers' relationships with funds and their investors. For example, there are no specific requirements for the information that private fund advisers must disclose to private fund investors about the funds'

[23] Form ADV has also increased transparency to investors.

[24] *See* Securities and Exchange Commission's Division of Examinations 2023 Examination Priorities (Feb. 7, 2023), *available at https://www.sec.gov/files/2023-exam-priorities.pdf.*

[25] To the extent that these issues negatively affect the efficiency with which investors search for and match with advisers, the alignment of investor and adviser interests, investor confidence in private fund markets, or competition between advisers, then the final rules may improve efficiency, competition, and capital formation in addition to benefiting investors. *See infra* sections VI.B, VI.E. *See, e.g.,* Comment Letter of Consumer Federation of America (Apr. 25, 2022) ("Consumer Federation of America Comment Letter").

[26] *See, e.g., In the Matter of Blackstone Management Partners, L.L.C., et. al.,* Investment Advisers Act Release No. 4219 (Oct. 7, 2015) (settled action) (alleging that the adviser received undisclosed fees) ("In the Matter of Blackstone"); *In the Matter of Lincolnshire Management, Inc.,* Investment Advisers Act Release No. 3927 (Sept. 22, 2014) (settled action) (alleging that the adviser misallocated fees and expenses among private fund clients) ("In the Matter of Lincolnshire"); *In the Matter of Cherokee Investment Partners, LLC and Cherokee Advisers, LLC,* Investment Advisers Act Release No. 4258 (Nov. 5, 2015) (settled action) (alleging that the adviser improperly shifted expenses related to an examination and an investigation away from itself).

[27] *Id.*

[28] *See In the Matter of re Kohlberg Kravis Roberts & Co. L.P.,* Investment Advisers Act Release No. 4131 (June 29, 2015) (settled action) ("In the Matter of Kohlberg Kravis Roberts & Co.").

[29] *See In re NB Alternatives Advisers LLC,* Investment Advisers Act Release No. 5079 (Dec. 17, 2018) (settled action) ("In the Matter of NB Alternatives Advisers").

[30] *See, e.g., In re Global Infrastructure Management, LLC,* Investment Advisers Act Release No. 5930 (Dec. 20, 2021) (settled action) (alleging private fund adviser failed to properly offset management fees to private equity funds it managed and made false and misleading statements to investors and potential investors in those funds concerning management fee offsets); *In the Matter of EDG Management Company, LLC,* Investment Advisers Act Release No. 5617 (Oct. 22, 2020) (settled action) (alleging that private equity fund adviser failed to apply the management fee calculation method specified in the limited partnership agreement by failing to account for write downs of portfolio securities causing the fund and investors to overpay management fees); *In the Matter of Energy Capital Partners Management, LP,* Investment Advisers Act Release No. 6049 (June 15, 2022) (settled action) (alleging that the adviser allocated undisclosed and disproportionate expenses to a private fund client) ("In the Matter of Energy Capital Partners"); *In the Matter of Insight Venture Management, LLC,* Investment Advisers Act Release No. 6322 (June 20, 2023) (settled action) (alleging that the adviser failed to disclose a conflict of interest relating to its fee calculations and overcharged management fees) ("In the Matter of Insight").

[31] *See In the Matter of Mitchell J. Friedman,* Investment Advisers Act Release No. 5338 (Sept. 4, 2019) (settled action).

[32] *See In the Matter of Diastole Wealth Management, Inc.,* Investment Advisers Act Release No. 5855 (Sept. 10, 2021) (settled action).

[33] *See* Proposing Release, *supra* footnote 3.

investments, performance, or incurred fees and expenses, notwithstanding the applicability of the antifraud provisions of the federal securities laws and any relevant requirements of the marketing rule and private placement rules. Rather, information and disclosure about these items and the terms of an investment in a private fund are generally individually negotiated between private fund investors and the fund's adviser. Since private fund structures can be complex and involve multiple entities that are related to, or otherwise affiliated with, the adviser, absent specifically negotiated disclosure, it may be difficult for investors to understand the conflicts embedded within these structures and the overall compensation received by the adviser. Without specific information, even sophisticated investors cannot understand the fees and expenses they are paying, the risks they are assuming, and the performance they are achieving in return.[34] Investors have received reduced returns due to improperly charged fees and expenses,[35] and they must sometimes choose between expending resources to negotiate for detailed fee and expense or performance reporting or using their bargaining power to improve the economic, informational, or governance terms of the investors' relationships with funds and their advisers.[36]

Conflicts of Interest. These rules address many of the problems raised by the conflicts of interest commonly present in private fund adviser practices. Conflicts of interest can harm investors, such as when an adviser grants preferential redemption rights to entice a large investor that will increase overall management fees to commit to a private fund, and then, when the fund experiences a decline, such preferential redemption rights allow a large investor to exit the private fund before and on more advantageous terms than other investors. Investors are also harmed by not being informed of conflicts of interest concerning the private fund adviser and the fund, which reduces the information available to investors to guide their investment decisions.[37] There is a trend of rising interest in private funds by smaller investors with less bargaining power, who may be particularly impacted by these practices, including where advisers grant preferential terms to larger investors that may exacerbate conflicts of interest as well as the risks of resulting investor harm.[38]

Certain conflicts of interest between advisers and private funds also involve sales practices or compensation schemes that are problematic for investors. For example, advisers have a conflict of interest with private funds (and, indirectly, investors in those funds) when they value the fund's assets and use that valuation as the basis for the calculation of the adviser's fees and fund performance. Similarly, advisers have a conflict of interest with the fund (and, indirectly, its investors) when they offer existing fund investors the choice between selling and exchanging their interests in the private fund for interests in another vehicle advised by the adviser or any of its related persons as part of an adviser-led secondary transaction.[39] In both of these examples, there are opportunities for advisers, funds, and investors to benefit, but there is also a potential for significant harm if the adviser's conflicts are not managed appropriately, including diminishing the fund's returns because of excess fees and expenses paid to the fund's adviser or its related persons.

Lack of Governance Mechanisms. These rules are designed to respond to harms arising out of private fund governance structures. In a typical private fund structure, the private fund is the adviser's client and investors in the private fund are not clients of the adviser (unless investors have a separate advisory relationship with the adviser in addition to their investment in the private fund). The adviser (or its related person) commonly serves as the general partner or managing member (or similar control person) of the fund. Because the adviser (or its related person) acts on behalf of the fund client and is typically not required to obtain the input or consent of investors in the fund, the governance structure of a typical private fund is not designed to prioritize investor oversight of the adviser and general partner or managing member (or similar control person) or investor policing of conflicts of interest.

For example, although some private funds may have limited partner advisory committees (''LPACs'') or boards of directors, these types of bodies may not have sufficient independence, authority, or accountability to oversee and consent to these conflicts.[40] Such LPACs or boards of directors do not have a fiduciary obligation to the private fund investors. Moreover, private fund advisers often provide certain investors with preferential terms, such as representation in an LPAC, that can create potential conflicts among the fund's investors. The interests of one or more private fund investors may not represent the interests of, or may otherwise conflict with the interests of, other investors in the private fund due to, among other things, business or personal relationships or other private fund investments. To the extent investors are afforded LPAC representation or similar rights, certain fund agreements may permit such investors to exercise their rights in a manner that places their interests ahead of the private fund or the investors as a whole. For example, certain fund agreements state that, subject to applicable law, LPAC members owe no duties to the private fund or to any of the other investors in the private fund and are not obligated to act in the interests of the private fund or the other investors as a whole.

The rules we are adopting are designed to protect private fund investors by addressing private fund advisers' conflicts of interest, sales practices, and compensation schemes. Such protection is necessary because investors face difficulties in negotiating for reformed practices, including stronger governance structures, because of the bargaining power held by advisers and by investors who benefit from current adviser practices, such as investors who receive preferential treatment from their advisers.[41] In addition, as discussed above, the indirect exposure of the general public to the risks of private fund investments

[34] *See, e.g., In the Matter of Insight, supra* footnote 30 (alleging that, due to lack of disclosure, investors were unaware of the extent of the conflict of interest associated with an adviser's permanent impairment criteria and that the adviser charged excessive management fees).

[35] *See infra* section II.B.

[36] *See, e.g.,* Comment Letter of Ohio Public Employees Retirement System (Apr. 25, 2022) (''OPERS Comment Letter''); Comment Letter of Institutional Limited Partners Association (Apr. 25, 2022) (''ILPA Comment Letter I'').

[37] *See, e.g., In the Matter of Insight, supra* footnote 30 (alleging that the adviser charged excess management fees and failed to disclose a conflict of interest to investors relating to its fee calculations).

[38] *See infra* sections VI.B, VI.C.1.

[39] Emerging Trends in the Evolving Continuation Fund Market, Private Equity Law Report (July 2022), *available at https://www.pelawreport.com/19285026/emerging-trends-in-the-evolving-continuation-fund-market.thtml* (stating that the market volume for private fund secondaries increased from $37 billion in 2016 to $132 billion in 2021 and that ''much of that growth was driven by an explosion in GP-led continuation fund activity'').

[40] A fund's LPAC or board typically acts as the decision-making body with respect to conflicts that may arise between the interests of the third-party investors and the interests of the adviser. In certain cases, advisers seek the consent of the LPAC or board for conflicted transactions, such as transactions involving investments in portfolio companies of related funds or where the adviser seeks to cause the fund to engage a service provider that is affiliated with the adviser.

[41] *See infra* section VI.B.

heightens the need for specific rulemaking to address these concerns.

B. Rules To Address These Risks and Harms

The Commission proposed rules to address the risks and harms to investors and funds, and we received many comment letters on the proposal.[42] A number of commenters supported the proposal and stated that it would have an overall positive impact on the industry.[43] Some commenters stated that it would establish baseline protections for investors, such as increased transparency and standardized reporting.[44] Other commenters expressed frustration with the conflicts of interest in the private funds industry[45] and supported prohibitions on certain unfair practices.[46] One commenter stated that the rules, if adopted, ''would implement a variety of essential improvements in the regulation of the private funds markets, making this increasingly important financial sector substantially more fair and transparent.''[47] Another commenter stated that the proposed rules are essential to protect the right of investors to access information critical to making informed investment decisions, especially because private market investments will likely play an increasingly growing role in the asset allocations and funding targets of institutional investors.[48] In contrast, other commenters opposed the proposal and expressed concern that it would negatively impact the industry by stifling capital formation and reducing competition.[49] Certain commenters asserted that the proposed requirements would overburden advisers (especially smaller advisers) with compliance costs, which may ultimately be passed on to investors, directly or indirectly.[50] These and other comments are discussed more fully below. The final rules include modifications in response to concerns raised and provide additional flexibility and tailoring to the rules as proposed, while preserving the needed investor protections.

The Quarterly Statement Rule. The Commission proposed a rule to require SEC-registered advisers to private funds to provide investors with periodic information about private fund fees, expenses, and performance.[51] The Commission is adopting the rule with changes in response to comments:[52]

○ Advisers to illiquid funds are required to calculate performance information with and without the impact of subscription facilities, rather than only without;

○ We have refined the definition of illiquid fund to be based primarily on withdrawal and redemption capability;

○ Instead of requiring advisers to present liquid fund performance since inception, we are only requiring a 10-year lookback; and

○ We are allowing additional time for delivery of fourth quarter statements and additional time for delivery of all statements for funds of funds.

As discussed more fully below, we are adopting the quarterly statement rule because we see this lack of transparency in many areas, including investment advisers' disclosure regarding private fund fees, expenses, and performance. For example, some private fund investors do not have sufficient information regarding private fund fees and expenses because those fees and expenses have varied labels across private funds and are subject to complicated calculation methodologies.[53] Increased transparency on fees can also help address conflicts of interest concerns. For example, some private fund advisers and their related persons charge a number of fees and expenses to the fund's portfolio companies, and it may be difficult for investors to track fee streams that flow to the adviser or its related persons and reduce the return on their investment.

Investors will also benefit from increased transparency into how private fund performance is calculated. Currently, private fund advisers use different metrics and specifications for calculating performance, which makes it difficult for investors to compare data across funds and advisers, even when advisers disclose the assumptions they used. More standardized requirements for performance metrics will allow private fund investors to compare more effectively the returns of similar fund strategies over different market environments and over time. In addition, they would improve investors' ability to interpret complex performance reporting and assess the relationship between the fees paid in connection with an investment and the return on that investment as they monitor their investment and consider potential future investments.

The Audit Rule. The Commission is adopting the requirement that an SEC-registered adviser cause each private fund that it advises to undergo an annual audit; however, in a change from the proposal, we are requiring the audit to comply with the audit provision under 17 CFR 275.206(4)–2 of the Advisers Act (''rule 206(4)–2'' ''custody rule'').[54] To address the valuation concerns described above and more fully below,[55] we are requiring SEC-registered advisers to cause the private funds they manage to obtain an annual audit. By addressing the concerns that arise in the valuation process, the rule will help prevent fraud and deception by the adviser.

The Adviser-led Secondaries Rule. The final rule will require SEC-registered advisers conducting an adviser-led secondary transaction to satisfy certain requirements; however, in a change from the proposal, advisers may obtain a fairness opinion *or* a valuation opinion under the final rule.[56] SEC-registered advisers conducting an adviser-led secondary transaction must

[42] *See* Proposing Release, *supra* footnote 3.

[43] *See, e.g.,* Comment Letter of United for Respect (Apr. 12, 2022) (''United for Respect Comment Letter I''); Comment Letter of Private Equity Stakeholder Project (Apr. 25, 2022); Comment Letter of Trine Acquisition Corp. (Apr. 21, 2022) (''Trine Comment Letter'').

[44] *See, e.g.,* Comment Letter of InvestX (Mar. 18, 2022) (''InvestX Comment Letter''); Comment Letter of American Association for Justice (Apr. 25, 2022) (''American Association for Justice Comment Letter''); OPERS Comment Letter.

[45] *See, e.g.,* Comment Letter of Public Citizen (Apr. 15, 2022) (''Public Citizen Comment Letter''); Comment Letter of the Comptroller of the State of New York (Apr. 25, 2022) (''NY State Comptroller Comment Letter''); Comment Letter of Comptroller of the City of New York (Apr. 21, 2022) (''NYC Comptroller Comment Letter'').

[46] *See, e.g.,* Comment Letter of General Treasurer of Rhode Island, For the Long Term and Illinois State Treasure, For the Long Term (June 13, 2022) (''For the Long Term Comment Letter''); Comment Letter of the Regulatory Fundamentals Group (Apr. 25, 2022) (''RFG Comment Letter II''); United for Respect Comment Letter I.

[47] *See* Better Markets Comment Letter.

[48] *See* Comment Letter of District of Columbia Retirement Board (Apr. 22, 2022) (''DC Retirement Board Comment Letter'').

[49] *See, e.g.,* Comment Letter of the Private Investment Funds Forum (Apr. 25, 2022) (''PIFF Comment Letter''); Comment Letter of the Alternative Investment Management Association Limited and the Alternative Credit Council (Apr. 25, 2022) (''AIMA/ACC Comment Letter''); Comment Letter of the Securities Industry and Financial Markets Association Asset Management Group (Apr. 25, 2022) (''SIFMA–AMG Comment Letter I'').

[50] *See, e.g.,* Comment Letter of Lockstep Ventures (Apr. 26, 2022) (''Lockstep Ventures Comment Letter''); Comment Letter of Thin Line Capital (Apr. 21, 2022) (''Thin Line Capital Comment Letter''); Comment Letter of Blended Impact (Apr. 24, 2022) (''Blended Impact Comment Letter'').

[51] *See infra* section II.B for a discussion of the comments on this aspect of the rule.

[52] The final quarterly statement, audit, adviser-led secondaries, restricted activities, and preferential treatment rules do not apply to investment advisers with respect to securitized asset funds they advise. *See infra* section II.A (Scope of Advisers Subject to the Final Private Fund Adviser Rules).

[53] *See* Proposing Release, *supra* footnote 3, at section I.

[54] *See infra* section II.C for a discussion of the comments on this part of the rule.

[55] *See infra* section II.C.

[56] *See infra* section II.C.8 for a discussion of the comments on this part of the rule.

also prepare and distribute a written summary of any material business relationships between the adviser or its related persons and the independent opinion provider. By requiring that investors receive a third-party opinion and a written summary of any material business relationships before deciding whether to participate in an adviser-led secondary transaction, the final rule will help prevent investors from being defrauded, manipulated, and deceived when the adviser is on both sides of the transaction.

The Restricted Activities Rule. The final rule will address concerns about five activities with respect to private fund advisers.[57] In a change from the proposal, while the restricted activities rule (referred to as the prohibited activities rule in the proposal) prohibits advisers from engaging in certain activity, the final rule includes certain disclosure-, and in some cases, consent-based exceptions. As a result, advisers generally are not flatly prohibited from engaging in the following activities,[58] so long as they provide appropriate specified disclosure and, in some cases, obtain investor consent:

◦ Charging or allocating to the private fund fees or expenses associated with an investigation of the adviser or its related persons by any governmental or regulatory authority; however, regardless of any disclosure or consent, an adviser may not charge or allocate fees and expenses related to an investigation that results or has resulted in a court or governmental authority imposing a sanction for violating the Investment Advisers Act of 1940 or the rules promulgated thereunder;

◦ Charging or allocating to the private fund any regulatory or compliance fees or expenses, or fees or expenses associated with an examination, of the adviser or its related persons;

◦ Reducing the amount of an adviser clawback by actual, potential, or hypothetical taxes applicable to the adviser, its related persons, or their respective owners or interest holders;

◦ Charging or allocating fees and expenses related to a portfolio investment (or potential portfolio investment) on a non-pro rata basis when multiple private funds and other clients advised by the adviser or its related persons have invested (or propose to invest) in the same portfolio investment, where such non-pro rata allocation is fair and equitable; and

◦ Borrowing money, securities, or other private fund assets, or receiving a loan or an extension of credit, from a private fund client.

In a change from the proposal, we are not adopting the prohibition on fees for unperformed services because we believe this activity generally already runs contrary to an adviser's obligations to its clients under the Federal fiduciary duty. We are also not adopting the indemnification prohibition that we proposed because much of the activity that it would have prohibited is already prohibited by the Federal fiduciary duty and antifraud provisions.

The Preferential Treatment Rule. The Commission is adopting a preferential treatment rule that prohibits advisers from providing preferential treatment with respect to redemption rights and portfolio holdings or exposure information, in each instance, that the adviser reasonably expects would have a material, negative effect on other investors, and requires disclosure of all other types of preferential treatment.[59] In a change from the proposal, the final rule includes certain exceptions from the redemptions prohibition (*i.e.,* if the redemption right is required by law or offered to all other existing investors) and information prohibition (*i.e.,* if the information is offered to all other existing investors) and limits the proposed requirement to provide advance written notice of preferential treatment to only apply to material economic terms (as opposed to all investment terms). Like the proposal, however, the final rule requires advisers to provide comprehensive post-investment disclosure.

We are also adopting the preferential treatment rule, in part, because all investors will benefit from increased transparency regarding the preferred terms granted to certain investors in the same private fund (*e.g.,* seed investors, strategic investors, those with large commitments, and employees, friends, and family). In some cases, these terms materially disadvantage other investors in the private fund or otherwise impact the terms applicable to their investment.[60] This new rule will help investors better understand marketplace dynamics and potentially improve efficiency for future investments, for example, by expediting the process for reviewing and negotiating adviser's fees and expenses.

The Annual Review Rule. As proposed, the final rule will amend the annual review component of Advisers Act rule 206(4)–7 (''compliance rule'') to require all SEC-registered advisers to document their annual review in writing, and we are adopting this rule as proposed.[61] We are adopting this requirement for two key reasons. First, written documentation of the annual review may help advisers better assess whether they have considered any compliance matters that arose during the previous year, any changes in the adviser's or an affiliate's business activities during the year, and any changes to the Advisers Act or other rules and regulations that may suggest a need to revise an adviser's policies and procedures. Second, the availability of written documentation of the annual review should allow the Commission and the Commission staff to determine if the adviser is regularly reviewing the adequacy of the adviser's policies and procedures.

The Recordkeeping Rule. As proposed, the final rule will amend the Advisers Act recordkeeping rule to require advisers who are registered or required to be registered to retain books and records related to the quarterly statement rule, the audit rule, the adviser-led secondaries rule, and the preferential treatment rule.[62] In a change from the proposal, we are also amending the Advisers Act recordkeeping rule to require advisers who are registered or required to be registered to retain books and records related to the restricted activities rule.[63]

---

[57] *See infra* sections II.E and II.F for a discussion of the comments on this part of the rule.

[58] As discussed in greater detail below, this does not change the applicability of any other disclosure and consent obligations, whether under law, rule, regulation, contract, or otherwise. For example, the adviser, as a fiduciary, is obligated to act in the fund's best interest and to make full and fair disclosure of all conflicts and material facts which might incline an investment adviser—consciously or unconsciously—to render advice which is not disinterested such that a client can provide informed consent to the conflict. *See* 2019 IA Fiduciary Duty Interpretation, *supra* footnote 5.

[59] *See infra* section II.G for a discussion of the comments on this part of the rule.

[60] *See, e.g., Securities and Exchange Commission* v. *Philip A. Falcone, Harbinger Capital Partners Offshore Manager, L.L.C. and Harbinger Capital Partners Special Situations GP, L.L.C.,* Civil Action No. 12 Civ. 5027 (PAC) (S.D.N.Y.) and *Securities and Exchange Commission* v. *and* (sic) *Harbinger Capital Partners LLC, Philip A. Falcone and Peter A. Jenson, Civil Action No.* 12 Civ. 5028 (PAC) (S.D.N.Y.), Civil Action No. 12 Civ. 5027 (PAC) (S.D.N.Y.), U.S. Securities and Exchange Commission Litigation Release No. 22831A (Oct. 2, 2013) (''Harbinger Capital'') (private fund adviser granted favorable redemption and liquidity terms to certain large investors in a private fund without disclosing these arrangements to the fund's board of directors and the other fund investors). *See also* 17 CFR 275.206(4)–8 (rule 206(4)–8 under the Advisers Act).

[61] *See infra* section III for a discussion of the comments on this part of the rule.

[62] *See infra* sections II.B.6, II.C.8, II.D.5, and II.G.6 for discussions of the comments on this part of the rule.

[63] The recordkeeping requirements associated with the restricted activities rule align with the modifications from the prohibited activities rule in the proposal. See *infra* section II.E for a discussion of the comments on this part of the rule.

We are adopting these requirements to enhance advisers' internal compliance efforts and to facilitate the Commission's enforcement and examination capabilities by improving our staff's ability to assess an adviser's compliance with the final rule.

C. The Commission Has Authority To Adopt the Rules

The Commission regulates investment advisers under the Advisers Act.[64] For the reasons we discussed in the Proposing Release and throughout this release, our adoption of these private fund adviser rules is a proper exercise of our rulemaking authority under the Advisers Act to prevent fraudulent, deceptive, and manipulative conduct, facilitate the provision of simple and clear disclosures to investors, and prohibit or restrict certain sales practices, conflicts of interest, and compensation schemes.[65]

We have authority under section 206(4) to adopt rules ''reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive or manipulative.'' [66] Among other things, section 206(4) permits the Commission to adopt prophylactic rules against conduct that is not itself necessarily fraudulent.[67] The Dodd-Frank Act expanded the Commission's oversight responsibility for private fund advisers.[68] It also added section 211(h) of the Advisers Act, which, among other things, directs the Commission to ''facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with . . . investment advisers'' and ''examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors.'' [69] As applied here, a sales practice includes any conduct by an investment adviser, or on its behalf, to induce or solicit a person to invest, or continue to invest, in a private fund client advised by the adviser or its related persons. For instance, an adviser offering preferential terms to certain private fund investors to attract, or retain, their investment in the private fund is a ''sales practice.'' As the Commission has previously stated, a conflict of interest means an interest that might incline an adviser, consciously or unconsciously, to render advice that is not disinterested.[70] Conflicts of interest can arise when an adviser's own interests conflict with, or are otherwise different than, its client's interests or when the interests of different clients conflict.[71] For instance, an adviser has a conflict of interest in an adviser-led secondary transaction because the adviser and its related persons typically are involved on both sides of the transaction. As applied here, a compensation scheme includes any arrangement through which an investment adviser is compensated—directly or indirectly—for providing services to its clients (*e.g.,* performance-based compensation). An example of a problematic compensation scheme is when an adviser opportunistically values a private fund to increase the adviser's compensation.

Sections 206(4) and 211(h) of the Advisers Act are the principal authority for all of the five new rules to regulate the activities of investment advisers to private funds. The new rules are within the Commission's legal authority under those sections of the Advisers Act as a means reasonably designed to prevent fraudulent or deceptive acts and practices, facilitate simple and clear disclosures to investors, and prohibit or restrict certain sales practices, conflicts of interest, and compensation schemes in the market for advisory services to private funds. The quarterly statement rule is designed to facilitate the provision of simple and clear disclosures to private fund investors regarding some of the most important and fundamental terms of their relationships with investment advisers—namely what fees and expenses those investors will pay and what performance they receive for their private fund investments. The audit rule is designed to help prevent the fraud, deception, or manipulation that might result from material misstatements in financial statements, and it is intended to address the conflicts of interest and potential compensation schemes that may result from an adviser valuing assets and charging fees related to those assets. When advisers offer investors the choice between selling and exchanging their interests in the private fund for interests in another vehicle advised by the adviser or any of its related persons as part of an adviser-led secondary transaction, advisers have a conflict of interest with the fund and its investors, and the adviser-led secondaries rule is designed to address this concern. The restricted activities rule is designed to prohibit certain activities that involve conflicts of interest and compensation schemes that are contrary to the public interest and the protection of investors unless such activities are disclosed to, and in some cases, consented to, by investors. Finally, the preferential treatment rule addresses our concern that an adviser's current sales practices do not provide all investors with sufficient detail regarding preferential terms granted to other investors, and we believe that disclosure (and in some cases prohibition) of preferential treatment is necessary to guard against fraudulent and deceptive practices. We have examined a range of alternatives to

[64] Under Federal law, an investment adviser is a fiduciary, and this fiduciary duty is made enforceable by the antifraud provisions of the Advisers Act. *See* 2019 IA Fiduciary Duty Interpretation, *supra* footnote 5.

[65] *See* Advisers Act, sections 206 and 211(h).

[66] 15 U.S.C. 80b–6(4).

[67] S. REP. NO. 1760, 86th Cong., 2d Sess. 4, 8 (1960). The Commission has used this authority to adopt several rules addressing abusive marketing practices, political contributions by investment advisers, proxy voting, compliance procedures and practices, deterring fraud with respect to pooled investment vehicles, and custodial arrangements including an audit provision. Rule 206(4)–1; 275.206(4)–2; 275.206(4)–6; 275.206(4)–7; and 275.206(4)8. Section 206(4) was added to the Advisers Act in Public Law 86–750, 74 Stat. 885, at sec. 9 (1960). *See* H.R. REP. NO. 2197, 86th Cong., 2d Sess., at 7–8 (1960) (''Because of the general language of section 206 and the absence of express rulemaking power in that section, there has always been a question as to the scope of the fraudulent and deceptive activities which are prohibited and the extent to which the Commission is limited in this area by common law concepts of fraud and deceit . . . [Section 206(4)] would empower the Commission, by rules and regulations to define, and prescribe means reasonably designed to prevent, acts, practices, and courses of business which are fraudulent, deceptive, or manipulative. This is comparable to Section 15(c)(2) of the Securities Exchange Act [15 U.S.C. 78o(c)(2)] which applies to brokers and dealers.''). *See also* S. REP. NO. 1760, 86th Cong., 2d Sess., at 8 (1960) (''This [section 206(4) language] is almost the identical wording of section 15(c)(2) of the Securities Exchange Act of 1934 in regard to brokers and dealers.''). The Supreme Court, in *United States* v. *O'Hagan,* interpreted nearly identical language in section 14(e) of the Securities Exchange Act [15 U.S.C. 78n(e)] as providing the Commission with authority to adopt rules that are ''definitional and prophylactic'' and that may prohibit acts that are ''not themselves fraudulent . . . if the prohibition is 'reasonably designed to prevent . . . acts and practices [that] are fraudulent.' '' *United States* v. *O'Hagan,* 521 U.S. 642, 667, 673 (1997). The wording of the rulemaking authority in section 206(4) remains substantially similar to that of section 14(e) and section 15(c)(2) of the Securities Exchange Act. *See also* Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles, Investment Advisers Act Release No. 2628 (Aug. 3, 2007) [72 FR 44756 (Aug. 9, 2007)] (''Prohibition of Fraud Adopting Release'') (stating, in connection with the suggestion by commenters that section 206(4) provides us authority only to adopt prophylactic rules that explicitly identify conduct that would be fraudulent under a particular rule, ''We believe our authority is broader. We do not believe that the commenters' suggested approach would be consistent with the purposes of the Advisers Act or the protection of investors.'').

[68] *See* the discussion of the Dodd-Frank Act above in the introductory portion of section I.

[69] Dodd-Frank Act, section 913(g).

[70] *See* 2019 IA Fiduciary Duty Interpretation, *supra* footnote 5, at 23.

[71] *See id.,* at 26.

our proposal, carefully considered all comments, and made revisions to the proposed rules where we concluded it was appropriate. The final rules represent an appropriate response to the developments we discuss above regarding the market for private fund advisory services.

Some commenters supported the Commission's legal foundation for the rulemaking.[72] For example, one commenter stated that all of the reforms in the proposal are fully within the Commission's ample legal authority to regulate advisers.[73] Another commenter emphasized that, importantly, the Commission's legal authority under section 211(h) is broad.[74] Other commenters, however, questioned the Commission's authority to promulgate the proposed rules[75] and argued that the rules undermine congressional intent regarding the regulation of private funds.[76] Some commenters argued that Congress, in drafting section 913(g) of the Dodd-Frank Act,[77] did not intend to apply section 211(h) of the Advisers Act to private fund advisers and instead intended this section to only apply to retail investors.[78] Commenters also stated that the legislative history surrounding section 913(g) and section 211(h) support a narrower reading that limits these provisions to retail customers and clients.[79] Another commenter stated that Congress would have provided clear congressional authorization to empower the Commission to materially alter the regulatory regime for private funds if it intended to do so.[80]

Section 913 of the Dodd-Frank Act contains numerous sub-parts, several of which specifically pertain to ''retail customers,'' which Congress defined as ''a natural person, or the legal representative of such natural person, who (1) receives personalized investment advice about securities from a broker or dealer or investment adviser; and (2) uses such advice primarily for personal, family, or household purposes.''[81] Congress also mentioned private fund investors in Section 913, specifically indicating in adding section 211(g) of the Advisers Act that ''the Commission shall not ascribe a meaning to the term 'customer' that would include an investor in a private fund[.]''[82] In the same provision, in adding section 211(h) of the Advisers Act entitled ''Other Matters,'' Congress spoke of ''investors,'' and in so doing gave no indication that it was referring to ''retail customers,'' a term it had defined and used in various other sub-parts.[83] The ''Other Matters'' provision likewise contains no instruction to the Commission to include or exclude private fund investors from the term ''investors''; in fact, it does not mention ''private fund investors'' at all.[84] This provision makes no mention of ''retail'' customers, ''retail'' clients, or ''retail'' investors, and therefore does not by its plain meaning apply to only *retail* investors. While commenters seek to read a ''retail'' limitation into the statute, that view is unsupported by the plain text of the statute.

Another commenter similarly argued that, because Congress added section 211(e) to the Advisers Act requiring the promulgation of rules to establish the form and content of certain reports regarding private funds required to be filed with the Commission under subsection 204(b) of the Advisers Act, it ''is inconceivable that Congress intended Section 211(h) to grant the broad private fund disclosure authority it claims when Congress spoke with such precision [in adding section 211(e)] within the same section of the Advisers Act.''[85] Contrary to this commenter's assertion, we find again that the juxtaposition of such provisions within the amendments Congress made to 211 of the Advisers Act show Congress knew when it wanted to limit a provision to private fund advisers, when it wanted to limit a provision to retail customers, and when it wanted to apply a provision to all investment advisers and investors. Another commenter asserted that Congress only intended to regulate the activities of private funds and their investment advisers in Title IV of the Dodd-Frank Act, and not in Title IX of the Dodd-Frank Act, and thus section 211(h) cannot be read to apply to private fund

[72] *See, e.g.,* Consumer Federation of America Comment Letter; Better Markets Comment Letter.

[73] *See* Better Markets Comment Letter.

[74] *See* Consumer Federation of America Comment Letter.

[75] *See, e.g.,* Comment Letter of Stuart Kaswell (Apr. 18, 2022) (''Stuart Kaswell Comment Letter''); Comment Letter of the Center for Capital Markets Competitiveness, U.S. Chamber of Commerce (Apr. 25, 2022) (Chamber of Commerce Comment Letter''); Comment Letter of the Managed Funds Association (Apr. 25, 2022) (''MFA Comment Letter I''); Comment Letter of American Investment Council (July 27, 2022) (''AIC Comment Letter III'').

[76] *See, e.g.,* Comment Letter of Brian Cartwright, Jay Clayton, Joseph A. Grundfest, Paul G. Mahoney, Harvey L. Pitt, Adam Pritchard, James S. Spindler, Robert B. Stebbins, J.W. Verret, and Charles Whitehead (Apr. 25, 2022) (''Cartwright et al. Comment Letter''); MFA Comment Letter I (stating that the legislative history surrounding Section 211(h), and Section 913 of the Dodd-Frank Act demonstrates that Section 211(h) was clearly intended to address the relationship between retail clients and their advisers).

[77] Section 913(g)(2) of the Dodd-Frank Act added section 211(h) to the Advisers Act.

[78] *See, e.g.,* AIMA/ACC Comment Letter; MFA Comment Letter I (stating that Section 913 focused on harmonizing and standardizing the standard of conduct with respect to retail customers and clients and therefore section 913(g) should also be narrowly interpreted to apply to this subset of the investor community). Another commenter asserted that, in amending the Advisers Act to add section 211(h), it was intended to only apply to retail customers because it was part of section 913 of the Dodd-Frank Act and, further, that this interpretation is supported by section 913 of the Dodd-Frank Act permitting promulgation of a best interest standard for retail customers under the section 211(g) amendment to the Advisers Act to include certain terms that this commenter asserted would be restricted by this rulemaking but permitted under section 211(g). *See* Comment Letter of the Committee on Private Investment Funds and the Committee on Investment Management Regulation of the New York City Bar Association (Apr. 25, 2022) (''NYC Bar Comment Letter II'') (pointing to section 211(g) stating under such a best interest standard ''any material conflicts of interest shall be disclosed and may be consented to by the customer'' and ''receipt of compensation based on commission or fees shall not, in and of itself, be considered a violation of such standard'').

[79] *See, e.g.,* AIMA/ACC Comment Letter; MFA Comment Letter I. Some commenters stated that analysis of provisions in section 913 of the Dodd-Frank Act supports a reading that it was enacted in response to a concern that retail investors did not appreciate the distinction between broker-dealers and advisers. *See, e.g.,* Stuart Kaswell Comment Letter; NYC Bar Comment Letter II.

[80] *See* AIC Comment Letter III. We disagree. For the reasons discussed in the Proposing Release and throughout this release, our adoption of these private fund adviser rules is a proper exercise of our rulemaking authority under the Advisers Act to prevent fraudulent, deceptive, and manipulative conduct, facilitate the provision of simple and clear disclosures to investors, and prohibit or restrict certain sales practices, conflicts of interest, and compensation schemes. This commenter also asserted that before finalizing a number of rulemaking proposals affecting private fund advisers, including the proposal underlying this final rule, we must (i) ''publish a reasonable assessment of the cumulative effects'' of these rules, (ii) reopen the comment periods for these rules ''to provide the public an opportunity to assess holistically the Commission's proposals'', and (iii) ''with the benefit of an appropriate analysis and public comment,'' finalize these rules ''holistically'' taking into account ''not just the expected effects on investors and our capital markets but also practical realities such as adoption timelines as well as information technology requirements.'' Comment Letter of the American Investment Council (Aug. 8, 2023) (''AIC Comment Letter IV''). This commenter asserted that failing to do so ''would be a violation of the Commission's obligations under the Administrative Procedures Act.'' The effects of any final rule may be impacted by recently adopted rules that precede it. Accordingly, each economic analysis in each adopting release considers an updated economic baseline that incorporates any new regulatory requirements, including compliance costs, at the time of each adoption, and considers the incremental new benefits and incremental new costs over those already resulting from the preceding rules. That is, the economic analysis appropriately considers existing regulatory requirements, including recently adopted rules, as part of its economic baseline against which the costs and benefits of the final rule are measured. *See infra* sections VI.C, VI.D.1, and VI.E.2 below.

[81] Dodd-Frank Act, Section 913(a).

[82] Dodd-Frank Act, Section 913(g)(2).

[83] *Id.*

[84] *Id.*

[85] *See* Stuart Kaswell Comment Letter II.

advisers.[86] We disagree. While Title IV contains a number of provisions specific to private fund advisers, there are many other provisions of the Dodd-Frank Act applicable to private fund advisers outside of that title, and while Title IX contains provisions that affect all investment advisers, there is no indication that Congress intended to restrict its coverage to exclude private fund advisers except where it explicitly does so.[87]

Some commenters challenged our ability to rely on sections 211(h) and 206 of the Advisers Act on the grounds that our use of such authority directly conflicts with Congress's intent in enacting the Investment Company Act of 1940 (''Investment Company Act'').[88] Specifically, commenters stated that the rules are an attempt to regulate private funds despite the fact that Congress explicitly excluded such funds from the definition of an ''investment company'' and therefore excluded them from regulation under the Investment Company Act. The final rules, however, regulate the activities of investment advisers to private funds, over whom the Commission has been given substantial authority, while the substantive provisions of the Investment Company Act, and rules thereunder, regulate investment companies. These final rules are not an indirect mechanism for regulating private funds because the rules focus on the adviser and do not apply to or restrict the private fund itself. For example, the rules do not dictate or limit the ability of private funds to engage in excessive leverage or borrowing,[89] do not regulate fund payment of redemption proceeds or require funds to comply with specific rules to maintain liquidity sufficient to meet redemptions,[90] do not regulate layering of fees or fund structures,[91] or changes in investment policies,[92] and do not impose a governance structure [93] the way that the Investment Company Act, and rules thereunder, impose such limitations on registered funds and their operations.

One commenter stated that Congress amended the Advisers Act to address private fund adviser registration and did not authorize a disclosure system for private funds or allow the Commission to circumvent that by putting the obligation on advisers.[94] We disagree. In amending the Advisers Act in connection with requiring most private fund advisers to register, Congress enacted other requirements specific to private fund advisers. For example, section 204(b) of the Act, entitled ''Records and Reports of Private Funds,'' specifically authorizes the Commission to require registered investment advisers to maintain such records of, and file with the Commission such reports regarding, private funds advised by the investment adviser, as necessary and appropriate in the public interest and for the protection of investors, or for the assessment of systemic risk by the Financial Stability Oversight Council and to provide or make available to the Council those reports or records or the information contained therein. It further provides that the records and reports of any private fund to which an investment adviser registered under this title provides investment advice shall be deemed to be the records and reports of the investment adviser. Congress thus appears to have squarely contemplated, for example, that reports regarding private funds would be achieved by putting the obligation on advisers. Even further, in amending the Advisers Act to require registration of private fund advisers, Congress did not mandate or restrict the Commission from applying rules adopted under the Advisers Act to these advisers. It did not indicate that a registered private fund adviser should be more or less subject to the Commission's rules under the Advisers Act than any other registered adviser simply because its clients are private funds.[95] Where Congress intended for certain private fund advisers to be treated differently from other registered investment advisers, it has been specific.[96]

Some commenters stated that the rules are inconsistent with precedent treating the Advisers Act as a disclosure-based regime, that the 2019 IA Fiduciary Duty Interpretation re-affirmed the practice of consent through disclosure, and that the Commission is abandoning this approach in favor of acting as a merit regulator.[97] The Advisers Act sets forth specific requirements for advisers, including advisers to private funds, and confers specific rulemaking authority to the Commission in sections 206(4) and 211(h). Nowhere in these sections or in the Advisers Act more broadly did Congress provide that the Advisers Act is purely a disclosure-based regime or that the Commission's rulemaking authority with respect to the Advisers Act is limited to disclosure-based rules. Furthermore, other statutory provisions of the Advisers Act are explicit when restricting the Commission's rulemaking authority to require disclosure compared to imposing other obligations. Indeed, while section 211(h)(1) of the Act specifies that the Commission shall facilitate the provision of certain

[86] *See* NYC Bar Comment Letter II.

[87] For example, there is nothing limiting the remit of the Investor Advisory Committee mandated by section 911 of the Dodd-Frank Act from considering investors in private funds and section 911 requires that such committee include representation of the interests of institutional investors, including pension funds, and thus many of the investors in private funds. There is also nothing to suggest the study of the examination of investment advisers under section 914 of the Dodd-Frank Act should exclude examination of private fund advisers. Finally, there is nothing under section 915 of the Dodd-Frank Act (codified as section 4(g) of the Exchange Act), which mandated the creation of an Investor Advocate at the Commission, to limit its remit to non-private fund advisers—indeed section 915 of the Dodd-Frank Act specifically refers to ''retail investors'' in some subsections and ''investors'' in others, showing Congress chose the application of its directives and grants of authority quite specifically. *Compare* section 4(g)(4)(A) of the Exchange Act (providing the Investor Advocate shall ''assist retail investors in resolving significant problems such investors may have with the Commission or self-regulatory organizations'') with section 4(g)(4)(B) of the Exchange Act (providing the Investor Advocate shall ''identify areas in which investors would benefit from changes in the regulations of the Commission or the rules of self-regulatory organizations'').

[88] *See, e.g.,* Comment Letter of the Loan Syndications and Trading Association (Apr. 25, 2022) (''LSTA Comment Letter''); Comment Letter of Citadel (May 3, 2022) (''Citadel Comment Letter'').

[89] *See* 15 U.S.C. 80a–18 and 17 CFR 270.18c–1, 17 CFR 270.18c–2, 17 CFR 270.18f–1, 17 CFR 270.18f–2, and 17 CFR 270.18f–4 under the Investment Company Act.

[90] *See* 15 U.S.C. 80a–22 and 17 CFR 270.22e–4 under the Investment Company Act.

[91] *See* 15 U.S.C. 80a–12.

[92] *See* 15 U.S.C. 80a–13.

[93] *See* 15 U.S.C. 80a–10 (independence of directors) and 15 U.S.C. 80a–16 (election of directors).

[94] *See* Stuart Kaswell Comment Letter.

[95] *See, e.g.,* 17 CFR 275.204A–1 (rule 204A–1) (requiring registered advisers to adopt codes of ethics); 17 CFR 275.205–3 (permitting investment advisers to charge performance fees to certain clients); 17 CFR 275.206(4)–1 (rule 206(4)–1) (regulating registered adviser marketing); rule 206(4)–2 (regulating the custody practices of registered advisers); 17 CFR 275.206(4)–5 (rule 206(4)–5) (prohibiting registered advisers and certain advisers exempt from registration from engaging in certain pay to play activities); rule 206(4)–8 (prohibiting advisers to pooled investment vehicles from making false or misleading statements to, or otherwise defrauding, investors or prospective investors in those pooled vehicles).

[96] For example, the various exemptions in section 203(b), the venture capital exemptions in section 203(l), and the private fund exemption in section 203(m). *See also* section 211(a) of the Act (''The Commission shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the functions and powers conferred upon the Commission elsewhere in this title, including rules and regulations defining technical, trade, and other terms used in this title, except that the Commission may not define the term 'client' for purposes of paragraphs (1) and (2) of section 206 to include an investor in a private fund managed by an investment adviser, if such private fund has entered into an advisory contract with such adviser.'')

[97] *See, e.g.,* Comment Letter of American Investment Council (June 13, 2022) (''AIC Comment Letter II''); SIFMA–AMG Comment Letter I.

disclosures, the very next subsection (section 211(h)(2) of the Act) provides that the Commission shall examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes. The authority granted to the Commission under section 206(4) of the Act, which enables the Commission to promulgate rules to define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative, also makes no mention of disclosure.

Similarly, the 2019 IA Fiduciary Duty Interpretation addressed advisers' fiduciary duties to their fund clients but did not state or seek to imply that advisers to private funds were otherwise exempt from the specifically worded provisions in the Advisers Act. We are not seeking to amend or change the Commission's existing rules or past interpretations of the Advisers Act with respect to private fund advisers. Rather, in this rulemaking, we are seeking to employ the rulemaking authority in sections 206(4) and 211(h) of the Act, as Congress set forth, to address the types of harms Congress specifically identified in those sections.

Other commenters argued that the Commission cannot rely on section 206 because the Commission has neither proposed to define fraudulent practices nor demonstrated how the rules would prevent fraud.[98] Section 206(4) gives the Commission the authority to prescribe means reasonably designed to prevent fraud, and we are employing the authority that Congress provided us in section 206(4). As detailed below in the discussion of the final rules in section II of the release, the rules we are adopting today are reasonably designed to prevent fraud, deception, or manipulation because, for example, requiring advisers to provide enhanced disclosure around potential and actual conflicts of interest decreases the likelihood that investors will be defrauded by certain practices, many of which involve conflicts of interest.[99] In addition, preventing advisers from engaging in certain activities, in some cases unless they provide disclosure, is another means to prevent fraud, deception, or manipulation.

Some commenters stated that the ''sales practices,'' ''conflicts of interest'' and ''compensation schemes'' referenced in section 211(h) should be read and understood all together in the context of an advisory relationship, not as a list of distinct items, but as sales practices that lead to conflicts of interest with associated compensation schemes, and that the word ''certain'' also underscores the limited reach of these terms' combined meaning.[100] These commenters' reading would effectively eliminate ''conflicts of interest'' and ''compensation schemes'' from the statutory language and reduce section 211(h)(2) to refer only to certain sales practices. We see no basis for reading out of the statute words Congress specifically chose to include. First, by providing a specific list of items in section 211(h) that the Commission ''shall examine and, where appropriate, promulgate rules,'' Congress intended for the Commission to address this particularized set of scenarios—''sales practices, conflicts of interest, and compensation schemes''—via rulemaking. Accordingly, we have sought to identify clearly which of these scenarios we are attempting to address in each rule that is based on our rulemaking authority under section 211(h). Second, we agree that ''certain'' indicates that 211(h) does not apply to all sales practices, conflicts of interest and compensation schemes, but rather only those that, after examination, the Commission deems contrary to the public interest and protection of investors. Following our examination, as described in this release, these rules aim to restrict only sales practices, conflicts of interest and compensation schemes that we believe are harmful to investors. There are other examples of sales practices, conflicts of interest and compensation schemes in the private fund industry that are not addressed in this rulemaking, some of which we do not currently view as rising to the level of concern set forth in section 211(h).

Some commenters offered their own interpretations of the term ''sales practices.''[101] A commenter interpreted the plain meaning of ''sales practice'' to be ''a mode or method of making sales,''[102] while another commenter interpreted ''sales practice'' to be ''a repeated or customary manner of promoting or selling goods.''[103] Some commenters suggested cold calling as an example of a ''sales practice.''[104] Yet another commenter interpreted ''sales practice'' to apply only to ''an adviser's marketing or promotion of its funds.''[105] We agree that such interpretations involve a sales practice, and we have taken them into consideration in interpreting this term. Our interpretation is appropriate because it is sufficiently broad to capture sales practices as they continue to evolve in the industry but not so broad as to capture operational activities that are independent of sales functions. Likewise, our interpretation of ''sales practice'' is not so narrow that it would exclude conduct that should be within scope. For example, the term would not exclude conduct because it is not ''repeated'' or ''customary.'' Similarly, it would not exclude activity that follows a period of marketing or promotion when an adviser takes steps to effectuate an investment.

Likewise, the staff has broadly interpreted the term ''compensation,'' explaining that ''the receipt of any economic benefit, whether in the form of an advisory fee or some other fee relating to the total services rendered, commissions, or some other combination of the foregoing'' would satisfy the ''for compensation'' prong of the definition of investment adviser set forth in Section 202(a)(11) of the Advisers Act.[106] A commenter suggested that fees and expenses being passed on to investors, such as accelerated monitoring fees, costs related to governmental or regulatory investigations, compliance expenses, and costs related to obtaining external financing, should be characterized as ''compensation schemes.''[107] Another

[98] *See, e.g.,* Citadel Comment Letter (discussing indemnification clauses); NYC Bar Comment Letter II.

[99] The audit rule increases the likelihood that fraudulent activity or problems with valuation are uncovered, thereby deterring advisers from engaging in fraudulent conduct. Similarly, the quarterly statement rule increases the likelihood that fraudulent activity or problems with fees, expenses, and performance are uncovered, thereby deterring advisers from engaging in fraudulent conduct. The adviser-led secondaries rule is designed to ensure that the private fund and investors that participate in the secondary transaction are offered a fair price, which is a critical component of preventing the type of harm that might result from the adviser's conflict of interest in leading the transaction. The restricted activities rule and preferential treatment rule prevent advisers from engaging in certain activities that could result in fraud and investor harm, unless advisers make appropriate disclosures or obtain consent, as applicable.

[100] *See, e.g.,* Comment Letter of American Investment Council (Apr. 25, 2022) (''AIC Comment Letter I''); Citadel Comment Letter.

[101] *See, e.g.,* Comment Letter of Haynes and Boone, LLP (Apr. 25, 2022) (''Haynes & Boone Comment Letter''); Comment Letter of Committee on Capital Market Regulation (Oct. 17, 2022) (''CCMR Comment Letter II''); Citadel Comment Letter.

[102] *See* AIC Comment Letter I.

[103] *See* CCMR Comment Letter II.

[104] *See, e.g.,* AIC Comment Letter I; Citadel Comment Letter.

[105] *See* Haynes & Boone Comment Letter.

[106] Applicability of the Advisers Act of 1940 to Financial Planners, Pension Consultants, and Other Persons Who Provide Others with Investment Advice as a Component of Other Financial Services, Investment Advisers Act Release No. 1092 (Oct. 8, 1987) (''Release 1092''). *See also United States* v. *Miller,* 833 F.3d 274 (3d Cir. 2016).

[107] *See* United for Respect Comment Letter I.

commenter suggested that we distinguish between ''compensation'' and ''reimbursement'' for purposes of defining a ''compensation scheme.'' [108] Previously, our staff has explained that the receipt of any economic benefit to a person providing a variety of services to a client, including investment advisory services, qualifies as ''compensation.'' [109] It has consistently recognized that reimbursements covering only the cost of services are ''compensation.'' [110] And staff has viewed ''compensation'' as including indirect payments for investment advisory services.[111] We similarly broadly interpret the term ''compensation scheme'' for purposes of this rulemaking to include any manner in which an investment adviser is compensated and receives economic benefit—directly or indirectly—for providing services to its clients.[112]

Commenters also argued that the Commission's approach runs contrary to the D.C. Circuit Court's decision in *Goldstein* v. *SEC.*[113] One commenter stated that the proposal, by offering protections directly to private fund investors, relies on the same ''look-through'' approach that the D.C. Circuit rejected in *Goldstein* v. *SEC.*[114] The exercise of our statutory authority under sections 211(h) and 206(4) is not inconsistent with the court's ruling in *Goldstein* v. *SEC* because section 206(4) is not limited in its application to ''clients'' and section 211(h) was designed to provide protection to ''investors.'' Notably, neither section 206(4) nor 211(h) references ''client,'' and section 211(h) references ''investors'' which does not exclude any particular type of investor, such as private fund investors. A plain interpretation of the statute supports a reading that Congress intended to allow the Commission to promulgate rules to protect investors directly (including private fund investors) and therefore does not contradict the court's ruling in *Goldstein* v. *SEC.*[115] Moreover, private fund advisers are already subject to rule 206(4)–8 under the Advisers Act, which prohibits investment advisers to pooled investment vehicles, which include private funds, from engaging in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.[116] We recognize that the private fund is the adviser's client, but this rulemaking addresses with particularity the risk of fraud, deception, or manipulation upon investors in private funds. As a means of preventing fraudulent, deceptive, or manipulative acts upon the fund, we are also addressing the relationship with the fund investors, with whom the adviser typically negotiates the terms of its relationship with the fund. Moreover, as fund clients often lack an effective governance process that is independent of the adviser to receive or provide consent,[117] these rules protect both the fund and its investors by empowering investors to receive disclosure and provide such informed consent.

Relatedly, some commenters stated that our interpretation of our authority under section 211(h) is inconsistent with the fact that, at the same time it added section 211(h), Congress amended 211(a) to clarify that advisers do not owe a duty to private fund investors.[118] On the contrary, the fact that Congress made these amendments to 211(a) at the same time it added section 211(h) supports our interpretation. In amending section 211(a), Congress made an explicit differentiation between a fund client of an adviser and investors in such fund client for purposes of establishing potential liability under sections 206(1) and 206(2) of the Advisers Act in the Advisers Act. However, Congress did not frame 211(h) in such terms. Rather, Congress did not use the term ''client'' in 211(h) at all but used the term ''investors'' specifically in 211(h). Congress addressed adviser-client relationships when it wished, but used a different framing and different terms in 211(h).

Some commenters stated that section 205 provides the only authority under the Advisers Act to regulate contracts and that section 205(b) carves out contracts with funds exempt from the Investment Company Act under section 3(c)(7) of that Act.[119] While section 205(a) provides authority under the Advisers Act to regulate investment advisory contracts, it does not state that such contracts or private funds are otherwise not subject to the other provisions of the Advisers Act, including disclosure requirements, antifraud provisions, or other investor protection provisions. The plain interpretation of section 205 is that Congress intended to exempt certain private funds from the prohibition on the specified advisory contract terms set forth in section 205(a) but did not otherwise attempt to imply that private finds are broadly exempted from the requirements of the Advisers Act.

II. Discussion of Rules for Private Fund Advisers

A. Scope of Advisers Subject to the Final Private Fund Adviser Rules

The scope of advisers subject to the final private fund adviser rules is unchanged from the proposal, except as discussed below with respect to advisers to securitized asset fund.[120] The quarterly statement, audit, and adviser-led secondaries rule apply to all SEC-registered advisers, and the restricted activities and preferential treatment rules apply to all advisers to private funds, regardless of whether

[108] *See* Haynes & Boone Comment Letter.

[109] *See* Release 1092, *supra* footnote 106, at 10.

[110] CFS Securities Corp., SEC Staff Letter (Feb. 27, 1987) (expressing the staff's view that a fee designed to cover costs would constitute 'special compensation''); Touche Holdings, Inc., SEC Staff Letter (Nov. 30, 1987) (explaining the staff's view that ''[t]he compensation element is satisfied even if payments for services only cover the cost of the services'').

[111] *See* Release 1092, *supra* footnote 106, at 10.

[112] One commenter supported a broad interpretation of ''compensation scheme'' and suggested that this authority has the potential to address significant failures in our markets. *See* Consumer Federation of American Comment Letter. However, another commenter maintained that the statutory context indicates that ''compensation schemes'' should be interpreted to refer to structural incentives that may encourage a broker-dealer or investment adviser to push an investor into an unsuitable transaction. *See* AIC Comment Letter I. As discussed above, this suggested interpretation would effectively eliminate ''conflicts of interest'' and ''compensation schemes'' from the statutory language and reduce section 211(h)(2) to refer only to certain sales practices. We see no basis for reading out of the statute words Congress specifically chose to include. Another commenter stated that ''compensation scheme'' has yet to be applied or interpreted to prohibit indemnification provisions or the passing through of certain fee and expense types. *See* Comment Letter of Committee on Capital Market Regulation (Apr. 25, 2022) (''CCMR Comment Letter I'').

[113] *See, e.g.,* MFA Comment Letter I; AIC Comment Letter I; *Goldstein* v. *SEC,* 451 F.3d 873 (DC Cir. 2006) (''*Goldstein* v. *SEC*'').

[114] *See* AIC Comment Letter I; *Goldstein* v. *SEC, supra* footnote 113 (clarifying that the ''client'' of an investment adviser managing a pool is the pool itself, not an investor in the pool).

[115] Further, the Dodd-Frank Act eliminated the ''private adviser'' exemption under section 203(b)(3) of the Advisers Act, which the court interpreted in *Goldstein* v. *SEC.* Thus, we do not believe the court's ruling in *Goldstein* v. *SEC* is necessarily relevant because we are not relying on repealed section 203(b)(3).

[116] *See* rule 206(4)–8 under the Advisers Act.

[117] *See supra* section I.A.

[118] *See, e.g.,* Stuart Kaswell Comment Letter; AIC Comment Letter II.

[119] *See, e.g.,* SIFMA–AMG Comment Letter I; Comment Letter of Federal Regulation of Securities Committee of the Business Law Section of the American Bar Association (Apr. 28, 2022); MFA Comment Letter I.

[120] The final quarterly statement, audit, adviser-led secondaries, restricted activities, and preferential treatment rules do not apply to investment advisers with respect to securitized asset funds they advise. *See* discussion below in this section II.A. All references to private funds shall not include securitized asset funds.

they are registered with the Commission. Our scoping decisions generally align with the Commission's historical approach and are based on the fact that the quarterly statement, audit, and adviser-led secondaries rules impose affirmative obligations on advisers, while the restricted activities and preferential treatment rules prohibit activity or require disclosure and, in some cases, consent.[121]

Commenters generally supported the proposed application of the quarterly statement rule, audit rule, and adviser-led secondaries rule to SEC-registered advisers.[122] One commenter asserted that the proposed quarterly statement rule and audit rule should also apply to exempt reporting advisers (''ERAs''),[123] arguing that investors in private funds advised by ERAs would similarly benefit from information about the funds' fees, expenses, and performance and from fund audits.[124] Other commenters asked for clarification that the proposed quarterly statement rule, audit rule, and adviser-led secondaries rule would not apply to an adviser whose principal office and place of business is outside of the United States (offshore adviser) with regard to any of its non-U.S. private fund clients even if the non-U.S. private fund clients have U.S. investors.[125]

We are applying these three rules to SEC-registered advisers, as proposed. No commenter requested we extend application of the adviser-led secondaries rule to ERAs or other unregistered advisers. Regarding the quarterly statement rule, we believe extending the rule to ERAs, such as venture capital fund advisers, would raise matters that we believe would benefit from further consideration—for example, whether different fee, expense, and performance information might be informative in the context of start-up investments. Similarly, while one commenter asserted that many ERAs are already obtaining audits and thus application of the audit rule would benefit investors in ERA-advised funds, we received no other comments on this topic and believe we would benefit from further comment on the benefits and costs of such a requirement, particularly from smaller ERAs.

We have previously stated, and continue to take the position, that we do not apply most of the substantive provisions of the Advisers Act with respect to the non-U.S. clients (including private funds) of an SEC-registered offshore adviser.[126] This approach was designed to provide appropriate flexibility where an adviser has its principal office and place of business outside of the United States.[127] It is appropriate to continue to apply this historical approach to these three new rules. The quarterly statement rule, audit rule, and adviser-led secondaries rule are substantive rules under the Advisers Act that we will not apply with respect to the non-U.S. private fund clients of an SEC-registered offshore adviser (regardless of whether they have U.S. investors).

The restricted activities rule prohibits all private fund advisers, regardless of registration status, from engaging in certain sales practices, conflicts of interest, and compensation schemes, unless the adviser satisfies certain disclosure, and, in some cases, consent obligations. Likewise, the preferential treatment rule prohibits all private fund advisers, regardless of registration status, from providing preferential treatment to any investor in a private fund (and in some cases to any investor in a similar pool of assets), unless the adviser satisfies certain disclosure obligations.

We proposed to continue to apply the Commission's historical position on the substantive provisions of the Advisers Act to the prohibited activities rule such that the rule would not apply with respect to a registered offshore adviser's non-U.S. private funds, regardless of whether those funds have U.S. investors.[128] We requested comment on whether this approach should apply to the proposed prohibited activities rule and the other proposed rules.[129] Several commenters supported applying the Commission's historical approach to all of the proposed rules.[130] Other commenters stated that the Commission's historical approach should not apply to the proposed prohibited activities rule because it is the domicile of the investor and not the domicile of the private fund that is most important for protecting U.S. investors.[131] The Commission's historical approach applies such that none of the final rules or amendments apply with respect to the offshore fund clients of an SEC-registered offshore adviser.

One commenter stated that the proposed prohibited activities rule and the preferential treatment rule should not apply to an *unregistered* offshore adviser to offshore private funds because the proposal would result in SEC-registered offshore advisers being subject to *less* regulation than offshore ERAs and other offshore unregistered advisers.[132] This commenter stated that the result would be that offshore SEC-registered advisers to offshore funds

[121] Compare the affirmative obligations in rule 204A–1 (requiring SEC-registered investment advisers to, among other things, establish, maintain and enforce a written code of ethics) and rule 206(4)–2 (requiring SEC-registered investment advisers to follow certain practices if they have custody of client funds or securities) *with* the prohibition in rule 206(4)–8 (prohibiting both registered and unregistered investment advisers to pooled investment vehicles from making false or misleading statements to, or otherwise defrauding, investors or prospective investors in those pooled vehicles).

[122] *See, e.g.,* AIMA/ACC Comment Letter (adviser-led secondaries rule); Comment Letter of Standards Board for Alternative Investments (Apr. 25, 2022) (''SBAI Comment Letter'') (adviser-led secondaries rule, quarterly statement rule); Comment Letter of Andrew (Apr. 25, 2022) (quarterly statement rule).

[123] An exempt reporting adviser is an investment adviser that qualifies for the exemption from registration under section 203(l) of the Advisers Act or 17 CFR 275.203(m)–1 (rule 203(m)–1) under the Advisers Act.

[124] Comment Letter of the North American Securities Administrators Association, Inc. (Apr. 25, 2022) (''NASAA Comment Letter'').

[125] *See, e.g.,* AIC Comment Letter II; Comment Letter of the British Private Equity and Venture Capital Association (Apr. 25, 2022) (''BVCA Comment Letter''); PIFF Comment Letter.

[126] *See, e.g.,* Exemptions Adopting Release, *supra* footnote 9, at 77 (Most of the substantive provisions of the Advisers Act do not apply with respect to the non-U.S. clients of a non-U.S. adviser registered with the Commission.); Registration Under the Advisers Act of Certain Hedge Fund Advisers, Investment Advisers Act Release No. 2333 (Dec. 2, 2004) [69 FR 72054, 72072 (Dec. 10, 2004)] (''Hedge Fund Adviser Release'') (stating that the following rules under the Advisers Act would not apply to a registered offshore adviser, assuming it has no U.S. clients: compliance rule, custody rule, and proxy voting rule and stating that the Commission would not subject an offshore adviser to the rules governing adviser advertising [17 CFR 275.206(4)–1], or cash solicitations [17 CFR 275.206(4)–3] with respect to offshore clients). We note that our staff has taken a similar position. *See, e.g.,* American Bar Association, SEC Staff No-Action Letter (Aug. 10, 2006) (confirming that the substantive provisions of the Act do not apply to offshore advisers with respect to those advisers' offshore clients (including offshore funds) to the extent described in those letters and the Hedge Fund Adviser Release); Information Update For Advisers Relying On The Unibanco No-Action Letters, IM Information Update No. 2017–03 (Mar. 2017). Any staff statements cited represent the views of the staff. They are not a rule, regulation, or statement of the Commission. Furthermore, the Commission has neither approved nor disapproved their content. These staff statements, like all staff statements, have no legal force or effect: they do not alter or amend applicable law; and they create no new or additional obligations for any person.

[127] *See, e.g.,* Investment Adviser Marketing, Investment Advisers Act Release No. 5653 (Dec. 22, 2021), at n.200 (''Marketing Release'').

[128] *See* Proposing Release, *supra* footnote 3, at section II.D.

[129] *See* Proposing Release, *supra* footnote 3, at section II.D.

[130] *See, e.g.,* BVCA Comment Letter; Comment Letter of Invest Europe (Apr. 25, 2022) (''Invest Europe Comment Letter''); AIC Comment Letter II; PIFF Comment Letter; AIMA/ACC Comment Letter.

[131] *See, e.g.,* Healthy Markets Comment Letter I; Consumer Federation of America Comment Letter.

[132] AIMA/ACC Comment Letter. *See also* SIFMA–AMG Comment Letter I.

would benefit by avoiding the proposed prohibited activities rule and preferential treatment rule, while unregistered offshore advisers to offshore funds would be subject to these two rules.[133] Other commenters requested clarification that the two rules would not apply to offshore advisers, regardless of their registration status.[134] We agree with commenters and clarify that the restricted activities rule and the preferential treatment rule do not apply to offshore unregistered advisers with respect to their offshore funds (regardless of whether the funds have U.S. investors). This scoping is consistent with our historical treatment of other types of offshore advisers, including ERAs,[135] advisers relying on the foreign private adviser exemption,[136] and other unregistered advisers. One commenter stated that the Commission has historically limited the application of prescriptive rules to offshore advisers.[137] This approach is also consistent with our historical position of not applying substantive provisions of the Advisers Act to SEC-registered offshore advisers with respect to their offshore clients, including private fund clients.[138]

It is appropriate to apply these two rules to all investment advisers, regardless of registration status, because these rules focus on prohibiting advisers from engaging in certain problematic sales practices, conflicts of interest, or compensation schemes.[139] Also, these rules are adopted pursuant to the authority under section 206 of the Advisers Act, which applies to all investment advisers, regardless of registration status.[140]

Several commenters addressed the proposed scope of the prohibited activities rule and the preferential treatment rule, and many commenters supported a narrower scope.[141] For example, one commenter stated that the application of the proposed prohibited activities rule to State-registered advisers would upend the balance of State and Federal authority that the National Securities Markets Improvement Act (''NSMIA'') established.[142] We do not believe that the application of the restricted activities rule and the preferential treatment rule to State-registered advisers and advisers that are otherwise subject to State regulation (*e.g.,* advisers that are exempt from State registration) runs contrary to the lines NSMIA established because we are adopting these two rules under sections 206 and 211 of the Advisers Act, which sections apply to all advisers.[143] Commission rules adopted using this authority, accordingly, may apply to all advisers, regardless of their registration status.[144] In contrast, other commenters either supported the scope of the rules as proposed or supported an even broader scope.[145]

We are not narrowing the scope of the restricted activities and preferential treatment rules to exclude ERAs, State-regulated advisers, advisers relying on the foreign private adviser exemption, or advisers that are otherwise unregistered. The sales practices, conflicts of interest, and compensation schemes addressed by the restricted activities rule and the preferential treatment rule can lead to advisers placing their interests ahead of their clients' (and, by extension, their investors') interests, and can result in significant harm to the private fund and its investors. As a result, all of these advisers are subject to the restricted activities rule and the preferential treatment rule. A number of our enforcement cases against advisers to private funds based on conflicts of interests have been brought against advisers that are not registered under the Advisers Act,[146] and we believe this demonstrates a need to apply these rules to unregistered private fund advisers.[147]

Investment Advisers to Securitized Asset Funds

The final quarterly statement, restricted activities, adviser-led secondaries, preferential treatment, and audit rules do not apply to investment advisers with respect to securitized asset funds (we refer to these advisers,

[133] AIMA/ACC Comment Letter.

[134] *See, e.g.,* BVCA Comment Letter; Invest Europe Comment Letter.

[135] *See* Exemptions Adopting Release, *supra* footnote 9, at 77 (stating that disregarding an offshore adviser's activities for purposes of the private fund adviser exemption reflects our long-held view that non-U.S. activities of non-U.S. advisers are less likely to implicate U.S. regulatory interests and that this territorial approach is in keeping with general principles of international comity); *see also id. at* 96 (stating that non-U.S. advisers relying on the private fund adviser exemption are subject to the Advisers Act antifraud provisions).

[136] Section 402 of the Dodd-Frank Act; section 202(a)(30) of the Advisers Act.

[137] BVCA Comment Letter.

[138] BVCA Comment Letter, *See* Hedge Fund Adviser Release, *supra* footnote 126, at section II.D.4.c.

[139] *See* section 211(h)(2) of the Advisers Act. Section 211(h)(2) of the Advisers Act applies to SEC- and State-registered advisers as well as other advisers that are exempt from registration and advisers that are prohibited from registering under the Advisers Act.

[140] *See* 2019 IA Fiduciary Duty Interpretation, *supra* footnote 5, at n.3 (stating that section 206 of the Advisers Act applies to SEC- and State-registered advisers as well as other advisers that are exempt from registration and advisers that are prohibited from registering under the Advisers Act).

[141] *See, e.g.,* Comment Letter of the Investment Adviser Association (Apr. 25, 2022) (''IAA Comment Letter II'') (arguing that the prohibited activities rule should not apply to State-registered advisers or ERAs, regardless of whether they are onshore or offshore); Comment Letter of Schulte Roth & Zabel LLP (Apr. 25, 2022) (''Schulte Comment Letter'') (arguing that the prohibited activities rule and preferential treatment rule should not apply to unregistered advisers); AIMA/ACC Comment Letter (arguing that all of the rules should not apply to ERAs and advisers relying on the foreign private adviser exemption); SBAI Comment Letter (arguing that the prohibited activities rule should only apply to SEC RIAs).

[142] IAA Comment Letter II.

[143] Moreover, this approach is consistent with the historical scope of section 206 of the Advisers Act, which was enacted before, and was unchanged by, the enactment of NSMIA.

[144] Rule 206(4)–8 under the Advisers Act, for example, was adopted under section 206(4) and applies to all unregistered advisers, including State-registered advisers. *See* Prohibition of Fraud Adopting Release, *supra* footnote 67), at 7, n.16 (''[o]ur adoption of [rule 206(4)–8] will not alter our jurisdictional authority''). *See also* Comment Letter of NASAA on Prohibition of Fraud by Advisers to Certain Pooled Investment Vehicles; Accredited Investors in Certain Private Investment Vehicles (Dec. 27, 2006) (''NASAA supports the application of the proposed rule to advisers registered or required to register at the state level.'').

[145] *See, e.g.,* NASAA Comment Letter (stating that ''the Proposal appropriately prohibits these activities for all PFAs [private fund advisers], not only those registered or required to be registered with the SEC''); Healthy Markets Comment Letter I; Consumer Federation of America Comment Letter (both stating that the prohibited activities rule should also apply with respect to an offshore private fund managed by an offshore SEC-registered investment adviser where such fund has U.S. investors).

[146] *See, e.g., In the Matter of SparkLabs Global Ventures Management, LLC,* Investment Advisers Act Release No. 6121 (Sept. 12, 2022) (settled action) (alleging unregistered advisers that managed private funds breached their fiduciary duty by causing private fund clients to lend to each other in violation of the funds' governing documents and failing to disclose conflicts of interest to the funds); *In the Matter of Augustine Capital Management, LLC,* Investment Advisers Act Release No. 4800 (Oct. 26, 2017) (settled action) (alleging unregistered private fund adviser caused the fund client to engage in conflicted transactions, including investments and loans, without disclosure to or consent by investors); *In the Matter of Alumni Ventures Group, LLC,* Investment Advisers Act Release No. 5975 (Mar. 4, 2022) (settled action) (alleging exempt reporting adviser that managed private funds breached its fiduciary duty by causing private fund clients to lend to each other in violation of the funds' governing documents and failing to disclose conflicts of interest to the fund investors).

[147] This approach is consistent with another rule adopted under section 206 of the Advisers Act, rule 206(4)–5, which applies to SEC-registered advisers, advisers relying on the foreign private adviser exemption, and ERAs. Rule 206(4)–5 was intended to combat pay-to-play arrangements in which advisers are chosen based on their campaign contributions to political officials rather than on merit. Rule 206(4)–5 applies to an investment adviser registered (or required to be registered) with the Commission or unregistered in reliance on the exemption available under section 203(b)(3) of the Advisers Act, or that is an exempt reporting adviser, as defined in rule 17 CFR 275.204–4(a) under the Advisers Act.

solely with respect to the securitized asset funds they advise, as ''SAF advisers''). These advisers will not be required to comply with the requirements of the final rules solely with respect to the securitized asset funds (''SAFs'') that they advise.[148]

Some commenters requested for all or some of the proposed rules not to apply to advisers to securitization vehicles or vehicles that issue asset-backed securities (in particular, collateralized loan obligations (''CLOs'')).[149] One commenter stated that the Commission did not identify specific concerns with SAFs, the rules were generally not applicable to SAFs, and that the rules did not address or contemplate the critical differences between these types of vehicles and other private funds.[150] Another commenter stated that, although SAFs are private funds, their structure and purpose are sufficiently distinct from other types of funds that their advisers should be exempt from the rules.[151] This commenter stated that SAFs are unlike private funds in several ways, including because: (i) SAFs do not issue equity but rather issue notes at various seniorities that entitle holders to interest payments and ultimate repayment of principal; (ii) SAFs do not have general partners affiliated with their advisers but rather have unaffiliated trustees as fiduciary agents of the SAF investors; and (iii) their notes are held in street name and traded such that an adviser does not necessarily know who the noteholders are.[152]

After considering comments, we are not applying the five private fund adviser rules to SAF advisers.[153] This approach avoids subjecting SAF advisers to obligations that were designed to address conduct we have observed in other parts of the private fund advisers industry, including with respect to advisers to hedge funds, private equity funds, venture capital funds, real estate funds, credit funds, hybrid funds, and other non-securitized asset funds (''non-SAF advisers''). We believe that the certain distinguishing structural and operational features of SAFs have together deterred SAF advisers from engaging in the type of conduct that the final rules seek to address. We also believe that the advisory relationship for SAF advisers and their clients presents different regulatory issues than the advisory relationship for non-SAF advisers and their clients. The final rules generally are not designed to take into account these differences, which together sufficiently distinguish SAFs from other types of private funds to warrant this approach.[154] As a result, we do not believe that the private fund adviser rules we are adopting here are the appropriate tool to regulate SAF advisers.

Definition of Securitized Asset Fund

The final rule will define SAF as ''any private fund whose primary purpose is to issue asset backed securities and whose investors are primarily debt holders.'' [155] This definition, which is based on the corresponding definition for ''securitized asset fund'' in Form PF and Form ADV, is designed to capture vehicles established for the purpose of issuing asset backed securities, such as collateralized loan obligations. SAFs are special purpose vehicles or other entities that ''securitize'' assets by pooling and converting them into securities that are offered and sold in the capital markets. The definition therefore will not capture traditional hedge funds, private equity funds, venture capital funds, real estate funds, and credit funds.[156] These private funds should not meet the definition because they typically have primarily equity investors, rather than debt investors, and/or they do not have a primary purpose of issuing asset backed securities. It is appropriate to apply the final rules to advisers with respect to these private funds because they present the concerns the final rules seek to address (*i.e.,* lack of transparency, conflicts of interest, and lack of governance).

In the context of requesting that the rule not apply with respect to collateralized loan obligations, one commenter stated that the final rule should use the following definition: any special purpose vehicle advised by an investment adviser that (A) (i) issues tradeable asset-backed securities or loans, the debt tranches of which are rated; and (ii) has at least 80% of its assets comprised of leveraged loans and cash equivalents; (B) is required by its governing transaction documents to appoint an unaffiliated person to, among other things, (i) calculate certain overcollateralization and interest coverage tests; (ii) prepare and make available to investors reports on the CLO, and (iii) make the indenture readily available to investors; and (C) appoints an independent accounting firm to perform a series of agreed upon procedures. Another commenter, when requesting exemptions or other relief from the rules, generally referred to these vehicles as ''special purpose vehicles that issue asset backed securities,'' while another commenter used the term ''collateralized loan obligations and similar credit securitization products.''

The definition in the final rule will include the types of funds described by these commenters. The definition of SAFs in the final rule, however, is one that many advisers are familiar with because it is used in both Form PF and Form ADV. For example, Item 7.B. and Schedule D of Form ADV ask whether the private fund is a securitized asset

[148] If an investment adviser that is a SAF adviser also advises other private funds that are not securitized asset funds, the investment adviser will be subject to the final rules with respect to such other private funds.

[149] *See* Comment Letter of Ropes & Gray LLP (Apr. 25, 2022) (''Ropes & Gray Comment Letter''); LSTA Comment Letter; SIFMA–AMG Comment Letter I; Comment Letter of Teachers Insurance and Annuity Association of America (Apr. 25, 2022) (''TIAA Comment Letter''); Comment Letter of Fixed Income Investor Network (Apr. 29, 2022) (''Fixed Income Investor Network Comment Letter''); PIFF Comment Letter; Comment Letter of Structured Finance Association (Apr. 25, 2022) (''SFA Comment Letter I''). Although commenters generally focused on the application of the proposed rules to CLOs, certain commenters clarified that their comments applied also more broadly to securitization vehicles and vehicles that issue asset-backed securities. *See* LSTA Comment Letter; SFA Comment Letter I; SIFMA–AMG Comment Letter I; PIFF Comment Letter.

[150] *See* LSTA Comment Letter.

[151] *See* Ropes & Gray Comment Letter.

[152] *See id.*

[153] Except as specified, we are not altering the applicability of the Advisers Act, or any rules adopted thereunder, to SAF advisers. For example, Section 206 and rule 206(4)-8 will continue to apply to SAF advisers with respect to SAFs (and any other private funds) they advise. We are also not limiting the scope of advisers subject to the Advisers Act compliance rule and thus all SEC-registered advisers, including SEC-registered SAF advisers, must document the annual review of their compliance policies and procedures in writing.

[154] We will, however, continue to consider whether any additional regulatory action may be necessary with respect to SAF advisers in the future.

[155] *See* final rule 211(h)(1)–1.

[156] We recognize that certain private funds have, in recent years, made modifications to their terms and structure to facilitate insurance company investors' compliance with regulatory capital requirements to which they may be subject. These funds, which are typically structured as rated note funds, often issue both equity and debt interests to the insurance company investors, rather than only equity interests. Whether such rated note funds meet the SAF definition depends on the facts and circumstances. However, based on staff experience, the modifications to the fund's terms generally leave ''debt'' interests substantially equivalent in substance to equity interests, and advisers typically treat the debt investors substantially the same as the equity investors (*e.g.,* holders of the ''debt'' interests have the same or substantially the same rights as the holders of the equity interests). We would not view investors that have equity-investor rights (*e.g.,* no right to repayment following an event of default) as holding ''debt'' under the definition, even if fund documents refer to such persons as ''debt investors'' or they otherwise hold ''notes.'' Further, we do not believe that many rated note funds will meet the other prong of the definition (*i.e.,* a private fund whose primary purpose is to issue asset backed securities), because they generally do not issue asset-backed securities.

fund or another type of private fund, such as a hedge fund or private equity fund.[157] Also, under Form PF, certain advisers to securitized asset funds are required to complete Section 1, which requires an adviser to report certain identifying information about itself and the private funds it advises.[158] We also chose this definition because it captures the core characteristics that differentiate these vehicles from other types of private funds: vehicles that issue asset-backed securities collateralized by an underlying pool of assets and that have primarily debt investors. Thus, as discussed above, traditional private funds, would not meet this definition.[159]

Distinguishing SAF Characteristics and Features

Although SAFs generally rely on the same exclusions from treatment as an ''investment company'' under the Investment Company Act as other types of private funds (*i.e.,* sections 3(c)(1) and (7) thereunder), we agree with commenters that certain fundamental structural and operational differences together sufficiently distinguish them from other types of private funds to warrant carving them out of the final rules. These fundamental differences, when considered in combination with the existing governance and transparency requirements of SAFs, would cause much of the rules to be generally inapplicable and/or ineffective with respect to achieving the rulemaking's goals. Below we provide examples of these distinguishing features and how they relate to certain aspects of the final rules.

We agree with commenters that SAFs have structural features that distinguish them from most other private funds that are relevant in assessing the benefit of an audit to investors. Commenters stated that Generally Accepted Accounting Principles (''GAAP'') financial statements are not typically considered relevant for SAFs.[160] One commenter stated that GAAP's efforts to assign, through accruals, a period to a given expense or income are not useful, and potentially confusing, for SAF investors because principal, interest, and expenses of administration of assets can only be paid from cash received.[161] We recognize that vehicles that issue asset-backed securities are specifically excluded from other Commission rules that require issuers to provide audited GAAP financial statements.[162] Previously, we have stated that GAAP financial information generally does not provide useful information to investors in asset-backed securities.[163] Instead, SAF and other asset-backed securities investors have historically been interested in information regarding characteristics and quality of the underlying assets used to pay the notes issued by the issuer, the standards for the servicing of the underlying assets, the timing and receipt of cash flows from those assets, and the structure for distribution of those cash flows.[164] We continue to believe that GAAP financial statements may be less useful to SAF investors than they are for non-SAF investors.

SAFs also have features that distinguish them from most other private funds that are relevant in assessing the benefit of the preferential treatment rule. Based on staff experience, SAFs typically issue primarily tradeable, interest-bearing debt securities backed by income-producing assets, unlike other private funds that typically issue equity securities to investors. These debt securities are typically structured as notes and issued in different tranches to investors. The tranches offer different priority of payments subject to a ''waterfall'' and defined levels of risk with upside participation caps or limits, which are compensated through the payment of increasing coupon rates on the more subordinated notes. Unlike investors in other private funds, the noteholders are similarly situated with all of the other noteholders in the same tranche and they cannot redeem or ''cash in'' their note ahead of other noteholders in the same tranche. As a result, in our experience, this structure has generally deterred investors from requesting, and SAF advisers from granting, preferential treatment. Thus, we do not believe that preferential treatment for SAFs presents the same conflicts of interest and investor protection concerns as it does for non-SAF funds.

We also believe that the quarterly statement would generally not provide meaningful information for SAF investors. For example, some commenters highlighted that the performance information required to be included in private fund quarterly statements would generally not constitute relevant or useful information for SAF investors, because the performance of a SAF, as a cash flow investment vehicle, primarily depends on the cash proceeds it realizes from its portfolio assets, as opposed to an increase in the value of its portfolio assets.[165] These commenters stated that, instead of the performance metrics required for liquid or illiquid funds under the rules, a yield performance metric and/or information regarding the SAF's cash distributions to investors (as well as its ability to make future cash distributions) would more appropriately reflect the specific cash flow structure of a SAF investment; and these commenters pointed out that SAF investors already receive this information, which is generally required to be periodically reported to investors in detail in accordance with a SAF's securitization transaction agreement. We agree with commenters that the required performance metrics would be less useful to SAF investors than they are for non-SAF investors, particularly in light of the detailed information that SAF investors are generally already required to receive. For example, because the performance reporting would report performance at the SAF level, but investors sit in different tranches along the SAF's distribution waterfall with different risk/return profiles, the required performance reporting would likely be uninformative with respect to any specific tranche.

As another example, the ''distribution'' requirements under the final rules would likely be impracticable for most SAF advisers. Unlike other private funds that are primarily purchased, with respect to U.S. persons, through a primary issuance pursuant to Regulation D, which generally restricts a security's transferability and does not contemplate an investor's resale of the security to a third party, SAF interests

[157] *See* Form ADV, Section 7.B.(1) and Schedule D Private Fund Reporting, Question 10.

[158] See Form PF, Section 1a, Question 3.

[159] We would also not view, depending on the facts and circumstances, private credit funds that borrow from third party lenders to enhance performance with fund-level leverage and invest in underlying loans alongside the equity investors as meeting this definition, even if they borrow an amount greater than the value of the equity interests they issue.

[160] *See* LSTA Comment Letter; SFA Comment Letter I; Fixed Income Investor Network Comment Letter; TIAA Comment Letter. This view by commenters is consistent with the low rate of audits of U.S. GAAP financial statements for SAFs. However, approximately 10% of SAFs do get audits of U.S. GAAP financial statements from independent auditors that are Public Company Accounting Oversight Board (''PCAOB'')-registered and -inspected. *See infra* section VI.C.1. Advisers to these funds would not be prohibited under the final rules from continuing to cause the fund to undergo such an audit of U.S. GAAP financial statements.

[161] *See* LSTA Comment Letter.

[162] *See* Asset-Backed Securities, Securities Act Release No. 8518 (Dec. 22, 2004) (adopting disclosure requirements for asset-backed securities issuers) (*https://www.sec.gov/rules/final/33-8518.htm*).

[163] *See id.*

[164] *See id.*

[165] *See* LSTA Comment Letter; SFA Comment Letter I; SIFMA–AMG Comment Letter I; TIAA Comment Letter.

are primarily purchased in the United States through a primary issuance and subsequently resold and traded on the secondary market by qualified institutional buyers pursuant to Regulation 144A. Because SAF interests are, unlike interests in other types of private funds, primarily traded on the secondary market, the interests are generally held in street name by broker-dealers on behalf of the fund's investors, who are, accordingly, not generally known by the fund or its investment adviser. To address delivery obligations under the fund documents, a SAF's independent collateral administrator typically establishes a website that is accessible by noteholders where their required reports are furnished, in accordance with the terms of the securitization transaction agreement. As a result, a SAF adviser may not have the necessary contact information for each noteholder of the SAF to satisfy the distribution requirements.

Finally, SAF advisers often have a more limited role in the management of a private fund, and SAFs or their sponsors typically engage more independent service providers than non-SAF funds. The primary role of an adviser to a SAF is, in many cases, to select and monitor the fund's pool of assets in compliance with certain portfolio requirements and quality tests (such as overcollateralization, diversification, and interest coverage tests) that are set forth in the fund's securitization transaction agreements. In many cases, the SAF's transaction agreement appoints an independent trustee to serve as custodian for the underlying investments. The trustee and collateral administrator are typically responsible for preparing detailed monthly and quarterly reports for the investors regarding the SAF's assets and expenses. We believe that these structural protections provide an important check on the adviser's activity or otherwise limit the actions the adviser can take to harm investors.

For the reasons described above, we believe it is appropriate not to apply all five private fund adviser rules to advisers with respect to SAFs they advise.

B. Quarterly Statements

Section 211(h)(1) of the Act states that the Commission shall facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with brokers, dealers, and investment advisers, including any material conflicts of interest. The quarterly statement rule is designed to facilitate the provision of simple and clear disclosures to investors regarding some of the most important and fundamental terms of their relationships with investment advisers to private funds in which those investors invest—namely what fees and expenses those investors will pay and what performance they receive on their private fund investments. These disclosures will allow investors to better understand their private fund investments and the terms of their relationship with the adviser to those funds.

Several commenters stated that section 211(h)(1) of the Act does not authorize the quarterly statement rule because details about past performance of funds and fees paid to the adviser are not terms of the relationship between investors and advisers.[166] However, section 211(h)(1) of the Act does not limit a ''term'' of the relationship only to the provisions in a contract, as these commenters assert.[167] In the private fund context, it is the adviser or its affiliated entities that generally draft the private fund's private placement memorandum and governing documents,[168] negotiate fund terms[169] with the private fund investors, manage the fund, charge and/or allocate fees and expenses to the private fund which are then paid by the private fund investors, and calculate and present performance information to the private fund investors. In this context, fees and performance are essential to the relationship between an investor and an adviser. The method used to calculate fees is typically set forth in the fund contracts. However, based on Commission staff experience, fee and performance disclosures are often not simple or clear, and investors may have difficulty understanding them. As a result, advisers have overcharged certain fees without investors recognizing it immediately.[170]

Similarly, performance is a crucial term of the relationship between an adviser and investors. Performance is implicitly or explicitly part of the terms of many fund contracts to the extent that advisers are often compensated in part based on the performance of the private fund.[171] The amount, calculation, and timing of performance compensation are often negotiated by the adviser and the investors and form the core economic term of their relationship.

Calculating performance is also complicated, and methods generally differ among advisers. Without comparable performance metrics and methodologies, it can be unclear how different advisers perform against one another. Performance calculations also generally are the product of many assumptions and criteria, such as the manner in which management fee rates are applied. Without simple and clear disclosures of such assumptions and criteria, investors are at a disadvantage with respect to understanding or being able to verify how their investments are performing.[172]

Section 206(4) of the Act gives the Commission the authority to prescribe means reasonably designed to prevent fraud, deception, and manipulation. The quarterly statement rule is reasonably designed to prevent fraud, deception, and manipulation because it requires advisers to provide timely and consistent disclosures that will improve the ability of investors to assess and monitor fees, expenses, and performance. This will decrease the likelihood that investors will be defrauded, deceived, or manipulated because they will be in a better position to monitor the adviser and their respective investments, and it increases the likelihood that any such misconduct will be detected sooner.[173] Moreover, the fee, expense and performance information in the quarterly statement will improve investors' ability to evaluate the adviser's conflicts of interest with respect to the fees and

[166] *See, e.g.,* AIC Comment Letter I; Comment Letter of the National Venture Capital Association (Apr. 25, 2022) (''NVCA Comment Letter I''); Citadel Comment Letter.

[167] *See, e.g.,* AIC Comment Letter I; Citadel Comment Letter.

[168] Including, for many types of private funds, the private fund operating agreement to which the adviser or its affiliate and the private fund investors are typically both parties.

[169] Such fund terms include, for example, the formulas that determine the amount of carried interest and management fees paid to the adviser in addition to other key terms such as the length of the life of the fund and the mechanics of fund governance.

[170] *See, e.g., In re Global Infrastructure Management, LLC, supra* footnote 30 (alleging private fund adviser failed to properly offset management fees to private equity funds it managed and made false and misleading statements to investors and potential investors in those funds concerning management fee offsets); *In the Matter of ECP Manager LP,* Investment Advisers Act Release No. 5373 (Sept. 27, 2019) (settled action) (alleging that private equity fund adviser failed to apply the management fee calculation method specified in the limited partnership agreement by failing to account for write downs of portfolio securities causing the fund and investors to overpay management fees).

[171] This includes the private fund operating agreement to which the adviser or its affiliate and private fund investors are typically both parties.

[172] Put simply, performance is key to the terms of the relationship between private fund investors and advisers because private fund investors pay advisers to seek to generate investment returns, and performance information allows investors to assess how an adviser is fulfilling that obligation.

[173] *See infra* footnotes 177–178 (providing examples of misconduct relating to fees, expenses, and performance).

expenses charged to the fund by the adviser and the performance metrics that the adviser presents to investors.[174]

Several commenters stated that Commission, in the proposal, failed to define a fraudulent, deceptive, or manipulative act as required by section 206(4) of the Act.[175] Another commenter stated that the Commission, in the proposal, failed to connect the proposed reporting requirements to any actual fraudulent act.[176] To the contrary, the quarterly statement is designed to prevent fraudulent, deceptive, or manipulative practices, including ones we have observed.[177] For example, if an adviser is charging investors a management fee and simultaneously charging a portfolio company a monitoring or similar fee without disclosing that fee to investors, we would view that as fraudulent or deceptive because it involves an undisclosed conflict in breach of fiduciary duty.[178] Similarly, if an adviser is knowingly using off-market assumptions (such as highly irregular valuation practices that are not used by similarly-situated advisers) when calculating performance without disclosing such to investors, we would view that practice as deceptive.

The rule requires an investment adviser that is registered or required to be registered with the Commission to prepare a quarterly statement that includes certain information regarding fees, expenses, and performance for any private fund that it advises and distribute the quarterly statement to the private fund's investors, unless a quarterly statement that complies with the rule is prepared and distributed by another person.[179] If the private fund is not a fund of funds, then a quarterly statement must be distributed within 45 days after the end of each of the first three fiscal[180] quarters of each fiscal year and 90 days after the end of each fiscal year.[181] If the private fund is a fund of funds, then a quarterly statement must be distributed within 75 days after the first, second, and third fiscal quarter ends and 120 days after the end of the fiscal year of the private fund.

Many commenters supported the quarterly statement rule as proposed and agreed that it would provide increased transparency to private fund investors who may not currently receive sufficiently detailed, comprehensible, or regular fee, expense, and performance information for each of their private fund investments.[182] These commenters generally indicated that the quarterly statement rule would provide increased comparability between private funds and accordingly would enable private fund investors to make more informed investment decisions, as well as potentially lead to increased competitive market pressures on the costs of investing in private funds. Some commenters indicated that the rule's establishment of a required baseline of recurring reporting would allow investors to focus their negotiation priorities with private fund advisers on other matters, such as fund governance, and could also provide investors with greater confidence when choosing to allocate capital to private fund investments.[183] One commenter suggested that the quarterly statement requirement would particularly help smaller or less sophisticated investors who may receive less timely or complete information than investors that possess greater negotiating power.[184] Other commenters did not support this quarterly statement rule (or parts of the rule, as discussed below).[185] Of these commenters, a number suggested that this quarterly statement requirement would increase costs for private funds that would ultimately be passed on to investors.[186] Some commenters stated that the quarterly statement rule may not provide meaningful information or would confuse investors because the required information would not be personalized to investors, may not be appropriate for certain types of private funds, or may differ from other information already provided to private fund investors.[187] Other commenters stated that the rule is unnecessary and duplicative, as advisory firms already provide similar or otherwise sufficient reporting, and investors are generally able to negotiate for and receive additional disclosure that may be appropriate for their particular needs.[188]

---

[174] *See supra* section I (discussing conflicts of interest).

[175] *See, e.g.,* AIC Comment Letter I; NVCA Comment Letter.

[176] *See* Citadel Comment Letter.

[177] *See, e.g., In the Matter of Sabra Capital Partners, LLC and Zvi Rhine,* Investment Advisers Act Release No. 5594 (Sept. 25, 2020) (settled order) (alleging that, among other things, an investment adviser misrepresented the performance of a fund it advised in updates sent to the fund's limited partners); *In the Matter of Finser International Corporation and Andrew H. Jacobus,* Investment Advisers Act Release No. 5593 (Sept. 24, 2020) (settled order) (alleging that, among other things, an investment adviser charged a fund it advised performance fees contrary to representations made in the fund's private placement memorandum); *In the Matter of Omar Zaki,* Investment Advisers Act Release No. 5217 (Apr. 1, 2019) (settled order) (alleging that, among other things, an investment adviser repeatedly misled investors in a fund it advised about fund performance); *In the Matter of Corinthian Capital Group, LLC, Peter B. Van Raalte, and David G. Tahan,* Investment Advisers Act Release No. 5229 (May 6, 2019) (settled order) (alleging that, among other things, an investment adviser failed to apply a fee offset to a fund it advised and caused the same fund to overpay organizational expenses); *In the Matter of Aisling Capital LLC,* Investment Advisers Act Release No. 4951 (June 29, 2018) (settled order) (alleging an investment adviser failed to apply a specified fee offset to a fund it advised contrary to the fund's limited partnership agreement and private placement memorandum).

[178] *See, e.g., In the Matter of Monomoy Capital Management, L.P.,* Investment Advisers Act Release No. 5485 (Apr. 22, 2020) (settled action); *In the Matter of WCAS Management Corporation,* Investment Advisers Act Release No. 4896 (Apr. 24, 2018) (settled action); *In the Matter of Fenway Partners, LLC, et. Al.,* Investment Advisers Act Release No. 4253 (Nov. 3, 2015) (settled action).

[179] Final rule 211(h)(1)–2.

[180] *See infra* section II.B.3 for a discussion of the change to fiscal time periods for the quarterly statement rule.

[181] Final rule 211(h)(1)–2.

[182] *See, e.g.,* Comment Letter of National Education Association and American Federation of Teachers (Apr. 12, 2022) (''NEA and AFT Comment Letter''); Comment Letter of the American Federation of Teachers New Mexico (Apr. IFT Comment Letter Comment Letter of the National Conference on Public Employee Retirement Systems (Apr. 25, 2022) (''NCPERS Comment Letter''); Better Markets Comment Letter; Comment Letter of Ohio Federation of Teachers (Apr. 25, 2022) (''OFT Comment Letter''); Comment Letter of American Federation of State, County and Municipal Employees (Apr. 25, 2022) (''AFSCME Comment Letter''); Consumer Federation of America Comment Letter; Public Citizen Comment Letter; Comment Letter of National Council of Real Estate Investment Fiduciaries (Apr. 25, 2022) (''NCREIF Comment Letter''); Comment Letter of New York State Insurance Fund (Apr. 25, 2022) (''NYSIF Comment Letter''); NYC Comptroller Letter; Comment Letter of AFL–CIO (Apr. 25, 2022) (''AFL–CIO Comment Letter''); Comment Letter NASAA Comment Letter.

[183] *See, e.g.,* DC Retirement Board Comment Letter; ILPA Comment Letter I; Comment Letter of National Electrical Benefit Fund Investments (Apr. 25, 2022) (''NEBF Comment Letter''); OPERS Comment Letter.

[184] *See* Healthy Markets Comment Letter I.

[185] *See, e.g.,* Comment Letter of Andreessen Horowitz (June 15, 2022) (''Andreessen Comment Letter''); NVCA Comment Letter; SIFMA–AMG Comment Letter I.

[186] *See, e.g.,* IAA Comment Letter II; AIC Comment Letter I; Comment Letter of Roubaix Capital (Apr. 12, 2022) (''Roubaix Comment Letter'').

[187] *See, e.g.,* AIC Comment Letter I; IAA Comment Letter II; Ropes & Gray Comment Letter.

[188] *See, e.g.,* AIMA/ACC Comment Letter; Comment Letter of Dechert LLP (Apr. 25, 2022) (''Dechert Comment Letter''); AIC Comment Letter I. One commenter stated that the Commission made no attempt to review the investor disclosures provided by open-end funds in order to evaluate whether the proposal would meaningfully increase transparency. *See* Citadel Comment Letter. On the contrary, Commission staff regularly reviews open- and closed-end fund investor disclosures as part of the Commission's examination program and that experience informs this rulemaking. *See, e.g.,* OCIE National Examination Program Risk Alert: Observations from Examinations of Investment Advisers Managing Private Funds (June 23, 2020) (''EXAMS Private Funds Risk Alert 2020''), *available at https://www.sec.gov/files/*

Continued

As stated elsewhere, we have observed that private fund investments are often opaque; advisers frequently do not provide investors with sufficiently detailed information about private fund investments.[189] Without sufficiently clear, comparable information, even sophisticated investors may be unable to protect their interests or make sound investment decisions. Accordingly, we are adopting the quarterly statement rule, in part, because of the lack transparency in key areas including private fund fees and expenses, performance, and conflicts of interest.

While we acknowledge that quarterly statements may increase costs, we believe these costs are justified in light of the benefits of the rule.[190] As discussed above, investors will benefit from increased transparency into the fees and expenses charged to the fund, as well as the conflicts they present, on a timely basis. Investors will also benefit from mandatory timely updates regarding fund performance if they were not already receiving them.[191] We also disagree with commenters' concerns regarding quarterly statements failing to provide meaningful information. The quarterly statement will present a baseline level of information in a clear format and will help private fund investors to monitor and assess the true cost of their investments better. For example, the enhanced cost information may allow an investor to identify when the private fund has incorrectly, or improperly, assessed a fee or expense by the adviser. We also disagree with certain commenters' concerns that the quarterly statement may not be appropriate for certain types of private funds. We believe that the fee, expense, and performance information required in the quarterly statement is a fundamental disclosure that is relevant to all types of private funds.

Moreover, we anticipate the costs of compliance with this rule may be of limited magnitude in light of the fact that many private fund advisers already maintain and, in many cases, already disclose similar information to investors.[192] Relatedly, we acknowledge that many private fund advisers contractually agree to provide fee, expense, and performance reporting to investors already. However, not all private fund investors are able to obtain this information. Other investors may be able to obtain relevant information, but the information may not be sufficiently clear or detailed regarding the costs and performance of a particular private fund to enable an investor to understand, monitor and make informed investment decisions regarding its private fund investments. For instance, some advisers report only aggregated expenses, or do not provide detailed information about the calculation and implementation of any negotiated rebates, credits, or offsets, which does not allow an investor to identify the actual extent and/or types of costs incurred and to evaluate their validity. Other investors may not have sufficient information regarding private fund fees and expenses in part because those fees and expenses have varied presentations across private funds and are subject to complicated calculation methodologies, which similarly prevents an investor from meaningfully assessing those fees and expenses and comparing private fund investments. Private fund investors are increasingly interested in more disclosure regarding private fund performance, including transparency into the calculation of the performance metrics.[193] Providing investors with simple and clear disclosures regarding fees, expenses, and performance will allow investors to understand better their private fund investments and the terms of their relationship with the adviser.[194]

We also disagree with commenters that suggested the quarterly statement would confuse investors. For example, some commenters asserted that standardized quarterly statement disclosures could confuse investors because the required information may not reflect an investor's actual, particularized investment experience in a fund.[195] However, investors will benefit from receiving a baseline level of simple and clear disclosures regarding fee, expenses, and performance. For example, private fund advisers currently use different metrics and specifications for calculating performance, which makes it difficult for investors to compare information across funds and advisers, even when advisers disclose the assumptions they used. More standardized requirements for performance metrics will allow private fund investors to compare more easily the returns of similar fund strategies over different market environments and over time. Simple and clear information about costs and performance that is provided on a regular basis will help an investor better decide whether to continue the terms of its relationship with the adviser, whether to remain invested in a particular private fund where the fund allows for withdrawals and redemptions, whether to invest in private funds managed by the adviser or its related persons in the future, and how to invest other assets in the investor's portfolio.

Certain commenters argued that the quarterly statement requirement would be particularly burdensome for small and emerging advisers.[196] We first observe that the quarterly statement rule is only applicable to investment advisers that are registered or required to be registered with the Commission. Thus, some private fund advisers, including those solely advising less than $150 million private fund assets under management and those with less than $100 million in regulatory assets under management registered with, and subject to examination by the States, will not be subject to the quarterly statement rule. Second, we understand that firms vary in the extent to which they devote resources specifically to compliance. It is important for all investors in private funds advised by SEC-registered advisers to receive sufficiently detailed, comprehensible, and regular information to enable investors to monitor whether fees and expenses are being mischarged and to ensure that accurate performance information is being clearly presented. We view sufficient fee, expense, and performance information under the rule as together forming, and each as an essential component of, the basic set of information that is generally necessary for private fund investors to evaluate accurately and confidently their private

Private%20Fund%20Risk%20Alert_0.pdf. As of Dec. 17, 2020, the Office of Compliance, Inspections and Examinations (''OCIE'') was renamed the Division of Examinations (''EXAMS'').

[189] *See* Proposing Release *supra* footnote 3, at n. 9–11.

[190] *See infra* section VI.D.2.

[191] Furthermore, even if investors are already receiving timely updates regarding fund performance for the funds in which they are currently invested, they may also benefit from no longer needing to expend resources negotiating for it for funds in which they wish to invest in the future. As the quarterly statement rule requires this baseline of performance information, investors will be able to focus their resources on negotiating for more bespoke reporting or other important rights in new funds.

[192] *See infra* sections VI.C.3, VI.D.2.

[193] *See, e.g.,* GPs feel the strain as LPs push for more transparency on portfolio performance and fee structures, Intertrust Group (July 6, 2020), *available at https://www.intertrustgroup.com/news/gps-feel-the-strain-as-lps-push-for-more-transparency-on-portfolio-performance-and-fee-structures/*; ILPA Principals 3.0, (2019), at 36 ''Financial and Performance Reporting'' and ''Fund Marketing Materials,'' *available at https://ilpa.org/wp-content/flash/ILPA%20Principles%203.0/?page=36.*

[194] Section 211(h)(1) of the Advisers Act directs the Commission to facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with investment advisers.

[195] *See, e.g.,* AIC Comment Letter I; IAA Comment Letter II.

[196] *See, e.g.,* AIC Comment Letter I; Lockstep Ventures Comment Letter; SBAI Comment Letter.

fund investments. Accordingly, we are not providing any exemptions to the quarterly statement rule for small or emerging advisers.

In addition to general comments on the proposed quarterly statement rule, commenters made specific suggestions or sought clarification on discrete parts of the proposal.[197] One commenter asked the Commission to clarify that investors may negotiate reporting in addition to what is required in the quarterly statements.[198] We confirm that the quarterly statements represent a baseline level of reporting that is required for covered private fund advisers. The quarterly statement rule itself does not restrict or limit the kinds of additional reporting for which private fund investors may negotiate.

Some commenters suggested that we require investor-specific or class-specific reporting in addition to fund-level reporting.[199] While we recognize the utility to investors of investor-level reporting, we do not believe that requiring investor-level reporting in quarterly statements is essential to this rulemaking. First, the quarterly statements are designed, in part, to allow individual private fund investors to use fund-level information to perform the types of personalized or otherwise customized calculations that underlie investor-specific reporting. Second, we understand that, even if private fund advisers provide investors with investor-specific reporting, many investors would still need to perform personalized or otherwise customized calculations to satisfy their own internal requirements.[200] Third, the fund-level reporting requirements do not prevent an adviser from providing (or causing a third party, such as an administrator, consultant, or other service provider, to provide) personalized information, as well as other customized information, to supplement the standardized baseline level (*i.e.,* the mandatory floor) of fund-level information required to be included in the quarterly statements, provided that such additional information complies with the other requirements of the final rule, the marketing rule,[201] and other disclosure requirements, each to the extent applicable. We are requiring what we view as essential baseline, fund-level information, allowing investors to focus their time and bargaining resources on requests for any more personalized information they may need, which may vary from investor to investor.

Similarly, while we recognize the value of class-level reporting, requiring class-level reporting on quarterly statements is not necessary for the same reasons as those discussed above for investor-specific reporting. Additionally, requiring class-level reporting would not increase comparability across different advisers. For example, an investor might be in substantially different classes in funds advised by different advisers and thus might have difficulty comparing class-level reporting across these funds.[202]

Commenters suggested that we should allow investors to waive this quarterly statement requirement.[203] However, if we were to allow investors to waive the quarterly statement requirement, then some private fund advisers may require investors to do so as a precondition to investing in a fund. Furthermore, even if a private fund adviser does not explicitly require such a waiver as a precondition to investment, a private fund adviser could attempt to anchor negotiations around a waiver by including one in a private fund's subscription agreement and thereby compelling investors to choose between expending resources to negotiate for quarterly statements or for other important terms related to fund governance and investor protection. Such an outcome would undermine improving transparency for these private fund investors and would fail to address the harms that the rule is intended to address.

Some commenters suggested requiring statements annually instead of quarterly.[204] Other commenters suggested requiring statements semi-annually.[205] Another commenter suggested requiring these statements more frequently than quarterly for liquid funds as many liquid funds currently provide monthly statements.[206] It is our understanding that most private funds (liquid and illiquid) report at least quarterly. Accordingly, we believe that requiring quarterly reporting is well suited to enhance investors' ability to compare performance as well as fee and expense information across liquid and illiquid private funds because many private investors are accustomed to receiving and reviewing quarterly reports. Monthly or more frequent reporting may also not provide sufficiently more meaningful information to justify imposing the burdens for private funds that do not already provide such frequent reporting.[207] All private funds, including liquid funds, may provide additional reporting on a more frequent basis than quarterly. On the other hand, we believe that annual or semi-annual statements are too infrequent and such infrequency would make it difficult for investors to monitor their investments. Receiving a year or six months' worth of fee and expense information at one time would make it more burdensome for investors to parse (particularly, because some of those outlays may be a year or six months old) and to help ensure that fees are being charged appropriately. Similarly, because a fund's performance can change drastically over the course of a year or six months, investors often need more frequent and regular performance reporting to make informed investment decisions and to balance their own portfolio. We believe that quarterly reporting strikes the right balance between sufficient frequency to enable investor analysis and decision making and mitigation of burdens on advisers.

[197] One commenter requested the Commission clarify that a registered U.S. sub-adviser would not need to comply with the quarterly statement rule with respect to a private fund whose primary adviser is not subject to the rule. *See* AIMA/ACC Comment Letter. However, the final rule does not include an exception for such advisers. We believe that the requested exception would diminish the effectiveness of the rule, as the fact that one adviser may not be subject to the final rule does not negate the need for the private fund and its underlying investors to receive the benefit of a quarterly statement.

[198] *See* NYC Comptroller Comment Letter.

[199] *See, e.g.,* ILPA Comment Letter I; Healthy Markets Comment Letter I; OPERS Comment Letter; NYSIF Comment Letter.

[200] For example, an investor may seek to analyze the performance of each of a fund's individual portfolio investments to better understand the nature of such fund's performance as well as the adviser's skill at investment selection and management at a more granular level.

[201] *See* rule 206(4)–1. A communication to a current investor can be an ''advertisement,'' for example, when it offers new or additional investment advisory services with regard to securities.

[202] Any class-based assumptions or criteria used to calculate fund-level performance should be prominently disclosed as part of the quarterly statements. For example, if an adviser uses a management fee rate that is averaged across different classes to compute fund-level performance, it should be prominently disclosed in the quarterly statement. *See infra* section II.B.2.c.

[203] *See, e.g.,* BVCA Comment Letter; Comment Letter of the German Private Equity and Venture Capital Association (June 2, 2022) (''GPEVCA Comment Letter'').

[204] *See, e.g.,* Schulte Comment Letter; Invest Europe Comment Letter; BVCA Comment Letter.

[205] *See, e.g.,* Ropes & Gray Comment Letter; MFA Comment Letter I; AIMA/ACC Comment Letter.

[206] *See* RFG Comment Letter II.

[207] For example, it is our understanding that the majority of private equity funds currently provide quarterly reporting. Since private equity funds generally invest on a longer time horizon, we do not expect that monthly reporting would inherently provide more beneficial information for investors than quarterly reporting and it would entail substantial additional administrative costs.

1. Fee and Expense Disclosure

The rule requires an investment adviser that is registered or required to be registered to prepare and distribute quarterly statements for any private fund that it advises with certain information regarding the fund's fees and expenses and any compensation paid or allocated to the adviser or its related persons by the fund, as well as any compensation paid or allocated by the fund's underlying portfolio investments. The statement will provide investors in those funds with comprehensive fee and expense disclosure for the prior quarterly period (or, in the case of a newly formed private fund's initial quarterly statement, its first two full fiscal quarters of operating results).

Many commenters generally supported the fee and expense disclosure requirement for the quarterly statements and agreed that establishing a standardized baseline level (*i.e.,* a "floor") of fee and expense disclosure would enhance the basic transparency, comparability and investors' understanding and oversight of their private fund investments.[208] Some commenters criticized it on various grounds, as discussed in more detail below, including that the fee and expense disclosure requirement as proposed would be overly broad, costly, and burdensome.[209] Certain commenters relatedly suggested that current fee and expense disclosure practices are sufficient because investors can already negotiate for the types of reporting that would meet their needs.[210]

Although the required fee and expense disclosure in the quarterly statement will impose some additional costs, it is essential that investors receive this information in a timely, detailed, and consistent manner. Private funds are often more expensive than other asset classes because the scope and magnitude of fees and expenses paid directly and indirectly by private fund investors can be extensive and complex. Although the types of fees and expenses charged to private funds can vary across the industry, investors typically compensate the adviser for managing the affairs of a private fund, often in the form of management fees[211] and performance-based compensation.[212] A fund's portfolio investments also may pay fees to the adviser or its related persons.[213] The quarterly statement will help ensure disclosure of these fees and expenses, and the corresponding dollar amounts, to current investors on a consistent and regular basis, which will allow investors to understand and assess the cost of their private fund investments.

We disagree with the suggestion from some commenters that current fee and expense disclosure practices are sufficient. We understand that some fund investors have struggled to obtain complete and usable expense information, including when institutionally required to do so, for example, by the laws applicable to State and municipal plan investors.[214] Many investors also generally lack transparency regarding the total cost of fees and expenses.[215] For instance, even though investors can indirectly end up bearing the costs associated with a portfolio investment paying fees to the adviser or its related persons, some advisers may not disclose the magnitude or scope of these fees to investors. Opaque reporting practices make it difficult for investors to measure and evaluate performance accurately, to assess whether an adviser's total fees are justified, and to make better informed investment decisions.[216] Moreover, opaque reporting practices may prevent private fund investors from assessing whether the types and amount of fees and expenses borne by the private fund comply with the fund's governing agreements or whether disclosures regarding fund fees and expenses accurately describe the adviser's practices or instead may be misleading. The Commission has brought enforcement actions related to the disclosure, misallocation and mischarging of fees and expenses by private fund advisers. For example, we have alleged in settled enforcement actions that advisers have received undisclosed fees,[217] received inadequately disclosed compensation from fund portfolio investments,[218] misallocated expenses away from the adviser to private fund clients,[219] mischarged a performance fee to a private fund client contrary to investor disclosures,[220] failed to offset certain fees or other amounts against management fees as set forth in fund documents,[221] and directly or indirectly misallocated fees and expenses among private fund and other clients.[222]

[208] *See, e.g.,* ILPA Comment Letter I; Comment Letter of the Council of Institutional Investors (Apr. 7, 2022) ("CII Comment Letter"); Comment Letter of the Seattle City Employees'' Retirement System (Apr. 19, 2022) ("Seattle Retirement System Comment Letter"); OFT Comment Letter; United for Respect Comment Letter I; Public Citizen Comment Letter; Comment Letter of the Los Angeles County Employees Retirement Association (July 28, 2022) ("LACERA Comment Letter"); OPERS Comment Letter; NCPERS Comment Letter; Comment Letter of Take Medicine Back (Apr. 25, 2022) ("Take Medicine Back Comment Letter"); Comment Letter of Segal Marco Advisors (Apr. 25, 2022) ("Segal Marco Comment Letter"); Comment Letter of the Illinois State Treasurer (May 12, 2022) ("IST Comment Letter"); AFL–CIO Comment Letter; Comment Letter of Morningstar, Inc. (Apr. 25, 2022) ("Morningstar Comment Letter"); Comment Letter of CFA Institute (June 24, 2022) ("CFA Comment Letter II").

[209] *See, e.g.,* Comment Letter of Impact Capital Managers, Inc. (Apr. 25, 2022) ("ICM Comment Letter"); MFA Comment Letter I; Comment Letter of Americans for Tax Reform (Apr. 23, 2022) ("ATR Comment Letter").

[210] *See* ICM Comment Letter; AIMA/ACC Comment Letter; Dechert Comment Letter; AIC Comment Letter I.

[211] Certain private fund advisers utilize a pass-through expense model where the private fund pays for most, if not all, expenses, including the adviser's expenses, but the adviser does not charge a management fee. *See infra* section II.E.1. for a discussion of such pass-through expense models.

[212] Investors typically enter into agreements under which the private fund pays such compensation directly to the adviser or its affiliates. Investors generally bear such compensation indirectly through their investment in the private fund; however, certain agreements may require investors to pay the adviser or its affiliates directly.

[213] *See* Proposing Release, *supra* footnote 3, at 24–26 (describing the types of fees and expenses private fund investors typically pay or otherwise bear, including portfolio-investment level compensation paid to the adviser or its affiliates).

[214] *See, e.g.,* LACERA Comment Letter.

[215] *See* Hedge Fund Transparency: Cutting Through the Black Box, The Hedge Fund Journal, James R. Hedges IV (Oct. 2006), *available at https://thehedgefundjournal2006).com/hedge-fund-transparency/* (stating that "the biggest challenges facing today's hedge fund industry may well be the issues of transparency and disclosure"); Fees & Expenses, Private Funds CFO (Nov. 2020)), at 12, *available at https://www.troutman.com/images/content/2/6/269858/PFCFO-FeesExpenses-Nov20-Final.pdf* (noting that it is becoming increasingly complicated for investors to determine what the management fee covers versus what is a partnership expense and stating that the "formulas for management fees are complex and unique to different investors."); *see also, e.g.,* ILPA Comment Letter I; For the Long Term Comment Letter; NCPERS Comment Letter; Comment Letter of Americans for Financial Reform Education Fund (Apr. 25, 2022) ("AFREF Comment Letter I").

[216] *See, e.g.,* Letter from State Treasurers and Comptrollers to Mary Jo White, U.S. Securities and Exchange Commission (July 21, 2015), *available at http://comptroller.nyc.gov/wp-content/uploads/documents/SEC_SignOnPDF.pdf*; *see also* Letter from Americans for Financial Reform Education Fund to Chairman Gary Gensler, U.S. Securities and Exchange Commission (July 6, 2021), *available at https://ourfinancialsecurity.org/wp-content/uploads/2021/07/Letter-to-SEC-re_-Private-Equity-7.6.21.pdf*.

[217] *See, e.g., In the Matter of Blackstone, supra* footnote 26.

[218] *See, e.g., In the Matter of Monomoy Capital Management, L.P.,* Investment Advisers Act Release No. 5485 (Apr. 22, 2020) (settled action).

[219] *See, e.g., In the Matter of Cherokee Investment Partners, LLC and Cherokee Advisers, LLC, supra* footnote 26; *In the Matter of Yucaipa Master Manager, LLC,* Investment Advisers Act Release No. 5074 (Dec. 13, 2018) (settled action).

[220] *See, e.g., In the Matter of Finser International Corporation, et al.,* Investment Advisers Act Release No. 5593 (Sept. 24, 2020) (settled action).

[221] *See, e.g., In the Matter of Corinthian Capital Group, LLC, et al.,* Investment Advisers Act Release No. 5229 (May 6, 2019) (settled action).

[222] *See, e.g., In the Matter of Lincolnshire, supra* footnote 26 (alleging that an investment adviser that

Commission staff has observed similarly problematic practices in its examinations of private fund advisers.[223] For example, Commission staff has observed advisers that charge private funds for expenses not permitted under the fund documents.[224] Commission staff has also observed advisers allocating expenses, such as broken-deal, due diligence, and consultant expenses, among private fund clients, other clients advised by an adviser or its related persons, and their own accounts in a manner that was inconsistent with disclosures to investors.[225] Investors are less able to monitor effectively whether such fee and expense misallocations are occurring and to respond effectively to this information without sufficiently timely, regular, and detailed fee and expense information.

Some commenters suggested requiring an expense ratio to help provide context as to the relative magnitude of a fund's expenses.[226] Although expense ratios may be helpful in certain circumstances in providing a top-line cost figure, they may be less helpful in others. For instance, if an adviser is misallocating certain smaller expenses, an expense ratio may obscure this practice if overall changes to the top-line cost figure are not obvious. Additionally, expense ratios may fail to capture some of the nuances of private fund fee and expense structures, such as with respect to the current and future impact of offsets, rebates and waivers, and investors might not otherwise receive sufficient disclosure on such fee and expense structures. The focus of this disclosure requirement is to require a private fund adviser to provide its private fund investors regularly and in a timely manner with at least a baseline level of consistent and detailed fee and expense information, so that private fund investors are generally better able to assess and monitor effectively the costs of investing in private funds managed by the adviser.[227] If investors receive this information reliably, they will be better able to calculate their own applicable expense ratios.

Furthermore, as stated above, advisers under the rule will remain able to provide, and investors are free to request and negotiate for, disclosure of expense ratios, as well as other information, to supplement the standardized baseline level (*i.e.,* the mandatory floor) of fund fee and expense disclosure required in the quarterly statements, provided that such additional information complies with the other requirements of the final rule, the marketing rule,[228] and other disclosure requirements, each to the extent applicable.

(a) Private Fund-Level Disclosure

The quarterly statement rule will require private fund advisers to disclose the following information to investors in a table format:

(1) A detailed accounting of all compensation, fees, and other amounts allocated or paid to the adviser or any of its related persons by the private fund (''adviser compensation'') during the reporting period;

(2) A detailed accounting of all fees and expenses allocated to or paid by the private fund during the reporting period other than those listed in paragraph (1) above (''fund expenses''); and

(3) The amount of any offsets or rebates carried forward during the reporting period to subsequent quarterly periods to reduce future payments or allocations to the adviser or its related persons.[229]

The table is designed to provide investors with comprehensive fund fee and expense disclosure for the prior quarterly period (or, in the case of a newly formed private fund's initial quarterly statement, its first two full fiscal quarters of operating results).[230] We discuss each of these elements in turn below.

Adviser Compensation. Substantially as proposed, the rule will require the fund table to show a detailed accounting of all adviser compensation during the reporting period, with separate line items for each category of allocation or payment reflecting the total dollar amount, as proposed.[231] The rule is designed to capture all forms and amounts of compensation, fees, and other amounts allocated or paid to the investment adviser or any of its related persons by the fund, including, but not limited to, management, advisory, sub-advisory, or similar fees or payments, and performance-based compensation, without permitting the exclusion of *de minimis* expenses, the general grouping of smaller expenses into broad categories, or the labeling of expenses as miscellaneous.

Many commenters generally supported the requirement to report adviser compensation on the quarterly statements.[232] Some commenters suggested that this requirement would be overly burdensome, in particular due to the breadth of certain aspects of the requirement (as discussed below), or that current market practices are sufficient.[233]

Many private funds compensate advisers with a ''2 and 20'' or similar arrangement, consisting of a 2% management fee and a 20% share of any profits generated by the fund. Certain advisers, however, receive other forms or amounts of compensation from private funds in addition to, or in lieu of, such arrangements.[234] Requiring advisers to disclose all forms of adviser compensation as separate line items without prescribing particular categories of fees is appropriate because this requirement will encompass the various and evolving forms of adviser compensation across the private funds industry.

In addition to compensation paid to the adviser, the rule requires the fund table to include disclosure of compensation, fees, and other amounts allocated or paid to the adviser's ''related persons.'' We are defining ''related persons'' to include: (i) all officers, partners, or directors (or any

misallocated expenses between its private funds' portfolio companies and violated its fiduciary duty to the private funds); *In the Matter of Rialto Capital Management, LLC,* Investment Advisers Release No. 5558 (Aug. 7, 2020) (settled action); *In the Matter of Energy Capital Partners, supra* footnote 30.

[223] *See* EXAMS Private Funds Risk Alert 2020, *supra* footnote 188.

[224] *See id.*

[225] *See id.*

[226] *See* MFA Comment Letter I; NCREIF Comment Letter.

[227] Although certain kinds of expense ratios are required in the registered funds context, we understand that fees and expenses are more likely to vary over time in the private fund space. For example, a private equity fund may incur a disproportionate amount of expenses early in its life when it is making the majority of its investments and incur fewer expenses during the middle part of its life when it is focused on holding these investments. The use of an expense ratio in these periods may overstate or understate, respectively, the expense burdens over the life of the fund.

[228] *See supra* footnote 201.

[229] Final rule 211(h)(1)–2(b).

[230] *See* final rule 211(h)(1)–1 (defining ''reporting period'' as the private fund's fiscal quarter covered by the quarterly statement or, for the initial quarterly statement of a newly formed private fund, the period covering the private fund's first two full fiscal quarters of operating results). To the extent a newly formed private fund begins generating operating results on a day other than the first day of a fiscal quarter (*e.g.,* Jan. 1), the adviser should include such partial quarter and the immediately succeeding fiscal quarters in the newly formed private fund's initial quarterly statement. For example, if a fund begins generating operating results on Feb. 1, the reporting period for the initial quarterly statement would cover the period beginning on Feb. 1 and ending on Sept. 30.

[231] Final rule 211(h)(1)–2(b)(1).

[232] *See, e.g.,* CII Comment Letter; Seattle Retirement System Comment Letter; IST Comment Letter.

[233] *See, e.g.,* ICM Comment Letter; Comment Letter of Alumni Ventures (Apr. 25, 2022) (''Alumni Ventures Comment Letter''); MFA Comment Letter I.

[234] *See* Proposing Release, *supra* footnote 3, at 28–29 (describing the types of adviser compensation private fund investors typically pay or otherwise bear).

person performing similar functions) of the adviser; (ii) all persons directly or indirectly controlling or controlled by the adviser; (iii) all current employees (other than employees performing only clerical, administrative, support or similar functions) of the adviser; and (iv) any person under common control with the adviser.[235] The term ''control'' is defined to mean the power, directly or indirectly, to direct the management or policies of a person, whether through ownership of securities, by contract, or otherwise.[236] We are adopting both definitions as proposed.

Many advisers conduct a single advisory business through multiple separate legal entities and provide advisory services to a private fund through different affiliated entities or personnel. The ''related person'' and ''control'' definitions are designed to capture the various entities and personnel that an adviser may use to provide advisory services to, and receive compensation from, private fund clients. Some commenters supported broadening the ''related person'' and ''control'' definitions to include, for example, unaffiliated service providers that provide payments to an adviser or over which an adviser has economic influence, former personnel and family members, operational partners, senior advisors, or similar consultants of an adviser, a private fund, or its portfolio investments, and/or any recipient of fund management fees or performance-based compensation.[237] Other commenters supported adopting definitions that are consistent with advisers' existing reporting obligations,[238] with one commenter suggesting that adopting different definitions could capture irrelevant persons or entities and create unnecessary confusion.[239] We are adopting definitions that are consistent with the definitions of ''related person'' and ''control'' used on Form ADV and Form PF, which advisers already have experience assessing as part of their disclosure obligations on those forms, and which capture the entities and personnel that advisers typically use to conduct a single advisory business and provide advisory services to a private fund.

One commenter suggested that the rule's reference to ''sub-advisory fees'' in the non-exhaustive list of compensation types covered by the adviser compensation disclosure requirement is inappropriate, because sub-advisory fees are generally not paid to the sub-adviser by a private fund and instead are often paid out of the management fee or other adviser compensation received by the fund's primary adviser from the fund.[240] As proposed, the rule requires disclosure of any adviser compensation allocated or paid to the adviser or any of its related persons, including, without limitation, a related person that is a sub-adviser to the private fund, to the extent that the compensation to the related person is allocated or paid by the fund. Accordingly, the rule does not require sub-advisory fees allocated or paid to a related person solely by the fund's adviser (and not by the fund) to be disclosed as a separate item of adviser compensation. Another commenter suggested that the rule should require disclosure of sub-advisory fees to unrelated sub-advisers, in addition to related person sub-advisers.[241] Compensation to unrelated sub-advisers is required to be separately disclosed as a fund fee and expense under 17 CFR 211(h)(1)–2(b)(2) (final rule 211(h)(1)–2(b)(2)), to the extent that such payments are allocated to or paid by the fund.

Substantially as proposed, we are defining ''performance-based compensation'' as allocations, payments, or distributions of capital based on a private fund's (or its investments') capital gains, capital appreciation, and/or profit.[242] Commenters generally did not provide comments with respect to the proposed definition of ''performance-based compensation.'' We are, however, making two non-substantive, technical changes to this definition. First, we are revising the definition to include not only capital gains and capital appreciation but also profit. This change will capture performance-based compensation that may be calculated based on other types or measures of investment performance, such as investment income. Second, the parenthetical in the definition now references ''or any of its investments'' rather than ''or its portfolio investments,'' because the value of the fund's investment (*i.e.,* the value of the fund's interest in a portfolio investment entity or issuer) will typically determine whether the adviser is entitled to performance-based compensation, rather than the value of the portfolio investment entity or issuer itself. The broad scope of this definition, which captures, without limitation, carried interest, incentive fees, incentive allocations, or profit allocations, among other forms of compensation, is appropriate in light of the various and evolving forms of performance-based compensation received by private fund advisers. This definition also covers both cash and non-cash compensation, including, for example, allocations, payments, or distributions of performance-based compensation that are in-kind.

Fund Fees and Expenses. The rule requires the table to show a detailed accounting of all fees and expenses allocated to or paid by the private fund during the reporting period, other than those disclosed as adviser compensation, with separate line items

[235] Final rule 211(h)(1)–1. Form ADV uses the same definition. The regulations at 17 CFR 275.206(4)–2 (rule 206(4)–2) use a similar definition by defining related person to include any person, directly or indirectly, controlling or controlled by the adviser, and any person that is under common control with the adviser.

[236] Final rule 211(h)(1)–1. The definition, in addition, provides that: (i) each of an investment adviser's officers, partners, or directors exercising executive responsibility (or persons having similar status or functions) is presumed to control the investment adviser; (ii) a person is presumed to control a corporation if the person: (A) directly or indirectly has the right to vote 25% or more of a class of the corporation's voting securities; or (B) has the power to sell or direct the sale of 25% or more of a class of the corporation's voting securities; (iii) a person is presumed to control a partnership if the person has the right to receive upon dissolution, or has contributed, 25% or more of the capital of the partnership; (iv) a person is presumed to control a limited liability company if the person: (A) directly or indirectly has the right to vote 25% or more of a class of the interests of the limited liability company; (B) has the right to receive upon dissolution, or has contributed, 25% or more of the capital of the limited liability company; or (C) is an elected manager of the limited liability company; or (v) a person is presumed to control a trust if the person is a trustee or managing agent of the trust. Form ADV uses the same definition.

[237] *See, e.g.,* Comment Letter of Convergence (Apr. 23, 2022) (''Convergence Comment Letter''); Comment Letter of XTP Implementation Services, Inc. (Apr. 25, 2022) (''XTP Comment Letter'').

[238] *See, e.g.,* AIMA/ACC Comment Letter; SBAI Comment Letter; SIFMA–AMG Comment Letter I.

[239] *See* AIMA/ACC Comment Letter.

[240] *See id.* This commenter also stated that disclosing sub-adviser fees separately could disincentivize sub-advisers from offering discounted or reduced fees to private funds. The final rule will not require separate disclosure of sub-adviser fees to the extent such fees are not paid by the fund, as discussed below. Nevertheless, this comment could also be understood to apply to any disclosure of sub-adviser compensation, including the disclosure of sub-adviser fees that are paid or allocated to the sub-adviser by the fund, which, as discussed below, will be required disclosure under the final rule. In this regard, although sub-adviser compensation, similar to any other adviser compensation, may be subject to upward or downward fee pressures as a result of the disclosure of compensation information, we believe that increased transparency and comparability with respect to the sub-adviser (and other adviser) compensation borne by a private fund is essential to generally enable private fund investors to make more informed investment decisions, and that this information could also lead to increased competitive market pressures on the costs of investing in private funds.

[241] *See* NASAA Comment Letter.

[242] Final rule 211(h)(1)–1.

for each category of fee or expense reflecting the total dollar amount, substantially as proposed.[243] In a change from the proposal, we are revising this requirement to capture not only amounts ''paid by'' the private fund but also fees and expenses ''allocated to'' the private fund during the reporting period.[244] This clarification is necessary to avoid potentially misleading investors in light of the various ways that a private fund may be caused to bear fees and expenses. Additionally, this change is consistent with the requirement in rule 211(h)(1)–2(b)(1), as proposed and adopted, to disclose compensation *allocated* or paid to the adviser or any of its related persons by the private fund during the reporting period.

Similar to the approach taken with respect to adviser compensation discussed above, the rule captures all fund fees and expenses allocated to or paid by the fund during the reporting period, including, but not limited to, organizational, accounting, legal, administration, audit, tax, due diligence, and travel expenses. The rule's capturing of all, rather than limited categories of, fund fees and expenses is appropriate because this requirement will encompass the various and evolving forms of private fund fees and expenses. Advisers must list each category of expense as a separate line item under the rule, rather than group fund expenses into broad categories that obfuscate the nature and/or extent of the fees and expenses borne by the fund. For example, if a fund paid insurance premiums, administrator expenses, and audit fees during the reporting period, a general reference to ''fund expenses'' on the quarterly statement will not satisfy the rule's detailed accounting requirement. Instead, an adviser is required to separately list each category of expense (*i.e.,* in the example above, insurance premiums, administrator expenses, and audit fees) and the corresponding total dollar amount.

A number of commenters generally supported this requirement to report all fees and expenses paid by the private fund during the reporting period on the quarterly statements.[245] Some commenters suggested that this requirement would be too costly or that existing market practices make this requirement unnecessary.[246]

We have observed two general trends among private fund advisers that support the rule's approach to adviser disclosure of fund fees and expenses. First, we have observed certain advisers shift certain expenses related to their advisory business to private fund clients.[247] For example, some advisers charge private fund clients for salaries and benefits related to personnel of the adviser. Such expenses have traditionally been paid by advisers with their management fee proceeds or other revenue streams but are increasingly being charged as separate fund expenses, in addition to the management fee, and the full nature and extent of these expenses may not be clearly disclosed and transparent to fund investors.[248] Second, expenses have risen significantly in recent years for certain private funds due to, among other things, advisers' use of increasingly complex fund structures, the expansion of global marketing and investment efforts by advisers, and increased service provider costs.[249] Advisers often pass on such increases to the private funds they advise without providing investors detailed disclosure about the magnitude and type of expenses actually charged to, or directly or indirectly borne by, the fund. Without this information, however, investors are less able to effectively assess and monitor the costs of investing in private funds managed by an adviser.

Some commenters stated that we should allow advisers to group smaller expenses generally into broad categories or disclose them as ''miscellaneous'' expenses.[250] Other commenters requested that we allow exemptions for *de minimis* amounts in the fee and expense section of the quarterly statement.[251] In contrast, one commenter suggested that we specifically not permit advisers to exclude *de minimis* expenses or group small expenses into broad categories.[252] We are not allowing advisers to exclude *de minimis* expenses, generally group small expenses into broad categories, or label expenses as miscellaneous. Private fund investors need detailed accounting of fees and expenses to understand fully the costs of their private fund investments. If we were to allow advisers to group small expenses generally into broad categories, they might be able to obscure certain costs from investors, including those that could raise conflict of interest issues. Similarly, advisers might use a *de minimis* exception to avoid disclosing individual expenses that, in aggregate, could be significant. These alternative approaches would not provide private fund investors with sufficient detail to assess and monitor whether that the private fund expenses borne by the fund conform to contractual agreements and the private fund's terms.

As discussed above,[253] some commenters suggested that section 211(h)(1) of the Act, which states that the Commission shall facilitate the provision of simple and clear disclosures to investors regarding the terms of their relationships with investment advisers, does not authorize the rule's quarterly disclosure requirement with respect to fund fees and expenses. These commenters generally asserted that ongoing fund fee and expense reporting does not constitute disclosure of the terms of the relationship between private fund investors and private fund advisers for purposes of section 211(h)(1) of the Act and that such terms are instead disclosed only at the outset of the relationship between a private fund investor and a private fund adviser; namely, in the terms set forth in a private fund's contractual documents.[254] Although we recognize that the methodology for calculating fund fees and expenses is typically set forth in a fund's contractual documents, as discussed above, investors must also receive simple and clear disclosures of the actual fees and expenses borne by their fund in order to be able to understand and confirm effectively the

[243] Final rule 211(h)(1)–2(b)(2).

[244] *Cf.* CFA Comment Letter II (noting that proposed rule 211(h)(1)–2(b)(2) could be read to ''not capture fees and expenses that have been accrued and not yet paid'').

[245] *See, e.g.,* OFT Comment Letter; Comment Letter of Meketa Investment Group (Mar. 21, 2022) (''Meketa Comment Letter''); Comment Letter of the Teacher Retirement System of Texas (Apr. 25, 2022) (''TRS Comment Letter'').

[246] *See, e.g.,* AIC Comment Letter I; Dechert Comment Letter; ATR Comment Letter.

[247] *See supra* footnote 219 and accompanying text.

[248] *See* Key Findings ILPA Industry Intelligence Report, ''What is Market in Fund Terms?'' (2021), at 18–19 (''ILPA Key Findings Report''), *available at https://ilpa.org/wp-content/uploads/2021/10/Key-Findings-Industry-Intelligence-Report-Fund-Terms.pdf* (stating that ''the importance of elevated transparency for [private fund investors] related to fees and expenses'' is underscored by the recent trend of ''cost shifting'' certain expenses traditionally borne by private fund advisers to their private fund clients).

[249] *See, e.g., id.; see also* Coming to Terms: Private Equity Investors Face Rising Costs, Extra Fees, Wall Street Journal (Dec. 20, 2021), *available at https://www.wsj.com/articles/coming-to-terms-private-equity-investors-face-rising-costs-extra-fees-11640001604.*

[250] *See, e.g.,* AIC Comment Letter II; Comment Letter of CFA Institute (Apr. 25, 2022) (''CFA Comment Letter I''); IAA Comment Letter II.

[251] *See, e.g.,* AIC Comment Letter I; PIFF Comment Letter; Ropes & Gray Comment Letter.

[252] *See* Convergence Comment Letter.

[253] *See supra* footnotes 166–169 and accompanying text.

[254] *See, e.g.,* AIC Comment Letter I; NVCA Comment Letter; Citadel Comment Letter.

accuracy of the terms of their relationship with a private fund adviser.

To the extent that a fund expense also could be characterized as adviser compensation under the rule, the rule requires advisers to disclose such payment or allocation as adviser compensation as opposed to a fund expense in the quarterly statement. For example, certain private funds may engage the adviser or its related persons to provide non-advisory services to the fund, such as consulting, legal, or back-office services. The rule requires advisers to disclose any compensation, fees, or other amounts allocated or paid by the fund for such services, whether advisory or non-advisory, as part of the detailed accounting of adviser compensation. This approach will help ensure that investors understand the entire amount of adviser compensation allocated or paid to the adviser and its related persons during the reporting period by the fund.

Offsets, Rebates, and Waivers. We are requiring advisers to disclose adviser compensation and fund expenses in the fund table both before and after the application of any offsets, rebates, or waivers.[255] Specifically, the rule requires an adviser to present the dollar amount of each category of adviser compensation or fund expense[256] before and after any such reduction for the reporting period.[257] In addition, the rule requires advisers to disclose the amount of any offsets or rebates carried forward during the reporting period to subsequent periods to reduce future adviser compensation.[258] We are adopting this portion of the rule as proposed.

Advisers may offset, rebate, or waive adviser compensation or fund expenses in a number of circumstances. For example, a private equity adviser may enter into a management services agreement with a fund's portfolio company, requiring the company to pay the adviser a fee for those services. To the extent that the fund's governing agreement requires the adviser to share the fee with the fund investors through an offset to the management fee, the management fee would typically be reduced, on a dollar-for-dollar basis, by an amount equal to the fee.[259] Under the final rule, the adviser would be required to list the management fee both before and after the application of the fee offset.

Some commenters generally supported the requirement that advisers disclose adviser compensation and fund expenses both before and after the application of any offsets, rebates, or waivers.[260] Some commenters suggested that advisers should only be required to disclose adviser compensation and fund expenses after the application of any offsets, rebates, or waivers, because information regarding adviser compensation and fund expenses before the application of any offsets, rebates, or waivers does not reflect actual investor experience and accordingly could confuse or be of little or no value to investors.[261] One commenter stated that we should consider excepting *de minimis* offsets, rebates, or waivers from this requirement.[262]

We considered whether to require advisers to disclose adviser compensation and fund expenses only after the application of offsets, rebates, and waivers, rather than before and after. We recognize that investors may find the reduced numbers more meaningful, given that they generally reflect the actual amounts borne by the fund during the reporting period. However, after considering comments, we believe that presenting both figures will provide investors with greater transparency into advisers' fee and expense practices, particularly with respect to how offsets, rebates, and waivers affect adviser compensation. Transparency into fee and expense practices is important, even with respect to *de minimis* amounts, because it will assist investors in monitoring their private fund investments and, for certain investors, will ease their own efforts at complying with their reporting obligations.[263] Advisers should have this information readily available, and both sets of figures will be helpful to investors in monitoring whether and how offsets, rebates, and waivers are applied.

In addition, we are requiring advisers to disclose the amount of any offsets or rebates carried forward during the reporting period to subsequent periods to reduce future adviser compensation.[264] This information will allow investors to understand whether they are or the fund is entitled to additional reductions in future periods.[265] Further, this information will assist investors with their liquidity management and cash flow models, as they should have greater insight into the fund's projected cash flows and their obligations to satisfy future capital calls for adviser compensation with cash on hand.

(b) Portfolio Investment-Level Disclosure

The quarterly statement rule requires advisers to disclose a detailed accounting of all portfolio investment compensation[266] allocated or paid by each covered portfolio investment[267] during the reporting period in a single table. We proposed, but in response to commenters are not adopting, a requirement that advisers disclose the private fund's ownership percentage of each covered portfolio investment. We discuss each of these aspects of the final rule below.

The rule defines ''portfolio investment'' as any entity or issuer in which the private fund has invested directly or indirectly, as proposed.[268] This definition is designed to capture any entity or issuer in which the private fund holds an investment, including through holding companies, subsidiaries, acquisition vehicles, special purpose vehicles, and other vehicles through which investments are made or otherwise held by the private

[255] Final rule 211(h)(1)–2(b).

[256] For example, an adviser must show any placement agent fees or excess organizational expenses before and after any management fee offset.

[257] Offsets, rebates, and waivers applicable to certain, but not all, investors through one or more separate arrangements are required to be reflected and described prominently in the fund-wide numbers presented in the quarterly statement. *See* final rule 211(h)(1)–2(d) and (g). Advisers are not required to disclose the identity of the subset of investors that receive such offsets, rebates, or waivers.

[258] Final rule 211(h)(1)–2(b)(3).

[259] The offset shifts some or all of the economic benefit of the fee from the adviser to the private fund investors.

[260] *See, e.g.,* Morningstar Comment Letter; CFA Comment Letter II; RFG Comment Letter II.

[261] *See, e.g.,* IAA Comment Letter II; PIFF Comment Letter.

[262] *See* Ropes & Gray Comment Letter.

[263] For example, certain investors, such as U.S. State pension plans, may be required to report complete information regarding fees and expenses paid to the adviser and its related persons. *See* LACERA Comment Letter.

[264] Final rule 211(h)(1)–2(b)(3).

[265] To the extent advisers are required to offset fund-level compensation (*e.g.,* management fees) by portfolio investment compensation (*e.g.,* monitoring fees), they typically do not reduce adviser compensation below zero, meaning that, in the event the monitoring fee offset amount exceeds the management fee for the applicable period, some fund documents provide for ''carryforwards'' of the unused amount. The carryforwards are used to offset the management fee in subsequent periods.

[266] *See* final rule 211(h)(1)–1 (defining ''portfolio investment compensation'' as any compensation, fees, and other amounts allocated or paid to the investment adviser or any of its related persons by the portfolio investment attributable to the private fund's interest in such portfolio investment).

[267] *See* final rule 211(h)(1)–1 (defining ''covered portfolio investment'' as a portfolio investment that allocated or paid the investment adviser or its related persons portfolio investment compensation during the reporting period).

[268] Final rule 211(h)(1)–1.

fund.[269] As a result, the definition may capture more than one entity or issuer with respect to any single investment made by a private fund. For example, if a private fund invests directly in a holding company that owns two subsidiaries, this definition captures all three entities.

One commenter supported the proposed definition of ''portfolio investment.'' [270] Other commenters proposed alternative definitions, such as to broaden the definition to cover broken deal expenses [271] or to narrow the definition to refer only to an issuer of securities in which the private fund has *directly* invested.[272] One commenter suggested limiting the definition of ''covered portfolio investment'' to portfolio investments over which the adviser has ''discretion or substantial influence'' to compensate the adviser or its related persons.[273]

Many commenters discussed how the proposed definitions of ''portfolio investment'' and ''covered portfolio investment'' would impact advisers to funds of funds. Some commenters suggested that we exclude from these definitions funds of funds and other pooled vehicles that invest indirectly through underlying funds or unaffiliated structures.[274] In contrast, another commenter stated that we should not exempt funds of funds because advisers to funds of funds should be able to provide the required information.[275] Despite commenter concerns, we are adopting these definitions as proposed in order to capture, and improve investor transparency into, portfolio investment compensation arrangements that pose potential or actual conflicts of interest for the adviser, without exception for advisers of fund of funds. A fund of funds adviser should be in a position to determine whether an entity paying the adviser, or a related person, is a portfolio investment of the fund of funds under the final rule. For example, the fund of funds adviser can request information from the payor regarding whether certain underlying funds hold an investment in the payor. The fund of funds adviser can also request a list of investments from the underlying funds to determine whether any of those underlying portfolio investments have a business relationship with the adviser or its related persons. However, we recognize that, despite their best efforts, certain fund of funds advisers may lack information or may not be given information in respect of underlying entities, and depending on a private fund's underlying investment structure, a fund of funds adviser may have to rely on good faith belief to determine which entity or entities constitute a portfolio investment under the rule. An adviser may consider documenting this determination, as well as its initial and ongoing diligence efforts to determine whether a portfolio investment has compensated the adviser or its related persons, in its records.

We recognize that portfolio investments of certain private funds may not pay or allocate portfolio investment compensation to an adviser or its related persons. For example, advisers to hedge funds focusing on passive investments in public companies may be less likely to receive portfolio investment compensation than advisers to private equity funds focusing on control-oriented investments in private companies. Under the final rule, advisers are required to disclose information regarding only *covered portfolio investments,* which are defined as portfolio investments that allocated or paid the investment adviser or its related persons portfolio investment compensation during the reporting period, as proposed.[276] We believe this approach is appropriate because the portfolio investment table is designed to highlight the scope and magnitude of any investment-level compensation and to improve transparency for investors into the potential and actual conflicts of interest of the adviser and its related persons. If an adviser or its related person does not receive investment-level compensation under the final definition of *covered portfolio investment,* the adviser will not have a related disclosure obligation under the rule. Accordingly, the rule does not require advisers to list any information regarding portfolio investments that do not fall within the *covered portfolio investment* definition for the applicable reporting period. These advisers, however, need to identify portfolio investment payments and allocations in order to determine whether they must provide the disclosures under this requirement.

Portfolio Investment Compensation. The rule requires the portfolio investment table to show a detailed accounting of all portfolio investment compensation allocated or paid by each covered portfolio investment during the reporting period, with separate line items for each category of allocation or payment reflecting the total dollar amount, including, but not limited to, origination, management, consulting, monitoring, servicing, transaction, administrative, advisory, closing, disposition, directors, trustees or similar fees or payments by the covered portfolio investment to the investment adviser or any of its related persons. An adviser should generally disclose the identity of each covered portfolio investment to the extent necessary for an investor to understand the nature of the potential or actual conflicts associated with such payments.

Similar to the approach taken with respect to adviser compensation and fund expenses discussed above, the rule requires a detailed accounting of *all* portfolio investment compensation paid or allocated to the adviser and its related persons.[277] This will require advisers to list as a separate line item each category of portfolio investment

[269] Certain investment strategies can involve complex transactions and the use of negotiated instruments or contracts, such as derivatives, with counterparties. Although such trading involves a risk that a counterparty will not settle a transaction or otherwise fail to perform its obligations under the instrument or contract and thus result in losses to the fund, we would generally not consider the fund to have made an investment in the counterparty in this context. This approach is appropriate because any gain or loss from the investment generally would be tied to the performance of the derivative and the underlying reference security, rather than the performance of the counterparty.

[270] *See* Convergence Comment Letter.

[271] *See* CFA Comment Letter II (observing that the proposed definition would not cover broken deal expenses). We understand that broken deal fees are often associated with situations in which ownership of a potential portfolio investment is in flux. Because the definition of ''portfolio investment'' under the rule includes only entities or issuers in which a private fund has invested (whether directly or indirectly), the rule's portfolio investment compensation requirements would not generally apply to compensation, such as a broken deal fee, from only a *potential* portfolio investment. A broken deal fee from an unconsummated portfolio investment transaction would thus generally not constitute portfolio investment compensation under the rule, which instead defines ''portfolio investment'' and ''portfolio investment compensation'' to broadly cover compensation that could reduce the value of a private fund's assets. However, to the extent that a fund bears a broken deal expense, rule 211(h)(1)–2(b)(2) will require its disclosure as a fund fee or expense. Because this information will thus be reported as a fund fee or expense under the rule whenever a fund's assets are actually reduced by broken deal expenses, we believe it is unnecessary to also require disclosure of this information as a type of portfolio investment compensation through changes to the definition of ''portfolio investment'' under the rule.

[272] *See* AIMA/ACC Comment Letter.

[273] *See* PIFF Comment Letter; *cf. infra* footnote 287.

[274] *See* AIC Comment Letter I; PIFF Comment Letter.

[275] *See* Convergence Comment Letter.

[276] *See* final rule 211(h)(1)–1 (defining ''covered portfolio investment'').

[277] Because advisers often use separate legal entities to conduct a single advisory business, the rule will capture portfolio investment compensation paid to an adviser's related persons.

compensation [278] and the corresponding total dollar amount.

The rule requires advisers to disclose the amount of portfolio investment compensation attributable to a private fund's interest in a covered portfolio investment.[279] Such amount should not reflect the portion attributable to any other person's interest in the covered portfolio investment. For example, if the private fund and another person co-invested in the same portfolio investment and the portfolio investment paid the private fund's adviser a monitoring fee, the table would list the total dollar amount of the monitoring fee attributable only to the fund's interest in the portfolio investment. In addition to the required disclosure under the rule relating to the fund's interest in the portfolio investment, advisers may, but are not required to, list the portion of the fee attributable to any other person's interest in the portfolio investment. This approach is appropriate because it will reflect the amount borne by the fund and, by extension, the investors. This will be meaningful information for investors because the amount attributable to the fund's interest generally reduces the value of investors' indirect interest in the portfolio investment.[280]

Similar to the approach discussed above with respect to adviser compensation and fund expenses, an adviser is required to list the amount of portfolio investment compensation allocated or paid with respect to each covered portfolio investment both *before and after the application of any offsets, rebates, or waivers.* This will require an adviser to present the aggregate dollar amount attributable to the fund's interest before and after any such reduction for the reporting period. Advisers will be required to disclose the amount of any portfolio investment compensation that they initially charge and the amount that they ultimately retain at the expense of the private fund and its investors.

We continue to believe that this approach is appropriate given that portfolio investment compensation can take many different forms and often varies based on fund type. For example, portfolio investments of private credit funds may pay the adviser a servicing fee for managing a pool of loans held directly or indirectly by the fund. Portfolio investments of private real estate funds may pay the adviser a property management fee or a mortgage-servicing fee for managing the real estate investments held directly or indirectly by the fund.

This disclosure will help inform investors about the scope of portfolio investment compensation allocated or paid to the adviser and related persons and provide insight to investors into the nature of some of the potential or actual conflicts of interest their private fund advisers face. For example, in cases where an adviser controls a fund's portfolio investment, the adviser also generally has discretion over whether to charge portfolio investment compensation and, if so, the rate, timing, method, amount, and recipient of such compensation. Additionally, where the private fund's governing documents require the adviser to offset portfolio investment compensation against other revenue streams or otherwise provide a rebate to investors, this information will help investors monitor the application of such offsets or rebates.

As with adviser compensation and fund expenses, this approach should provide investors with sufficient detail to validate that portfolio investment compensation borne by the fund conforms to contractual agreements.

Some commenters supported this portfolio investment compensation reporting requirement, stating that it will increase transparency.[281] Other commenters suggested that this requirement will be overly burdensome or unnecessary.[282] Some commenters similarly suggested that this portfolio investment compensation disclosure requirement will be overly broad in its application, as described below.[283] One commenter stated that each private fund is itself a ''related person'' of the adviser, so any amounts paid to a fund (*e.g.,* dividends on equity investments or interest and fees on debt investments) would be reportable under the rule as drafted, even though the fund's investors receive 100% of the benefit.[284] Another commenter requested that we clarify that the definition of ''portfolio investment compensation'' excludes fund-level fees and other compensation paid by a subsidiary of the fund in accordance with the fund's governing documents.[285]

To clarify, this portfolio investment compensation disclosure requirement does not include distributions representing profit or return of capital to the fund, in each case, in respect of the fund's ownership or other interest in a portfolio investment (*e.g.,* dividends). This disclosure requirement is intended generally to capture potentially or actually conflicted compensation arrangements where the fund's interest in a portfolio investment may be negatively impacted by that portfolio investment's allocation or payment of portfolio investment compensation to the fund's adviser or its related persons, such as when an adviser or its related person charges a monitoring fee to a portfolio investment of a fund it advises, including when such charges are made in accordance with the fund's governing documents. Although investors may contractually agree, per a fund's governing documents and with appropriate initial disclosure, to an adviser's ability to receive portfolio investment compensation, investors may be misled with respect to the magnitude and scope of such compensation to the extent that an adviser does not disclose information relating to the total dollar amount of such compensation after the fact.

The rule requires an adviser to include the portfolio investment compensation paid to a related person, including, without limitation, a related person that is a sub-adviser, in its quarterly statement. Because portfolio investment compensation to related sub-advisers presents the same conflicts of interest concerns discussed above with respect to portfolio investment compensation to advisers, the portfolio investment compensation disclosure requirements under the rule extends to portfolio investment compensation to an

[278] This includes cash or non-cash compensation, including, for example, stock, options, and warrants.

[279] *See* final rule 211(h)(1)–1 (defining ''portfolio investment compensation'').

[280] This information should be meaningful for investors regardless of whether the private fund has an equity ownership interest or another kind of interest in the covered portfolio investment. For example, if a private fund's interest in a covered portfolio investment is represented by a debt instrument, the amount of portfolio-investment compensation paid or allocated to the adviser may hinder or prevent the covered portfolio investment from satisfying its obligations to the fund under the debt instrument.

[281] *See, e.g.,* OFT Comment Letter; LACERA Comment Letter; XTP Comment Letter.

[282] *See, e.g.,* AIC Comment Letter I; Comment Letter of the Goldman Sachs Group, Inc. (Apr. 25, 2022) (''Goldman Comment Letter''); IAA Comment Letter II.

[283] *See, e.g.,* MFA Comment Letter I; PIFF Comment Letter.

[284] *See* MFA Comment Letter I.

[285] *See* PIFF Comment Letter. This commenter also suggested that including adviser compensation paid by a subsidiary of the fund as portfolio investment compensation will result in duplicate disclosure of these compensation amounts. To the extent that a subsidiary of the fund compensates the investment adviser on behalf of the fund, whether such compensation amounts should be disclosed in the fund table or the portfolio-investment table will depend on the facts and circumstances and, in particular, whether the subsidiary is an entity or issuer in which the fund has invested (*i.e.,* a portfolio investment). However, such compensation amounts would not need to be disclosed twice (unless the adviser discloses such compensation amounts before and after the application of any offsets, rebates, or waivers, if applicable).

adviser or any of its related persons, including a related sub-adviser, as proposed.

Some commenters stated that we should require only aggregate portfolio investment-level disclosure and not each instance of portfolio investment compensation in order to provide more helpful information to investors, reduce costs and compliance burdens for advisers, or to avoid potentially causing portfolio companies to decline private fund investments.[286] Although we recognize that it could be simpler or less burdensome for certain advisers to provide aggregate information, it is important that investors are made aware of each instance of portfolio investment compensation to the adviser. Investors should be able to analyze each such instance and raise any potential concerns about these compensation schemes with the adviser. Aggregated information could provide investors with a sense of the magnitude of such compensation schemes, but investors may not be able to understand the nature and scope of the conflicts associated with portfolio investment compensation to the adviser.

Several commenters stated that the requirement to disclose portfolio investment compensation should be limited to circumstances in which an adviser has the discretion or authority to cause a portfolio investment to compensate the adviser or its related persons, as those are the circumstances in which conflicts of interest would arise.[287] In contrast, another commenter supported our proposed approach and stated that advisers should be required to report portfolio investment compensation regardless of whether they have such discretion or authority over a portfolio investment.[288] Other commenters suggested that the portfolio investment compensation disclosure requirement should exclude portfolio investment compensation to an adviser's related persons that are operationally and otherwise independent of the adviser, stating that some advisers have related persons who negotiate with advisers or their affiliates on an arm's-length basis and would not represent their interests when negotiating with a portfolio investment.[289] Although we understand that conflicts of interest issues are heightened when an adviser has the discretion or authority to control a portfolio investment (and in the context of portfolio investment compensation to a related person, to control such related person), we recognize that potential or actual conflicts of interest are not limited to scenarios where an adviser has such control and may arise, for instance, where an adviser does not have control but has substantial influence over a portfolio investment (or in the context of portfolio investment compensation to a related person, over such related person) and the portfolio investment is compensating the adviser or its related persons.[290] As a result, we believe that it is necessary to provide investors with comprehensive information regarding payments of portfolio investment compensation allocated or paid to an adviser or its related person, without limitation to circumstances in which an adviser has discretion or authority over the portfolio investment (or over the related person, as applicable).

Some commenters raised concerns about potential confidentiality issues if advisers are required to disclose the names of portfolio investments as part of this portfolio investment compensation disclosure.[291] Although we appreciate these confidentiality concerns, we believe that many investors may likely already know the names of the fund's portfolio investments. Even if investors do not know this information, investors are typically subject to contractual obligations to maintain the confidentiality of this information. Further, as stated above, advisers should generally disclose the identity of each covered portfolio investment to the extent necessary for an investor to understand the nature of the potential or actual conflicts associated with such payments. To the extent the identity of any covered portfolio investment is not necessary for an investor to understand the nature of the conflict, advisers may use consistent code names (*e.g.,* ''portfolio investment A'').

Ownership Percentage. We proposed but are not adopting a requirement that the portfolio investment table include a list of the fund's ownership percentage of each covered portfolio investment. At proposal, we stated that we believed this information would provide investors with helpful context for the amount of portfolio investment compensation paid or allocated to the adviser or its related persons relative to the fund's ownership. For example, if portfolio investment compensation is calculated based on the portfolio investment's total enterprise value, then investors would be able to compare the amount of portfolio investment compensation relative to the fund's ownership percentage.

One commenter indicated that these ownership percentages would not be helpful for investors in practice.[292] Another commenter stated that calculating and recording ownership percentages of portfolio investments would be onerous and costly.[293] Another commenter suggested that we should require advisers to disclose these ownership percentages only if the adviser has discretion or substantial influence to cause the accompanying portfolio investment compensation to be paid to the adviser.[294] In contrast, one commenter suggested expanding the ownership percentage disclosure obligation to cover any economic right, interest, or benefit that the fund has in a company.[295] Although we maintain that these ownership percentages might provide illustrative information for investors in certain circumstances, like the one noted above, we recognize that they might be misleading or unhelpful in other cases. For instance, if a fund owns voting stock in a company with a significant amount of non-voting stock, then the ownership percentage might appear low relative to the amount of control that the fund's adviser actually exerts. Similarly, if a fund owns only a debt interest in a portfolio investment, its ownership percentage would be represented as zero even if the debt interest is substantial enough that the fund's adviser can exact some sort of compensation for itself. We do not want investors to misestimate the degree to which advisers are able to influence portfolio investments to provide compensation. Accordingly, in response to commenters, we have decided not to adopt this requirement to include ownership percentages for covered portfolio investments.

[286] *See, e.g.,* PIFF Comment Letter; CFA Comment Letter I; Goldman Comment Letter.

[287] *See, e.g.,* AIMA/ACC Comment Letter; SIFMA–AMG Comment Letter I; SBAI Comment Letter; *see also supra* footnote 273.

[288] *See* Convergence Comment Letter.

[289] *See, e.g.,* AIC Comment Letter I; Goldman Comment Letter.

[290] An adviser may be subject to a potential or actual conflict of interest arising out of its substantial influence over a portfolio investment, for example, if a fund it advises owns a sizeable but non-controlling share of the investment or if the portfolio investment is otherwise dependent on the adviser to operate its business. More broadly, we have recognized that an adviser is generally subject to a potential or actual conflict of interest with an advisory client when it has a conflicting interest that ''might incline [the] investment adviser—consciously or unconsciously—to render advice which was not disinterested.'' IA Fiduciary Duty Release, *supra* footnote 58, at 23.

[291] *See, e.g.,* PIFF Comment Letter; AIMA/ACC Comment Letter.

[292] *See* CFA Comment Letter I.

[293] *See* ATR Comment Letter.

[294] *See* PIFF Comment Letter.

[295] *See* Convergence Comment Letter.

(c) Calculations and Cross-References to Organizational and Offering Documents

As proposed, the quarterly statement rule requires each statement to include prominent disclosure regarding the manner in which expenses, payments, allocations, rebates, waivers, and offsets are calculated.[296] This disclosure should assist private fund investors in understanding and evaluating the adviser's calculations. This disclosure will generally require advisers to describe, among other things, the structure of, and the method used to determine, any performance-based compensation set forth in the quarterly statement (such as the distribution waterfall, if applicable) and the criteria on which each type of compensation is based (*e.g.,* whether such compensation is fixed, based on performance over a certain period, or based on the value of the fund's assets). To facilitate an investor's ability to seek additional information and understand the basis of any expense, payment, allocation, rebate, waiver, or offset calculation, the quarterly statement also must include cross-references to the relevant sections of the private fund's organizational and offering documents that set forth the applicable calculation methodology.[297]

Some commenters supported this calculation and cross-reference disclosure requirement, stating that it would help investors monitor and understand fees and expenses.[298] Other commenters suggested that this calculation and cross-reference disclosure requirement would be too costly or that it would clutter the statement and make it more difficult for investors to read and digest the information contained therein.[299]

The required cross-references to the fund's documents will enable investors to compare what the private fund's documents establish that the fund (and indirectly the investors) will be *obligated* to pay to what the fund (and indirectly the investors) *actually* paid during the reporting period and thus to assess and monitor more effectively the accuracy of the payments. Including this information in the quarterly statement will better enable an investor to confirm that the adviser calculated, for example, advisory fees in accordance with the fund's organizational and offering documents and to identify whether the adviser deducted or charged incorrect or unauthorized amounts.

2. Performance Disclosure

As proposed, in addition to providing information regarding fees and expenses, the rule requires advisers to include standardized fund performance information in each quarterly statement provided to fund investors. The rule requires advisers to liquid funds[300] to show performance based on net total return on an annual basis for the 10 fiscal years prior to the quarterly statement or since the fund's inception (whichever is shorter), over one-, five-, and 10-fiscal year periods, and on a cumulative basis for the current fiscal year as of the end of the most recent fiscal quarter. For illiquid funds,[301] the rule requires advisers to show performance based on internal rates of return and multiples of invested capital since inception and to present a statement of contributions and distributions.[302] The rule requires advisers to display the different categories of required performance information with equal prominence.[303]

Many commenters supported the performance disclosure requirement and generally suggested that it would better enable investors to monitor, compare, or otherwise alter their private fund investments.[304] Other commenters did not support this requirement for a number of reasons.[305] In general, opponents of this requirement stated that the required performance disclosure in the quarterly statements would lead to increased costs that would ultimately be passed down to private fund investors with potentially little or no corresponding benefit, as many advisers already regularly provide performance reporting that they assert investors deem adequate.[306] These commenters stated that current market practices are typically sufficient and can potentially be more effective in conveying relevant and fund-tailored information regarding a private fund's performance than a standardized disclosure approach would.[307]

While we acknowledge that quarterly statements may increase costs, we believe these costs are justified in light of the benefits of the rule.[308] It is essential that quarterly statements include performance in order to enable investors to compare private fund investments, comprehensively understand their existing investments, and determine what to do holistically with their overall investment portfolio.[309] A quarterly statement that includes fee, expense, and performance information will allow investors to monitor their investments better for market developments and potential fund-level abnormalities (*e.g.,* if performance varies drastically quarter to quarter or differs extensively from relevant market trends or, if applicable, comparable benchmarks), as well as to understand more broadly the impact of fees and expenses on the performance of their investments. Simple and clear disclosure of this information is fundamental to the terms of an investor's relationship with an adviser because it is critical to investors' abilities to make investment decisions. For example, a quarterly statement that includes fee and expense, but not performance, information would not allow an investor to perform a cost-benefit analysis to determine whether to retain the current investment or consider other options. Similarly, an investor without fee, expense, and performance information would be unable to determine whether to invest in other private funds managed by the same adviser. In addition, investors may use fee, expense, and performance information about their current investments to inform their overall investment decisions (*e.g.,* whether to diversify) and their view of the market. The inclusion of performance disclosure

[296] Final rule 211(h)(1)–2(d).

[297] *Id.*

[298] *See, e.g.,* Comment Letter of Albourne Group (Apr. 22, 2022) (''Albourne Comment Letter''); TRS Comment Letter; Comment Letter of the California Public Employees' Retirement System (May 3, 2022) (''CalPERS Comment Letter'').

[299] *See, e.g.,* LSTA Comment Letter; AIMA/ACC Comment Letter; IAA Comment Letter II.

[300] The definition of a liquid fund is discussed below in this section II.B.2.

[301] The definition of an illiquid fund is discussed below in this section II.B.2.

[302] As discussed below, we are adopting modifications to (i) the proposed definition of illiquid fund and, by reference, the proposed definition of liquid fund and (ii) certain aspects of the required performance disclosure for illiquid funds.

[303] Final rule 211(h)(1)–2(e)(2). For example, the rule requires an adviser to an illiquid fund to show gross internal rate of return with the same prominence as net internal rate of return. Similarly, the rule requires an adviser to a liquid fund to show the annual net total return for each fiscal year with the same prominence as the cumulative net total return for the current fiscal year as of the end of the most recent fiscal quarter covered by the quarterly statement.

[304] *See, e.g.,* CII Comment Letter; NEA and AFT Comment Letter; OPERS Comment Letter; Morningstar Comment Letter.

[305] *See, e.g.,* IAA Comment Letter II; Comment Letter of ApeVue, Inc. (Apr. 25, 2022); ICM Comment Letter.

[306] *See, e.g.,* Ropes & Gray Comment Letter; NYC Bar Comment Letter II. While we acknowledge that quarterly statements may increase costs, we believe these costs are justified in light of the benefits of the rule. As discussed above, investors will benefit from mandatory timely updates regarding fund performance. *See supra* the introductory discussion in section II.B.

[307] *See, e.g.,* Schulte Comment Letter; PIFF Comment Letter; NYC Bar Comment Letter II.

[308] *See infra* section VI.D.2.

[309] *See infra* section II.B.2.a) and section II.B.2.b) for discussion of the use of the particular performance metrics obligations for liquid funds and illiquid funds, respectively, in the final rule.

in the quarterly statement also helps prevent fraud, deception, and manipulation because it requires advisers to provide timely and consistent performance disclosures to enable and empower investors to assess adviser performance. This disclosure will decrease the likelihood that investors will be defrauded, deceived, or manipulated by deceptive or manipulative representations of performance and it increases the likelihood that any misconduct will be detected sooner.

One commenter stated that we should align the performance reporting standards with the principles-based approach reflected in the marketing rule.[310] Although there are commonalities between the performance reporting elements of the final rule and the performance elements of our recently adopted marketing rule, the two rules have different purposes that stem from the needs of the different types of clients and investors they seek to protect. While the marketing rule is focused on prospective clients and investors,[311] the quarterly statement rule is focused on current clients and investors. All clients and investors should be protected against misleading, deceptive, and confusing information, but current clients and investors have different needs from those of prospective clients and investors. Current investors should receive performance reporting that allows them to evaluate an investment alongside corresponding fee and expense information. Current investors also should receive performance reporting that is provided at timely, predictable intervals so that an investor can monitor and evaluate an investment's progress over time, remain abreast of changes, compare information from quarter to quarter, and take action where possible.[312] Although the marketing rule requires net performance to accompany gross performance, it does not prescribe a breakdown of fees and expenses to accompany performance as is required under the quarterly statement rule. The marketing rule also does not require performance to be delivered at specified intervals as is required under the quarterly statement rule. While these rules both promote investor protection, the quarterly statement rule is specifically designed to meet the needs of current investors to evaluate their current portfolios.

Without standardized performance metrics (and adequate disclosure of the criteria used and assumptions made in calculating the performance),[313] it is more difficult for investors to compare their private fund investments managed by the same adviser or gauge the value of an adviser's investment management services by comparing the performance of private funds advised by different advisers.[314] Currently, there are various approaches to report private fund performance to fund investors, often depending on the type of private fund (*e.g.,* the fund's strategy, structure, target asset class, investment horizon, and liquidity profile). Certain of these approaches to performance reporting may be misleading without the benefit of adequately disclosed assumptions, and others may lead to investor confusion. For example, an adviser showing internal rate of return with the impact of fund-level subscription facilities could mislead investors as fund-level subscription facilities can artificially increase performance metrics.[315] An adviser showing private fund performance as compared to a public market equivalent (''PME'') in a case where the private fund does not have an appropriate benchmark may mislead investors to believe that the private fund performance is comparable to the performance of the PME. Certain investors may also be led to believe that their private fund investment has a liquidity profile that is similar to an investment in the PME or an index that is similar to the PME.

Standardized performance information will help an investor decide whether to continue to invest in the private fund or, if applicable, redeem or withdraw from the private fund, as well as more holistically to make decisions about other components of the investor's portfolio. Furthermore, requiring advisers to show performance information alongside fee and expense information in the quarterly statement will provide a more complete picture of an investor's private fund investment. This information will help investors understand the true cost of investing in the private fund and be particularly valuable for investors that are paying performance-based compensation. This performance reporting will also provide greater transparency into how private fund performance is calculated, improving an investor's ability to understand performance.

One commenter requested that we clarify that investors may negotiate for performance and other reporting in addition to what is required by this rule.[316] The rule recognizes the need for different performance metrics for private funds based on certain fund characteristics, but also imposes a general framework to help ensure there is sufficient standardization in order to provide useful, comparable information to investors. An adviser remains free to include additional performance metrics in the quarterly statement as long as the quarterly statement presents the performance metrics prescribed by the rule and complies with the other requirements in the rule. However, advisers that choose to include additional information should consider what other rules and regulations might apply. For example, although we generally do not consider information in the quarterly statement required by the rule to be an ''advertisement'' under the marketing rule, an adviser that offers new or additional investment advisory services with regard to securities in the quarterly statement would need to consider whether such information is subject to the marketing rule.[317] An adviser also needs to consider whether performance information presented outside of the required quarterly statement, even if it contains some of the same information as the quarterly statement, is subject to, and meets the requirements of, the marketing rule. Regardless, the quarterly statement is subject to the antifraud provisions of the Federal securities laws.[318]

Some commenters suggested that we should also require a public market equivalent (''PME'') as part of the

[310] *See* AIMA/ACC Comment Letter.

[311] Advertisements to prospective clients and investors include advertisements to current clients and investors about new or additional advisory services with regard to securities. *See* Marketing Release, *supra* footnote 127, at section II.A.2.a.iv (noting that the definition of ''advertisement'' includes a communication to a current investor that offers new or additional advisory services with regard to securities, provided that the communication otherwise satisfies the definition of ''advertisement'').

[312] The marketing rule and its specific protections generally do not apply in the context of a quarterly statement. *See* Marketing Release, *supra* footnote 127, at sections II.A.2.a.iv and II.A.4.

[313] Private funds can have various types of complicated structures and involve complex financing mechanisms. As a result, an adviser may need to make certain assumptions when calculating performance for private funds.

[314] *See* David Snow, Private Equity: A Brief Overview: An introduction to the fundamentals of an expanding, global industry, PEI Media (2007), at 11 (discussing variations on private equity performance metrics).

[315] *See infra* section II.B.2.b).

[316] *See* NYC Comptroller Comment Letter.

[317] *See* rule 206(4)–1. A communication to a current investor is an ''advertisement'' when it offers new or additional investment advisory services with regard to securities.

[318] This includes the antifraud provisions of section 206 of the Advisers Act, rule 206(4)–8 under the Advisers Act (rule 206(4)–8), section 17(a) of the Securities Act, and section 10(b) of the Exchange Act (and rule 10b–5 thereunder), to the extent relevant.

quarterly statements.[319] While a PME may be helpful in certain circumstances, it can also be misleading or confusing in others. Many private fund investment strategies may not have an appropriate PME. For example, it may be difficult to identify an effective PME for a private fund whose strategy is focused on turn-around opportunities for private companies. Similarly, it may be challenging to identify appropriate PMEs for certain private funds with highly technical or niche strategies. A PME may also mislead investors to believe that their investment has a similar liquidity profile to the PME. For example, comparing the performance of a technology-focused buy-out fund to a public technology company index may obscure the reality that the former is illiquid while the latter is liquid and thus a reasonable investor would not necessarily expect them to have the same performance. Accordingly, the final rule does not require a PME as part of the quarterly statements.

Certain commenters suggested that we should clarify that the adviser's (and its affiliate's) interests should be excluded when calculating performance because such interests are typically non-fee paying.[320] We agree that the adviser's (and its affiliate's) interests should generally be excluded when calculating performance for the quarterly statements to prevent the performance from being misleading. A typical example would be the general partner's interest in a private fund, which generally does not pay management fees or carried interest. Due to the lack of fees, the performance of such non-fee paying interests is not necessarily relevant for other investors and would serve to increase net returns in a way that could be misleading.

One commenter suggested that we should not require performance metrics until the fund has at least four quarters of results.[321] While some private funds may have limited investment activities during the first four quarters of their life, it is not always such the case. Many liquid funds are able to deploy capital quickly and, as a result, generate important performance information that investors should have access to. Because investors have the ability to redeem from liquid funds, it is also important that they begin receiving performance information as soon as practicable so that they can decide whether or not to remain invested in the fund. Many illiquid funds are also able to deploy capital and realize or partially realize investments on an accelerated basis and thus will have meaningful performance information in the early quarters of their life. Accordingly, we are requiring all private funds, whether liquid or illiquid, to provide quarterly statements containing these performance metrics after their first two full fiscal quarters of operating results.

Liquid v. Illiquid Fund Determination

The performance disclosure requirements of the quarterly statement rule require an adviser first to determine whether its private fund client is an illiquid or liquid fund, as defined in the rule, no later than the time the adviser sends the initial quarterly statement.[322] The adviser is then required to present certain performance information depending on this categorization. These definitions are intended to facilitate consistent portrayals of the fund returns over time as well as more standardized comparisons of the performance of similar funds.

We are defining ''illiquid fund'' as a private fund that: (i) is not required to redeem interests upon an investor's request and (ii) has limited opportunities, if any, for investors to withdraw before termination of the fund.[323]

At proposal, we had listed six factors used to identify an illiquid fund: a private fund that (i) has a limited life; (ii) does not continuously raise capital; (iii) is not required to redeem interests upon an investor's request; (iv) has as a predominant operating strategy the return of the proceeds from disposition of investments to investors; (v) has limited opportunities, if any, for investors to withdraw before termination of the fund; and (vi) does not routinely acquire (directly or indirectly) as part of its investment strategy market-traded securities and derivative instruments. The proposed factors were aligned with the factors for determining how certain types of private funds should report performance under U.S. Generally Accepted Accounting Principles (''U.S. GAAP'').[324] We requested comment on whether we should modify the illiquid fund definition by adding or removing factors.

Many commenters supported the liquid and illiquid fund distinction as part of the required performance reporting,[325] and many other commenters criticized it.[326] Of these, a number of commenters suggested we modify the proposed definitions for liquid and illiquid funds.[327] Certain commenters stated that the distinction between liquid and illiquid funds is overly technical and does not align with how sponsors typically market their private funds, particularly with respect to the proposed ''disposition of investments'' prong.[328] We had requested comment specifically regarding whether the proposed ''disposition of investments'' prong could cause certain funds, such as real estate funds and credit funds, for which we generally believe internal rate of return and multiple of invested capital are the appropriate performance measures, to be treated as liquid funds under the proposed rule.[329] Certain commenters responded with their view that the proposed rule would result in private funds that should report an internal rate of return and multiple of invested capital instead reporting a total net return metric (or *vice versa*).[330] Similarly, a commenter stated that we should define ''illiquid fund'' more precisely to capture strategies such as private credit, *e.g.,* income generating portion of assets, not just a focus on return of proceeds from the disposition of investments, as contemplated by prong four of the proposed definition.[331] Some commenters stated that it may be unclear how certain kinds of private funds would be categorized under the proposed six factor definition.[332]

After considering responses from commenters, we have decided that the definition of an illiquid fund should focus only on number three and number five of the proposed six factors, *i.e.,* a private fund that (i) is not required to

[319] *See, e.g.,* NEA and AFT Comment Letter; Comment Letter of the Interfaith Center on Corporate Responsibility (Apr. 25, 2022) (''ICCR Comment Letter''); AFL–CIO Comment Letter.

[320] *See* CFA Comment Letter I; Comment Letter of KPMG LLP (Apr. 25, 2022) (''KPMG Comment Letter'').

[321] *See* AIC Comment Letter II.

[322] Final rule 211(h)(1)–2(e)(1). The rule does not require the adviser to revisit the determination periodically; however, advisers should generally consider whether they are providing accurate information to investors and whether they need to revisit the liquid/illiquid determination based on changes in the fund.

[323] Final rule 211(h)(1)–1 (defining ''illiquid fund'').

[324] *See* Financial Accounting Standards Board (FASB) Accounting Standards Codification (ASC) 946–205–50–23.

[325] *See, e.g.,* OFT Comment Letter; IST Comment Letter; CII Comment Letter.

[326] *See, e.g.,* Morningstar Comment Letter; SIFMA–AMG Comment Letter I; SBAI Comment Letter.

[327] *See, e.g.,* ILPA Comment Letter I; SIFMA–AMG Comment Letter I.

[328] Proposed prong (iv) states ''. . . has as a predominant operating strategy the return of the proceeds from disposition of investments to investors.''

[329] *See* Proposing Release, *supra* footnote 3, at 62.

[330] *See, e.g.,* PIFF Comment Letter; Comment Letter of Pricewaterhouse Coopers LLP (Apr. 25, 2022) (''PWC Comment Letter'').

[331] *See* ILPA Comment Letter I.

[332] *See, e.g.,* SIFMA–AMG Comment Letter I; Morningstar Comment Letter; Convergence Comment Letter.

redeem interests upon an investor's request; and (ii) has limited opportunities, if any, for investors to withdraw before termination of the fund because we believe that redemption and withdrawal capability represents the distinguishing feature between illiquid and liquid funds. We also believe that, by narrowing the definition to this distinguishing feature, the rule provides a more targeted approach and will result in fewer funds being mischaracterized than under the proposed definition.

Generally, if a private fund allows voluntary redemptions/withdrawals, then it is a liquid fund and must provide total returns. Similarly, if a private fund does not allow voluntary redemptions/withdrawals, then it is an illiquid fund and must provide internal rates of return and multiples of invested capital. Private funds that fall into the ''illiquid fund'' definition are generally closed-end funds that do not offer periodic redemption/withdrawal options other than in exceptional circumstances, such as in response to regulatory events. For example, most private equity and venture capital funds will likely fall under the illiquid fund definition, and the rule requires advisers to these types of funds to provide performance metrics that suit their particular characteristics, such as irregular cash flows, which otherwise make measuring performance difficult for both advisers and investors. We recognize, however, that even traditional, closed-end private equity funds have certain redemption or withdrawal rights for regulatory events (*e.g.,* redemptions related to the Employee Retirement Income Security Act (''ERISA'') and the Bank Holding Company Act (''BHCA'')) and other extraordinary circumstances (*e.g.,* redemptions related to a violation of a State pay-to-play law). Private equity and other similar closed-end funds would still be classified as illiquid funds, as defined in this rule, so long as such opportunities to redeem are limited.

As proposed, we are defining a ''liquid fund'' as any private fund that is not an illiquid fund. Some commenters generally supported the liquid and illiquid fund distinction as noted above,[333] while other commenters generally criticized the distinction.[334] We continue to believe that the proposed definition is appropriate because it will capture any fund that does not fit within the definition of ''illiquid fund'' and ensure that liquid fund investors receive the same type of performance metrics. Private funds that fall into the ''liquid fund'' definition generally allow periodic investor redemptions, such as monthly, quarterly, or semi-annually. The rule will require advisers to these types of funds to provide performance metrics that show the year-over-year return using the market value of the underlying assets.

We continue to believe that the performance metrics for liquid funds—which are discussed in detail below—will allow investors to assess better these funds' performance. We understand that liquid funds generally are able to determine their net asset value on a regular basis and compute the year-over-year return using the market-based value of the underlying assets. We have taken a similar approach with regard to registered funds, which invest a substantial amount of their assets in primarily liquid holdings (*e.g.,* publicly traded securities) and, as a result, are also generally able to determine their net asset value on a regular basis and compute the year-over-year return using the market-based value of the underlying assets. Investors in a private fund that is a liquid fund would similarly find this information helpful. Most traditional hedge funds likely fall into the liquid bucket and will need to provide disclosures regarding the underlying assumptions of the performance (*e.g.,* whether dividends or other distributions are reinvested).

Some commenters suggested creating a third category to capture certain ''hybrid'' funds.[335] A third category for hybrid funds would create confusion and increase the possibility of certain private funds not clearly belonging to a single category. A category of hybrid funds would encapsulate an enormous diversity of funds, many of which would be more different from one another than they would be from liquid or illiquid funds, as defined in the rule. Additionally, new structures for private funds are constantly being developed, and there will certainly be new approaches in the future as well that are difficult to anticipate. It would likely be impractical to attempt to define characteristics of hybrid funds and thus to determine what performance metrics are necessary for them. We believe it is more effective to crystallize the key difference between liquid and illiquid funds in the final rule, as discussed above. In this regard, and as stated above, we believe that our simplification of the definition of ''illiquid fund'' in the final rule will result in fewer funds being mischaracterized than under the proposed definition, and thus this change in the final rule will reduce the need to create an additional category of hybrid funds to facilitate the categorization of private funds for performance reporting purposes.

Other commenters requested that we let advisers choose the most appropriate approach with respect to performance reporting instead of requiring these categories.[336] A primary objective of the rule, however, is to provide the investors of a private fund with comparable performance information with respect to that fund and the investor's other private fund investments. Accordingly, we believe that establishing standardization with respect to a minimum level of sufficient disclosure is necessary. Currently, it may be difficult for certain investors to compare performance across their private fund investments if the investors are not large enough to negotiate for supplemental fund reporting or well-resourced enough to analyze in a timely manner the potential nuances in how different private funds present their performance. We believe that establishing a level of standardized performance reporting should make it easier for investors to evaluate their private fund investments and make more informed investment decisions.

The final rule requires advisers to provide performance reporting for each private fund as part of the fund's quarterly statement. The determination of whether a fund is liquid or illiquid dictates the type of performance reporting that must be included and, because it will result in funds with similar liquidity characteristics presenting the same type of performance metrics, this approach will improve comparability of private fund performance reporting for fund investors.

(a) Liquid Funds

We are adopting the performance requirements for liquid funds as proposed, other than (i) the proposed requirement for an adviser to disclose annual net total returns since inception and (ii) the proposed use of calendar year reporting periods. Under the final rule, an adviser to a liquid fund is required to provide annual net total returns *since inception or for each fiscal*

[333] *See, e.g.,* OFT Comment Letter; IST Comment Letter; CII Comment Letter.

[334] *See, e.g.,* Morningstar Comment Letter; SIFMA–AMG Comment Letter I; SBAI Comment Letter.

[335] *See, e.g.,* Morningstar Comment Letter; Convergence Comment Letter.

[336] *See, e.g.,* BVCA Comment Letter; SBAI Comment Letter; AIMA/ACC Comment Letter.

year over the 10 years prior to the quarterly statement, whichever is shorter. As discussed in greater detail below, this change to the minimum number of years of required performance is responsive to commenters who stated that reporting since inception is overly broad and that many advisers would not have records going back to inception. Under the final rule, an adviser to a liquid fund must also provide performance metrics based on fiscal rather than calendar year reporting periods. As discussed in greater detail below,[337] the adoption of fiscal reporting periods seeks to align the delivery of the fourth quarter statement with the time that private funds obtain their audited annual financials. The adoption of fiscal reporting periods is also responsive to commenters who stated that fiscal periods would more closely align with industry practice.[338] While this modification may affect comparability for some investors across private funds with differing fiscal years, we understand that the majority of private funds' fiscal years match the calendar year and thus do not expect comparability to be substantially affected in most cases. We discuss each performance reporting requirement for liquid funds in turn below.

Annual Net Total Returns. The final rule requires advisers to liquid funds to disclose performance information in quarterly statements for specified periods. First, as noted above, an adviser to a liquid fund is required to disclose either the liquid fund's annual net total returns since inception or for each fiscal year over the 10 years prior to the quarterly statement, whichever is shorter. For example, a liquid fund that commenced operations four fiscal years ago would show annual net total returns for each of the first four fiscal years since its inception. A liquid fund that commenced operations fourteen years ago, however, would be required to show annual net total returns only for each of the most recent 10 fiscal years.

Some commenters stated that the proposed requirement of performance since inception is unworkable.[339] In particular, certain commenters stated that certain longstanding funds may not have the necessary records to calculate the requisite performance metrics on an inception-to-date basis, particularly those records outside of the record-keeping requirements of the Advisers Act.[340] Another commenter suggested that, instead of annual returns since inception for liquid funds, we should require annual returns for the past 10 years.[341] We recognize that it may be difficult for certain longstanding liquid funds to calculate inception-to-date performance. Specifically, liquid funds that have been operating for decades might have to make significant estimations to be able to report inception-to-date performance if the relevant records have not been maintained over their entire life. While we believe there continues to be value in reporting inception-to-date performance even for longstanding funds, we also do not want liquid funds to be obligated to report inaccurate or misleading performance information based on estimates of performance from decades ago to investors. We agree with commenters that stated 10 years is an appropriate time period for liquid funds to report performance,[342] as it will capture the salient performance history in most cases and generally align with market practice and investor preferences, based on staff experience. A 10-year period should also generally still capture recent, relevant market cycles that may have affected performance. Accordingly, we are requiring only a minimum of 10 years of performance for liquid funds that have been in operation for longer than that. Liquid funds are free, but not required, to report performance on a longer horizon than 10 years, if applicable.

Annual net total returns will provide fund investors with a comprehensive overview of the fund's performance over the life of the fund or the prior 10 years, whichever is shorter, and improve an investor's ability to compare the fund's performance with other similar funds. As noted above, investors can use performance information in connection with fee and expense information to analyze the value of their private fund investments. This requirement helps ensure that advisers do not present only recent performance results or only results for periods with strong performance. The rule also requires advisers to present each time period with equal prominence.

Average Annual Net Total Returns. Second, advisers to liquid funds are required to show each liquid fund's average annual net total returns over the one-, five-, and 10-year periods, as proposed.[343] If the private fund did not exist for any of these prescribed time periods, then the adviser is not required to provide the corresponding information. Requiring performance over these time periods will provide investors with standardized performance metrics that reflect how the private fund performed during different market or economic conditions. These time periods provide reference points for private fund investors, particularly when comparing two or more private fund investments, and provide private fund investors with aggregate performance information that can serve as a helpful summary of the fund's performance.

One commenter suggested that we should include a definition for ''net total returns.'' [344] To the contrary, other commenters suggested that we should not prescribe how performance is calculated.[345] We think that defining ''net total returns'' for liquid funds in this rulemaking may not result in the best outcomes for investors. As used in the final rule, the liquid fund category captures a set of private funds that is unrestricted so long as they do not meet the definition of an illiquid fund and, as a result, is highly diverse. Some liquid funds target highly niche assets for which the calculation of net total returns is based on specialized industry norms and practices. Without further consideration and study, prescribing a single definition for ''net total returns'' could end up harming investors by distorting the reported performance of liquid funds that invest in less common asset classes from what investors have come to understand and expect. Consequently, we do not believe it is appropriate to prescribe a definition for ''net total returns'' at this time.

Certain commenters stated that requiring liquid funds to report the one-, five-, and 10-year periods would provide data to investors that the Commission recently determined in the marketing rule was not useful information for private funds.[346] One such commenter asserted that requiring the use of standardized reporting information to be presented alongside

[337] *See* section II.B.3.

[338] *See, e.g.,* AIMA/ACC Comment Letter; ILPA Comment Letter I; SIFMA–AMG Comment Letter I (suggesting that the SEC require reporting only on an annual basis within 120 days of the fund's fiscal year end); GPEVCA Comment Letter (suggesting that any periodic disclosure requirement be tied to the annual audit process).

[339] *See, e.g.,* ATR Comment Letter; AIMA/ACC Comment Letter.

[340] *See, e.g.,* PWC Comment Letter; AIMA/ACC Comment Letter.

[341] *See* CFA Comment Letter I.

[342] *See* CFA Comment Letter II; Ropes & Gray Comment Letter.

[343] Final rule 211(h)(1)–2(e)(2)(i)(B).

[344] *See* CFA Comment Letter I.

[345] *See, e.g.,* GPEVCA Comment Letter; BVCA Comment Letter.

[346] *See, e.g.,* IAA Comment Letter II; NYC Bar Comment Letter II; PIFF Comment Letter; Schulte Comment Letter. *See also* Marketing Release, *supra* footnote 127, at 182.

the more relevant data would result in multiple sets of performance data and metrics, creating additional confusion for investors and an overwhelming volume of information.[347] While we acknowledge that the marketing rule excepted private funds from its one-, five-, and 10-year periods presentation requirement, the underlying concern with requiring these intervals was that it could be not useful or meaningful, and possibly confusing, for investors in a closed-end fund.[348] Among our reasons for excepting *all* private funds from the requirement under the marketing rule, we stated that we did not believe the benefit of having advisers parse the rule's requirements based on specific fund types would justify the complexity.[349] Performance information in the quarterly statements serves a somewhat different purpose, however. As stated above, the needs of *current* clients and investors often differ in some respects from the needs of *prospective* clients and investors. Current investors generally need to receive performance reporting during different time periods to be able to evaluate properly an investment's performance. Current investors also generally need to receive performance reporting that is provided at timely, predictable intervals to be able to compare information effectively from quarter to quarter and year to year, and thus be positioned to take action where possible. Requiring regular disclosure of performance for liquid funds over these periods will help prevent fraud, deception, and manipulation because timely and consistent performance information will decrease the likelihood that investors will be defrauded, deceived, or manipulated by deceptive or misleading representations of performance, especially if such representations occur with respect to each time period.[350] It also increases the likelihood that any misconduct will be detected sooner. Accordingly, the final rule will retain the one-, five- and 10-year periods for liquid funds because we believe they will assist investors with this process.

Cumulative Net Total Returns. Third, the adviser is required to show the liquid fund's cumulative net total return for the current fiscal year as of the end of the most recent fiscal quarter covered by the quarterly statement. For example, a liquid fund that has been in operation for four fiscal years (beginning on January 1) and seven months would show, pursuant to this requirement, the cumulative net total return for the current fiscal year through the end of the second quarter (*i.e.,* year-to-date fund performance as of the end of the most recent fiscal quarter covered by the quarterly statement). This information will provide fund investors with insight into the fund's most recent performance, which investors can use to assess the fund's performance during recent market conditions. This quarterly performance information will also provide helpful context for reviewing and monitoring the fees and expenses borne by the fund during recent quarters, which the quarterly statement will disclose.

These required performance metrics should allow investors to better assess these funds' performance. Liquid funds generally should be able to determine their net asset value on a regular basis and compute the year-over-year return using the market-based value of the underlying assets. We have taken a similar approach with regard to registered open-end funds, which typically invest a substantial amount of their assets in primarily liquid underlying holdings (*e.g.,* publicly traded securities).[351] Liquid funds, like registered funds, currently generally report performance, at a minimum, on an annual and quarterly basis. Investors in a private fund that is a liquid fund would similarly find this information helpful. Most traditional hedge funds are likely liquid funds and will need to provide disclosures regarding the underlying assumptions of the performance (*e.g.,* whether dividends or other distributions are reinvested).[352]

One commenter suggested that we should reevaluate the requirement for liquid funds to show both annualized and cumulative net performance and grant private funds flexibility in providing either annualized or cumulative net performance.[353] We decided not to allow this flexibility to help ensure that investors receive standardized, comparable information for each private fund. Permitting advisers to pick and choose which return metrics to use would be inconsistent with this goal. Accordingly, as proposed, the final rule will require advisers to show both annualized and cumulative net performance.

Another commenter suggested that we should also require liquid funds to provide average annual net returns over a three-year period in addition to the one-, five- and 10-year periods to potentially provide additional transparency to private fund investors.[354] Although we recognize that additional performance information may serve to enhance the overall amount of information available to investors, we believe that the presentation of standardized performance information for one-, five- and 10-year periods will provide a sufficient level of minimum disclosure (which may be further supplemented) for private fund investors to monitor and gain insight into how a private fund performed during different market or economic conditions.[355]

(b) Illiquid Funds

We are adopting the performance requirements for illiquid funds largely as proposed, other than the requirement for an adviser to disclose performance figures solely *without* the impact of fund-level subscription facilities. Under the final rule, an adviser is required to disclose performance figures *with and without* the impact of fund-level subscription facilities. As discussed in greater detail below, this change is responsive to commenters who stated that reporting both sets of performance figures would provide investors with a more complete picture of the fund's performance. We discuss each performance reporting requirement for illiquid funds in turn below.

The rule requires advisers to illiquid funds to disclose the following performance measures in the quarterly statement, shown since inception of the illiquid fund and computed *with and without* the impact of any fund-level subscription facilities: [356]

[347] *See* PIFF Comment Letter.

[348] *See* Marketing Release, *supra* footnote 127, at 181–182.

[349] *See id.*

[350] For example, if performance suddenly and dramatically improves without explanation, then investors will be in a better position (especially where there are comparable benchmarks that did not experience the same sudden and dramatic change) to ask advisers to provide an explanation and assess whether fraud, deception or manipulation may be occurring.

[351] *See, e.g.,* Item 4(b)(2) of Form N–1A.

[352] *See supra* the discussion of the definition of ''liquid fund'' in section II.B.2.

[353] *See* SIFMA–AMG Comment Letter I.

[354] *See* Morningstar Comment Letter.

[355] We also note that advisers are able to provide, and investors are free to request and negotiate for, average annual net returns over a three-year period, provided that such additional reporting complies with other regulations, such as the final marketing rule when applicable. *See supra* the introductory discussion in section II.B.2.

[356] One commenter recommended that we should clarify how distributions that are recalled by advisers for additional investments (often referred to as ''recycling'') should be treated for certain of these illiquid fund performance metrics. *See* CFA Comment Letter II. Advisers generally should treat any distributions that they recall for additional investments as additional contributions for purposes of calculating these illiquid fund performance metrics as we understand this is the expectation of investors. As a result, illiquid fund performance information that does not treat such

Continued

(i) Gross internal rate of return and gross multiple of invested capital for the illiquid fund;

(ii) Net internal rate of return and net multiple of invested capital for the illiquid fund; and

(iii) Gross internal rate of return and gross multiple of invested capital for the realized and unrealized portions of the illiquid fund's portfolio, with the realized and unrealized performance shown separately.

The rule also requires advisers to provide investors with a statement of contributions and distributions for the illiquid fund.[357]

Since Inception. The rule requires an adviser to disclose the illiquid fund's performance measures since inception. This requirement will ensure that advisers are not providing investors with only recent performance results or presenting only results or periods with strong performance, which could mislead investors. We are requiring this for all illiquid fund performance measures under the rule, including the performance measures for the realized and unrealized portions of the illiquid fund's portfolio.

The rule requires an adviser to include performance measures for the illiquid fund through the end of the quarter covered by the quarterly statement. We recognize, however, that certain funds may need information from portfolio investments and other third parties to generate performance data and thus may not have the necessary information prior to the distribution of the quarterly statement. Accordingly, to the extent quarter-end numbers are not available at the time of distribution of the quarterly statement, an adviser is required to include performance measures through the most recent practicable date, which we generally believe would be through the end of the quarter immediately preceding the quarter covered by the quarterly statement. The rule requires the quarterly statement to reference the date the performance information is current through (*e.g.,* December 31, 2023).[358]

Some commenters supported the since inception performance disclosure requirement for illiquid funds,[359] while other commenters criticized it.[360] One commenter commented specifically on the since inception requirement for illiquid fund performance, stating that we should retain this requirement because inception-to-date returns allow investors to understand the improvement or deterioration of returns over the most relevant period, especially for illiquid funds with long-hold periods.[361] We believe that it is important for illiquid funds to provide performance information since inception so that investors are able to evaluate the full performance of their investment. For many illiquid funds, investors commit capital at or near the inception of the fund.[362] These same investors generally also contribute the capital used to make the fund's initial investments. Accordingly, anything less than performance since inception would misrepresent the performance of such investors' investments in the illiquid fund. While there may be situations where investors make capital commitments to an illiquid fund later on in its life, we understand that these circumstances are rare. Even in these scenarios, the illiquid fund may have already made most of the investments it will make over its life by the time this capital is committed later in its life. We also agree with this commenter that inception-to-date returns allow investors to better assess performance trends, particularly for illiquid funds, since inception performance will generally align with the typical investment holding period and the period for which the performance-based fee is generally calculated for many illiquid funds. Accordingly, we maintain that performance since inception is the best approach for representing the illiquid fund's performance.

Computed With and Without the Impact of Fund-Level Subscription Facilities. The rule requires advisers to calculate performance measures for each illiquid fund both with and without the impact of fund-level subscription facilities.[363] For performance measures *without* the impact of fund-level subscription facilities (''unlevered returns''), the rule requires advisers to calculate performance measures as if the private fund called investor capital, rather than drawing down on fund-level subscription facilities, as proposed.[364] For performance measures *with* the impact of fund-level subscription facilities (''levered returns''), the rule requires advisers to calculate performance measures reflecting the actual capital activity from both investors and fund-level subscription facilities, including, for the avoidance of doubt, any activity prior to investor capital contributions as a result of the fund drawing down on fund-level subscription facilities.

In response to our requests for comment, a number of commenters suggested that we require performance measures for illiquid funds both with and without the impact of fund-level subscription facilities.[365] Of these, one commenter stated that requiring performance measures for illiquid funds both with and without the impact of fund-level subscription facilities would provide a more complete picture of the effects of a fund's financing strategies.[366] Another commenter stated that this approach would allow investors to understand the impact of the adviser's decision to use a subscription facility.[367] In response to commenters, we are requiring advisers to calculate performance measures for each illiquid fund both with and without the impact of fund-level subscription facilities. As one commenter pointed out, an internal rate of return *with* the impact of the subscription facilities is typically used to calculate performance-based compensation, and this return also usually reflects the actual investor return.[368] Accordingly, after considering comments, we think it is necessary for investors to be able to compare their illiquid fund performance both with and without the impact of fund-level subscription facilities to better

recalled distributions as additional contributions may be misleading.

[357] Final rule 211(h)(1)–2I(2)(ii).

[358] Final rule 211(h)(1)–2(e)(2)(iii).

[359] *See, e.g.,* Trine Comment Letter; AFREF Comment Letter I; IST Comment Letter.

[360] *See, e.g.,* IAA Comment Letter II; PIFF Comment Letter; AIMA/ACC Comment Letter.

[361] *See* CFA Comment Letter II.

[362] Investors that enter an illiquid fund in a closing subsequent to the fund's initial closing are also generally subject to types of equalization payments or adjustments (*e.g.,* ''true-ups'') that result in their treatment by the private fund as if they had entered the fund at its initial closing.

[363] Final rule 211(h)(1)–2(e)(2)(ii)(A).

[364] As discussed below, the rule also requires advisers to prominently disclose the criteria used and assumptions made in calculating performance. This includes the criteria and assumptions used to prepare an illiquid fund's unlevered performance measures.

[365] *See, e.g.,* ILPA Comment Letter I; Comment Letter of Predistribution Initiative (Apr. 25, 2022) (''Predistribution Initiative Comment Letter II''); IST Comment Letter.

[366] *See* Predistribution Initiative Comment Letter II.

[367] *See* CFA Comment Letter I. However, this commenter also stated that, in certain cases, the calculation of performance without the impact of subscription facilities could be challenging, particularly for historical periods. The commenter stated that advisers may need to make assumptions about which historical capital calls would have been impacted. Because the final rule requires advisers to disclose any assumptions used in calculating performance, we believe that investors will be able to analyze the assumptions made and weigh their impact on performance. Nonetheless, we recognize that, to the extent these assumptions by advisers are not accurate, the benefits of the information to investors may be reduced. *See infra* section VI.D.2.

[368] *See* CFA Comment Letter I.

understand how the use and costs of any fund-level subscription facilities are affecting their returns. Because most advisers with fund-level subscription facilities are already reporting performance with the impact of such facilities, we do not anticipate that this requirement will entail substantial additional burdens for most advisers.[369]

Some commenters suggested exempting advisers from the requirement to present unlevered returns to the extent they used subscription facilities on a short term basis to efficiently manage capital, rather than to increase returns.[370] Of these, some stated that this exemption would be for advisers using facilities solely or primarily to streamline capital calls and not to enhance performance.[371] Some commenters suggested that a ''short-term'' subscription facility is generally one for which the facility is repaid within 120 days using committed capital that is drawn down through a capital call.[372] While we acknowledge that some short-term subscription facilities may be less likely to cause the issues we discuss below, providing such an exemption could lead to certain undesirable outcomes. For instance, a fund may only repay each use of a subscription facility within 120 days for the first two years of the fund's life but then start leaving such subscription facility unpaid for longer spans of time for the remaining eight years of its life. If we were to provide such an exemption, such a fund would not be required to show unlevered performance measures for the first two years but then would be required to do so in the third year. However, in year three and after, investors would only have past levered performance measures and may find it difficult to assess the newly received unlevered performance measures. Additionally, it is important that investors understand how costs associated with a subscription facility are affecting performance, and the unlevered performance measures will facilitate this understanding.

As proposed, we are defining ''fund-level subscription facilities'' as any subscription facilities, subscription line financing, capital call facilities, capital commitment facilities, bridge lines, or other indebtedness incurred by the private fund that is secured by the unfunded capital commitments of the private fund's investors.[373] This definition is designed to capture the various types of subscription facilities prevalent in the market that serve as temporary replacements or substitutes for investor capital.[374] Such facilities enable the fund to use loan proceeds—rather than investor capital—to fund investments initially and pay expenses. This practice permits the fund to delay the calling of capital from investors, which has the potential to increase performance metrics artificially.

Many advisers currently provide performance figures that reflect the impact of fund-level subscription facilities. We believe that these ''levered'' performance figures, alone, have the potential to mislead investors.[375] For example, an investor could reasonably believe that levered performance results are similar to those that the investor has achieved from its investment in the fund. Unlevered performance figures, when presented alongside levered performance figures, will provide investors with more meaningful data and improve the comparability of returns.

We stated in the proposal that we would generally interpret the phrase computed without the impact of fund-level subscription facilities to require advisers to exclude fees and expenses associated with the subscription facility, such as the interest expense, when calculating net performance figures and preparing the statement of contributions and distributions. One commenter suggested that excluding subscription line fees and expenses from net performance should be optional, rather than required.[376] On the contrary, allowing such flexibility would degrade comparability and standardization. In addition, this approach is appropriate because it will result in returns that show what the fund would have achieved if there were no subscription facility, which will help investors understand the impact of the use of the subscription facility.

While there may be certain circumstances under which including subscription line fees and expenses in unlevered performance metrics may have advantages, standardization is important. If we were to make the exclusion of subscription line fees and expenses from net performance for illiquid funds optional instead of required, some advisers might include such fees and expenses while others might exclude them. This variability could make it difficult for investors to assess unlevered performance metrics across illiquid funds that are managed by different advisers. Additionally, some advisers might start by including subscription line fees and expenses from unlevered performance metrics and then switch to excluding such fees and expenses if there was a downward trend in performance. This potential gamesmanship could mislead investors. Accordingly, we are not allowing such optionality.

Fund-Level Performance. The rule requires an adviser to disclose an illiquid fund's gross and net internal rate of return and gross and net multiple of invested capital for the illiquid fund. We are adopting the entirety of this portion of the rule, including all definitions discussed below, as proposed.

Some commenters supported this performance disclosure requirement as providing a useful component in the totality of information that would be required to be provided to private fund investors under the rule.[377] Other commenters criticized this performance disclosure requirement on a number of grounds.[378] One commenter stated that we should prohibit the use of internal rates of return and multiples of invested capital because they can be flawed

[369] *See infra* section VI.D.2.

[370] *See, e.g.,* CFA Comment Letter I; AIC Comment Letter II; ILPA Comment Letter I.

[371] *See, e.g.,* AIC Comment Letter II; ILPA Comment Letter I.

[372] *See, e.g.,* CFA Comment Letter I; ILPA Comment Letter I.

[373] Final rule 211(h)(1)–1. The rule defines ''unfunded capital commitments'' as committed capital that has not yet been contributed to the private fund by investors, and ''committed capital'' as any commitment pursuant to which a person is obligated to acquire an interest in, or make capital contributions to, the private fund. *See id.*

[374] We recognize that a private fund may guarantee portfolio investment indebtedness. In such a situation, if the portfolio investment does not have sufficient cash flow to pay its debt obligations, the fund may be required to cover the shortfall to satisfy its guarantee. Even though investors' unfunded commitments may indirectly support the fund's guarantee, the definition would not cover such fund guarantees. Unlike fund-level subscription facilities, such guarantees generally are not put in place to enable the fund to delay the calling of investor capital.

[375] We recognize that fund-level subscription facilities can be an important cash management tool for both advisers and investors. For example, a fund may use a subscription facility to reduce the overall number of capital calls and to enhance its ability to execute deals quickly and efficiently.

[376] *See* CFA Comment Letter I. This commenter stated that it could be challenging to identify all activity related to these subscription facilities for those advisers that have not previously calculated internal rates of return without the impact of subscription facilities, particularly for funds with long histories. While we acknowledge these calculations could be challenging in certain instances, we believe these burdens are justified by the benefits of improved comparability and standardization across quarterly statements. Moreover, we also believe that these challenges will lessen as older funds wind down.

[377] *See, e.g.,* ICCR Comment Letter; AFREF Comment Letter I; NEA and AFT Comment Letter.

[378] *See, e.g.,* SBAI Comment Letter; PIFF Comment Letter; AIMA/ACC Comment Letter.

performance metrics,[379] and another commenter indicated that these performance metrics may not be meaningful in the early stages of a fund until it has had time to deploy its capital and generate returns.[380] Finally, certain commenters stated that advisers and investors should retain discretion to determine appropriate performance metrics.[381]

We recognize that most illiquid funds have particular characteristics, such as irregular cash flows, that make measuring performance difficult for both advisers and investors. We also recognize that internal rate of return and multiple of invested capital have their drawbacks as performance metrics.[382] Nonetheless, we continue to believe that, received together, these metrics complement one another.[383] Moreover, these metrics, combined with a statement of contributions and distributions reflecting cash flows discussed below, will help investors holistically understand the fund's performance, allow investors to diligence the fund's performance, and calculate other performance metrics they may find helpful. When presented in accordance with the conditions and other disclosures required under the rule, such standardized reporting measures will provide meaningful performance information for investors, allowing them to compare returns among funds that they are invested in and make more-informed decisions with respect to, for example, other components of their portfolios or whether or not to invest with the same adviser in the future. Accordingly, we are adopting this aspect of the rule as proposed.

As proposed, we are defining ''internal rate of return'' as the discount rate that causes the net present value of all cash flows throughout the life of the private fund to be equal to zero.[384] Cash flows will be represented by capital contributions (*i.e.,* cash inflows) and fund distributions (*i.e.,* cash outflows), and the unrealized value of the fund will be represented by a fund distribution (*i.e.,* a cash outflow). This definition will provide investors with a time-adjusted return that takes into account the size and timing of a fund's cash flows and its unrealized value at the time of calculation.[385]

We are defining ''multiple of invested capital'' as (i) the sum of: (A) the unrealized value of the illiquid fund; and (B) the value of all distributions made by the illiquid fund; (ii) divided by the total capital contributed to the illiquid fund by its investors.[386] This definition will provide investors with a measure of the fund's aggregate value (*i.e.,* the sum of clauses (i)(A) and (i)(B)) relative to the capital invested (*i.e.,* clause (ii)) as of the end of the applicable reporting period, as proposed. Unlike the definition of internal rate of return, the multiple of invested capital definition does not take into account the amount of time it takes for a fund to generate a return (meaning that the multiple of invested capital measure focuses on ''how much'' rather than ''when'').

We received few comments on the proposed definitions, with one commenter stating that neither definition takes into account the timing of fund transactions.[387] Another commenter argued that definitions were unnecessary because investors have their own methods for calculating internal rate of return and multiple of invested capital, and that advisers typically provide investors with sufficient information to calculate performance already.[388] After considering comments, we believe that the proposed definitions of internal rate of return and multiple of invested capital are appropriate because they will promote comparability and standardization. As stated in the proposal, the definitions are generally consistent with how the industry currently calculates such performance metrics. By adopting definitions that are widely understood and accepted in the industry, the rule will decrease the risk of advisers presenting internal rate of return and multiple of invested capital performance figures that are not comparable. Furthermore, the rule will not prevent an adviser from providing information or performance metrics in addition to those required by the rule (subject to other requirements applicable to the adviser) or an investor from using such additional information or metrics for its own calculations.

As proposed, the final rule requires advisers to present each performance metric on a gross and net basis.[389] Commenters were generally supportive of this requirement.[390] Presenting both gross and net performance measures will help prevent investors from being misled. Gross performance will provide insight into the profitability of underlying investments selected by the adviser. Solely presenting gross performance, however, may imply that investors have received the full amount of such returns. The net performance will assist investors in understanding the actual returns received and, when presented alongside gross performance, the negative effect fees, expenses, and performance-based compensation have had on past performance.

Statement of Contributions and Distributions. The rule also requires an adviser to provide a statement of contributions and distributions for the illiquid fund reflecting the aggregate cash inflows from investors and the aggregate cash outflows from the fund to investors, along with the fund's net asset value, as proposed.[391]

We are defining a statement of contributions and distributions as a document that presents:

(i) All capital inflows the private fund has received from investors and all

[379] *See* Comment Letter of SOC Investment Group (Apr. 25, 2022) (''SOC Comment Letter'').

[380] *See* AIC Comment Letter II.

[381] *See, e.g.,* PIFF Comment Letter; SBAI Comment Letter.

[382] Primarily, multiple of invested capital does not factor in the amount of the time it takes for a fund to generate a return, and internal rate of return assumes early distributions will be reinvested at the same rate of return generated at the initial exit.

[383] By receiving both an internal rate of return and a multiple of invested capital, an investor will be able to use each performance metric to assess the limitations of the other. For example, a high multiple of invested capital but a low internal rate of return likely means that returns are low compared to the length of time the investment has been held. Similarly, a high internal rate of return but a low multiple of invested capital likely means that the investment was not held long enough to generate substantial returns for the fund.

[384] Final rule 211(h)(1)–1 (defining ''gross IRR'' and ''net IRR'').

[385] When calculating a fund's internal rate of return, an adviser will need to take into account the specific date a cash flow occurred (or is deemed to occur). Certain electronic spreadsheet programs have ''XIRR'' or other similar formulas that require the user to input the applicable dates.

[386] Final rule 211(h)(1)–1 (defining ''gross MOIC'' and ''net MOIC'').

[387] *See* Comment Letter of XTAL Strategies (Feb. 28, 2022) (''XTAL Comment Letter''). As discussed in greater detail below in Section VI.C.3, this commenter provided examples where multiple funds with different distribution timings had the same internal rates of return. However, we were not persuaded by this commenter because the fact that it is possible to construct examples in which two funds with different timings of payments can have the same internal rates of return does not mean that such performance metric broadly fails to take into account the timing of transactions.

[388] *See* AIC Comment Letter II.

[389] Final rule 211(h)(1)–2(e)(2)(ii).

[390] *See, e.g.,* NEA and AFT Comment Letter (noting ''[s]tandardized reporting of the internal rate of return (IRR) and the multiple of capital (MoC) invested, both gross and net of fees and considering the use of subscription credit lines, would mark a leap forward in transparency.''); *see also* AFL–CIO Comment Letter; ICM Comment Letter; ILPA Comment Letter I.

[391] At proposal, the statement of contributions and distributions requirement was listed as rule 211(h)(1)–2(e)(2)(ii)(A)(*4*). At adoption, we have changed the statement of contributions and distributions requirement to rule 211(h)(1)–2(e)(2)(ii)(B). We have made this change for clarification as a statement of contributions and distributions is not a ''performance measure'' that can be ''computed'' as rule 211(h)(1)–2(e)(2)(ii)(A) is phrased.

capital outflows the private fund has distributed to investors since the private fund's inception, with the value and date of each inflow and outflow; and

(ii) The net asset value of the private fund as of the end of the reporting period covered by the quarterly statement.[392]

Some commenters supported the requirement to provide a statement of contributions and distributions.[393] Other commenters criticized specific parts of this requirement.[394] One commenter suggested that the statement of contributions and distributions would be of limited value to private fund investors and is not often currently requested by private fund investors,[395] whereas another commenter conversely suggested that private fund investors typically already receive information beyond what we are requiring to be included in the statement of contributions and distributions.[396] Another commenter suggested that we provide flexibility with respect to the requirement that the statement of contributions and distributions include the date of each cash inflow and outflow, in light of the possibility that older cash flow information may have been recorded by certain advisers using legacy systems that assumed that all cash flows during a certain period occurred on the last day of such period.[397]

We believe that the statement of contributions and distributions will provide private fund investors with important information regarding the fund's performance, because it will reflect the underlying data used by the adviser to generate the fund's returns, which, in many cases, is not currently provided to private fund investors. Such data will allow investors to diligence the various performance measures presented in the quarterly statement. In addition, this data will allow the investors to calculate additional performance measures based on their own preferences.

Some commenters suggested that subscription facility fees and expenses should be included in the statement of contributions and distributions.[398] At proposal, we had required private fund advisers to exclude such fees and expenses because we had proposed to require only unlevered performance metrics for illiquid funds and believed that the statement of contributions and distributions should directly align with these unlevered performance metrics. As we are requiring both levered and unlevered performance to be included in the quarterly statement for illiquid funds under the final rule, advisers should consider including in the statement of contributions and distributions any fees and expenses related to a subscription facility.

One commenter suggested that we should require additional detail in the statement of contributions and distributions.[399] We believe that it is important that the statement of contributions and distributions provide sufficient information to enable investors to conduct due diligence on the various performance measures presented in the quarterly statement and to potentially perform their own additional performance calculations. Investors will need the dates and amounts of subscription facility drawdowns to be able to calculate unlevered returns. As such, we view these dates and amounts as providing investors critical information necessary to perform these calculations on their own. Although we are not prescribing additional particular information to be disclosed beyond what was included in the proposal, advisers may wish to consider also providing other details they believe investors would find relevant in the statement of contributions and distributions, such as information about how each contribution and distribution was used and the dates of drawdowns from fund-level subscription facilities.

Realized and Unrealized Performance. As proposed, the rule also requires an adviser to disclose a gross internal rate of return and gross multiple of invested capital for the realized and unrealized portions of the illiquid fund's portfolio, with the realized and unrealized performance shown separately.[400]

Some commenters supported this requirement to disclose realized and unrealized performance metrics for illiquid funds as contributive to the policy goals of transparency and comparability of private fund investments promoted by the rule.[401] Other commenters suggested, however, that this requirement could serve to undermine these goals and prove unhelpful to private fund investors, because disaggregating an illiquid fund's realized performance and its unrealized performance ultimately may involve subjective determinations[402] and will depend on the specific facts and circumstances.[403] One commenter stated that, if we adopt this requirement, we should also provide a detailed methodology for calculating realized and unrealized performance.[404] Other commenters suggested allowing advisers to take a flexible approach with respect to determining what investments are realized versus unrealized provided that their methodology is properly documented and disclosed.[405]

We recognize that it may be difficult to determine whether a partially realized investment has been realized under the final rule, for example, following a significant dividend recapitalization where the fund recoups all or a substantial portion of its initial investment. We continue to believe, however, that disclosure of realized and unrealized performance will provide investors with important context for analyzing the adviser's valuations and for weighing their impact on the fund's overall performance.[406] As a result, we believe that the burden associated with determining whether a partially realized investment should be categorized as realized or unrealized is justified by the benefits that this performance data will provide to investors.

We recognize that categorizing a partially realized investment as realized or unrealized for purposes of the rule will depend on the facts and circumstances and may not always be purely objective. We agree with

[392] Final rule 211(h)(1)–1.

[393] *See, e.g.,* CFA Comment Letter I; OFT Comment Letter.

[394] *See, e.g.,* IAA Comment Letter II; PIFF Comment Letter.

[395] *See* IAA Comment Letter II.

[396] *See* ILPA Comment Letter I.

[397] *See* CFA Comment Letter II.

[398] *See, e.g.,* CFA Comment Letter I; AIC Comment Letter II.

[399] *See* XTAL Comment Letter. This commenter specifically suggested we require the inclusion of additional information such as uncalled commitment, cumulated distributions, and net of performance fee accruals. While they are helpful, we view these additional requirements as potentially overly burdensome relative to their benefits since they are not necessary for investors to diligence the performance measures presented in the quarterly statement.

[400] Final rule 211(h)(1)–2(e)(2)(ii)(A)(*3*).

[401] *See, e.g.,* ILPA Comment Letter I; AFL–CIO Comment Letter; AFREF Comment Letter I; CFA Comment Letter I.

[402] *See, e.g.,* AIC Comment Letter I; AIC Comment Letter II; IAA Comment Letter II; SBAI Comment Letter.

[403] *See, e.g.,* AIC Comment Letter II; ATR Comment Letter.

[404] *See* NCREIF Comment Letter.

[405] *See, e.g.,* AIC Comment Letter II; SBAI Comment Letter; CFA Comment Letter I.

[406] As stated in the proposal, the value of the unrealized portion of an illiquid fund's portfolio typically is determined by the adviser and, given the lack of readily available market values, can be challenging. This creates a conflict of interest wherein the adviser may be evaluated and, in certain cases, compensated based on the fund's unrealized performance. Further, investors often decide whether to invest in a successor fund based on a current fund's performance as reported by the adviser. These factors create an incentive for the adviser to inflate the value of the unrealized portion of the illiquid fund's portfolio. *See* Proposing Release *supra* footnote 3, at n.9, 74–75.

commenters that it is valuable for advisers to have some discretion in determining whether an investment has been realized for purposes of the rule based on the specific facts and circumstances, provided that their methodology is properly documented.[407] It is also important that advisers remain consistent in how they determine realized and unrealized investments and that they provide sufficient disclosure to investors about the methodology and criteria they use to achieve consistency in their determinations. We do not believe it is appropriate to set a bright-line standard or otherwise prescribe detailed methodology for making this determination because any such standard or methodology may lead to less useful reporting for investors.[408] For example, it is our understanding that the methodologies used by private equity buy-out funds, private credit funds,[409] and their respective investors to determine realization can vary considerably. A private equity buy-out fund and its investors may seek to analyze realization as it relates to the sale of a portfolio company (or return of a certain amount of proceeds relative to the amount invested or anticipated to be invested), whereas a private credit fund and its investors may seek to analyze realization as it relates to a paydown of a portion of the principal balance of a loan. If we were to prescribe one methodology for both of these funds and their investors, it may lead to scenarios in which there is a conflict between how the rule views realization and how these funds and their investors view realization. Such a result could lead to worse reporting outcomes for investors.[410]

One commenter suggested requiring reporting of distributions to paid-in capital (''DPI'') and residual value to paid-in capital (''RVPI'') instead of gross multiple of invested capital (''MOIC'') for realized and unrealized investments.[411] As discussed in the proposal, some advisers have an incentive to inflate the value of the unrealized portion of an illiquid fund's portfolio. Highlighting the performance of the fund's unrealized investments assists investors in determining whether the aggregate, fund-level performance measures present an overly optimistic view of the fund's overall performance.[412] While we recognize that DPI and RVPI may provide some potentially beneficial, additional information, these metrics may not be as effective at highlighting potentially overly optimistic valuations. RVPI, for example, provides investors with information on the fund's residual value *relative to the amount of capital that has been paid in,* including paid-in capital attributable to the realized portion of the portfolio.[413] MOIC for unrealized portion of the portfolio, on the other hand, provides investors with information on the fund's residual value *relative to the capital that has been contributed in respect of the unrealized investments,* which has the effect of highlighting the adviser's valuations of the remaining investments relative to those capital contributions only. Accordingly, we believe that gross MOIC for realized and unrealized investments provides more direct information on the differences between the actual distributions received by investors from the realized portfolio and the *adviser's valuations* of the unrealized portfolio. This approach better addresses our concerns surrounding advisers' incentive to inflate the value of the unrealized portion of an illiquid fund's portfolio.

The rule only requires an adviser to disclose gross performance measures for the realized and unrealized portions of the illiquid fund's portfolio, as proposed. Commenters generally agreed with this approach.[414] We continue to believe that calculating net figures for the realized and unrealized portions of the portfolio could involve complex and potentially subjective assumptions regarding the allocation of fund-level fees, expenses, and adviser compensation between the realized and unrealized portions.[415] In our view, such assumptions have the potential to erase the benefits that net performance measures would provide.

(c) Prominent Disclosure of Performance Calculation Information

As proposed, the final rule will require advisers to include prominent disclosure of the criteria used and assumptions made in calculating the performance. This information will enable the private fund investor to understand how the performance is calculated and help provide useful context for the presented performance metrics. Additionally, while the rule includes detailed information about the type of performance an adviser must present for liquid and illiquid funds, it is still possible that advisers will make certain assumptions or rely on criteria that the rule's requirements do not address specifically. This information is integral to the quarterly statement because it will enable the investor to understand and analyze the performance information better and better compare the performance of funds and advisers without having to access other ancillary documents. As a result, investors should receive this information as part of the quarterly statement itself.

For example, the rule requires an adviser to display, for a liquid fund, the annual returns for each fiscal year over the past 10 years or since the fund's inception, whichever is shorter. If the adviser makes any assumptions in performing that calculation, such as

[407] The methodology used to determine whether an investment is realized or unrealized is an important criterion to calculate this required performance information. Accordingly, it must be prominently disclosed in the quarterly statement. Final rule 211(h)(1)–2(e)(2)(iii).

[408] For example, if we were to set an 100% threshold for determining when an investment has been fully realized, this may lead to reporting that is too high as compared to what investors have negotiated for or what they have come to expect for certain private funds (or too low if we set the percentage threshold lower). If we were to establish a realization test based on a different trigger (*e.g.,* the sale of a portfolio investment) it might not be applicable for certain kinds of private funds (*e.g.,* private credit funds that primarily make loans).

[409] These examples refer to private credit funds that issue equity interests to investors and invest in debt instruments privately issued by companies.

[410] Based on the experience of Commission staff, it is our understanding that investors generally do not seek to compare realization methodologies across different types of illiquid funds in the same way that they might for performance reporting. As a result, it is not as important to ensure comparability of realization methodologies across different types of illiquid funds as it is to ensure comparability of performance reporting.

[411] *See* CFA Comment Letter II. RVPI plus DPI equal total value to paid-in capital (''TVPI''), while unrealized MOIC and realized MOIC must be combined as a weighted average to yield total MOIC. For TVPI, the unrealized and realized analogues are RVPI and DPI ratios, and the denominator in both of these cases is the total called capital of the entire fund. For MOIC, unrealized and realized MOIC have as denominators just the portions of the called capital attributable to unrealized and realized investments in the portfolio.

[412] For example, if the performance of the unrealized portion of the fund's portfolio is significantly higher than the performance of the realized portion, it may imply that the adviser's valuations are overly optimistic or otherwise do not reflect the values that can be realized in a transaction or sale with an independent third party.

[413] DPI is not effective at highlighting overly optimistic valuations because it focuses on distributions (and not residual value) relative to paid in capital.

[414] *See, e.g.,* AIMA/ACC Comment Letter; AIC Comment Letter II.

[415] The inclusion of realized and unrealized performance information in the quarterly statement serves chiefly to provide a comparison between the two and provide a check against advisers' exaggeration of unrealized performance at the fund-level. We believe this is achieved by requiring only gross realized and unrealized performance without also requiring net performance and the associated assumptions, such as the allocation of organizational expenses, that are part of the calculation of net performance for individual investments and can entail additional costs and subjectivity.

whether dividends were reinvested, the adviser must disclose those assumptions in the quarterly statement. As another example, for an illiquid fund, the rule requires an adviser to present the net internal rate of return and net multiple of invested capital. Correspondingly, the adviser must disclose the use of any assumed fee rates, including whether the adviser is using fee rates set forth in the fund documents, whether it is using a blended rate or weighted average that would factor in any discounts, or whether it is using a different method for calculating net performance. The rule requires the disclosure to be within the quarterly statement.[416] Thus, an adviser may not provide the information only in a separate document, website hyperlink or QR code, or other separate disclosure.[417]

Some commenters supported this requirement to include prominent disclosure of the criteria used and assumptions made in calculating the performance.[418] Other commenters stated that such a requirement is unnecessary.[419] For legal, tax, and other reasons, advisers often use complex structures to set up private funds, which make it difficult, in certain circumstances, for advisers to calculate, and for investors to understand, fund performance as a whole. We recognize that, due to these complex structures, the criteria used and assumptions made in calculating performance can sometimes be nuanced and challenging to concisely include in the quarterly statement. Nonetheless, it is essential that advisers disclose assumptions, such as assumed fee rates, in the quarterly statement so that investors can readily understand the performance information being provided, despite these challenges. Without prominent disclosure of the criteria used and assumptions made in calculating performance, performance information is neither simple nor clear. Absent disclosure of the criteria used and assumptions made in the underlying calculations, performance information may not be simple to the extent it requires referencing multiple sources, such as capital call notices, distribution notices, and audited financials, to understand crucial criteria and assumptions. Such disclosure that is not prominent would also not be clear because it would obscure the extent and import of the adviser's assumptions or discretion in making such calculations.[420] To meet the prominence standard, the disclosures should, at a minimum, be readily noticeable and included within the quarterly statement. Thus, an adviser may not provide these disclosures only in a separate document, website hyperlink or QR code, or other separate disclosure.

We believe this prominently displayed information is vital in making these disclosures as simple and clear as possible for investors. Furthermore, permitting advisers to provide quarterly statements without prominent disclosure of the criteria used and assumptions made in calculating performance would not sufficiently prevent practices that may be fraudulent, deceptive, or manipulative. For instance, advisers may use a deceptive assumed fee rate to calculate performance and investors may not be aware of it if it is not prominently disclosed in the quarterly statement. Accordingly, it is crucial that private fund investors receive this prominent disclosure as part of the quarterly statement itself.

3. Preparation and Distribution of Quarterly Statements

The rule requires quarterly statements to be prepared and distributed to investors in private funds that are not funds of funds within 45 days after the first three fiscal quarter ends of each fiscal year and 90 days after the end of each fiscal year. Advisers to funds of funds must prepare and distribute quarterly statements within 75 days after the first three fiscal quarter ends of each year and 120 days after the fiscal year end.[421] In each instance, an adviser must prepare and distribute the required quarterly statement within the applicable period set forth in the rule, unless another person prepares and delivers such quarterly statement.[422] The reporting period for the final quarterly statement covers the fiscal quarter in which the fund is wound up and dissolved. Under the proposed rule, quarterly statements would have been required to be prepared and distributed to investors for each private fund, including funds of funds, within 45 days of each calendar quarter end, including after the end of the fiscal year.

For a newly formed private fund, the rule requires a quarterly statement to be prepared and distributed beginning after the fund's second full quarter of generating operating results, as proposed. However, one commenter stated that the requirement to provide performance metrics should not be triggered until the private fund has four quarters of operating results, rather than two.[423] We continue to believe, however, that two full quarters of operating results is an appropriate standard because it balances the needs of investors to receive performance information with the needs of advisers to have adequate time to generate results. We believe that the requirements for newly formed funds will help ensure that investors receive comprehensive information about the adviser's management of the fund during the early stage of the fund's life.

Some commenters supported the proposed rule's 45-day timing requirement.[424] Other commenters suggested that additional time or flexibility should be provided, as discussed below.[425] Based on our

[416] Final rule 211(h)(1)–2(e)(2)(iii).

[417] *See also* Marketing Release, *supra* footnote 127, at n.61 (discussing clear and prominent disclosures in the context of advertisements).

[418] *See, e.g.,* United for Respect Comment Letter I; Comment Letter of CPD Action (Apr. 25, 2022) (''CPD Comment Letter''); ICCR Comment Letter.

[419] *See, e.g.,* Schulte Comment Letter; MFA Comment Letter I; Comment Letter of National Society of Compliance Professionals (Apr. 19, 2022) (''NSCP Comment Letter'').

[420] One commenter suggested that private fund advisers should be required to provide supporting calculations to investors upon request. *See* CFA Comment Letter I. While advisers do not need to provide all supporting calculations as part of a quarterly statement, advisers generally should make them available upon request from an investor. While we believe it is important that investors have access to this information if requested, including all supporting calculations as a part of each quarterly statement could make each quarterly statement overly long and difficult to parse, thus undermining its utility.

[421] In a change from the proposal, we are providing additional time for funds of funds to deliver quarterly statements in response to commenters that stated that many funds of funds will need to receive reporting from their private fund investments before they are able to prepare and distribute their own quarterly statements. For purposes of the final rule, one example of a fund of funds would be a private fund that invests substantially all of its assets in the equity of private funds that do not share its same adviser and, aside from such private fund investments, holds only cash and cash equivalents and instruments acquired to hedge currency exposure.

[422] By specifying that ''such quarterly statement,'' as opposed to more generally *a* quarterly statement, must be prepared and distributed, final rule 211(h)(1)–2 requires that a quarterly statement furnished by ''another person'' must still comply with paragraphs (a) through (g) of the rule, including with respect to the information otherwise required to be included in the quarterly statement by the investment adviser. For purposes of this section, to the extent that some but not all of the information that an investment adviser is required to include in the quarterly statement is included in a quarterly statement furnished by another person, the investment adviser generally would need to prepare and distribute separately the required information that is not included in the quarterly statement furnished by another person, as required under the final rule.

[423] *See* AIC Comment Letter II.

[424] *See, e.g.,* Convergence Comment Letter; Predistribution Initiative Comment Letter II; Healthy Markets Comment Letter I.

[425] *See, e.g.,* MFA Comment Letter I; AIMA/ACC Comment Letter; Comment Letter of Ullico

Continued

experience, advisers generally should be in a position to prepare and deliver quarterly statements within this period. We believe that the timing requirement is important because quarterly statements will provide fund investors with timely and regular statements that contain meaningful and comprehensive information. Some commenters, however, suggested allowing for additional time for the fourth quarterly statement of the year as audited financials are also being prepared at this time.[426] We recognize the value in providing additional time for the fourth quarterly statement in light of the increased burdens that advisers will concurrently face in preparing other end-of-year statements, such as audited financials. Some commenters suggested specifically extending the deadline for the fourth quarterly statement to 120 days to parallel the deadline for audited financials.[427] Although we recognize the potential for some value in aligning the deadline for the fourth quarterly statement to 120 days to parallel the deadline for audited financials, it would delay the delivery of these quarterly statements too greatly. Assuming a December 31 fiscal year end, allowing 120 days would mean that an adviser would not have to deliver the fourth quarterly statement until April 30 of the following year (assuming it is not a leap year). However, the first quarterly statement for that following year would be due only 15 days later on May 15. It is important that investors receive quarterly statements on a timely basis so that they can effectively monitor the costs and performance of their investments. Additionally, requiring the preparation and delivery of the fourth quarterly statement before the deadline for audited financials under the final rule should not in our view lead to undue burdens or investor confusion. Although we recognize the possibility that information reported in the fourth quarterly statement may ultimately be updated or corrected in the subsequently delivered audited financials, the final rule will not separately require an adviser to issue a reconciled fourth quarterly statement reflecting such updated or corrected information (which, however, generally should be reflected in subsequent quarterly reports).[428] This approach balances the needs of investors to receive fee, expense, and performance information relatively quickly following the end of the fiscal year, with the needs of advisers to have sufficient time to collect the necessary information and distribute the statements to investors. Accordingly, in response to commenters, we are increasing the deadline for the fourth quarterly statement from 45 days to 90 days. We believe that 90 days is an appropriate approach to allow additional time to prepare the fourth quarterly statement while also preparing the annual audited financials without delaying this quarterly statement too greatly.

Some commenters suggested allowing additional time for the first three quarterly statements of the year as well.[429] Other commenters suggested allowing for a more flexible standard, such as ''as soon as reasonably practical'' or ''promptly''.[430] We do not think it is necessary to extend the time allowed for the first three quarterly statements or adopt a more flexible standard for the deadline. It is important that investors are receiving these quarterly statements routinely, so that they can properly monitor the fees and expenses and performance of their investments. If investors receive these quarterly statements only 60 or more days after quarter-end for the first three quarterly statements, the statements may be too delayed to enable effective engagement and investment decision-making as an investor (*e.g.,* whether to redeem from the private fund (if applicable), to invest additional amounts with or divest other investments with the adviser, or to otherwise modify the investor's portfolio). Moreover, a more flexible standard, such as ''as soon as reasonably practical'' or ''promptly,'' might lead to inconsistently delivered quarterly statements, which could impair their comparability and thus their value. However, we recognize there may be times when an adviser reasonably believes that a fund's quarterly statement would be distributed within the required timeframe but fails to have it distributed in time because of certain unforeseeable circumstances.[431] Accordingly, and in light of the fact that there is not an alternative method by which to satisfy the rule, the Commission would take the position that, if an adviser is unable to deliver the quarterly statement in the timeframe required under the rule due to reasonably unforeseeable circumstances, this would not provide a basis for enforcement action so long as the adviser reasonably believed that the quarterly statement would be distributed by the applicable deadline and the adviser delivers the quarterly statement as promptly as practicable.

We asked in the proposal whether advisers should be required to report based on the private fund's fiscal periods, rather than calendar periods, as proposed. Because the proposed rule required advisers to distribute all four reports, including the fourth quarter report, within the same time period (*i.e.,* 45 days), we did not believe the distinction between fiscal periods and calendar periods was as significant for purposes of the proposed rule. However, because we are modifying the final rule to provide additional time for fourth quarter statements, as discussed above, we believe it is important to revisit this question. Because certain private funds may have a fiscal year that is different from the calendar year, we believe it is appropriate to revise the rule text to reference fiscal periods, rather than calendar periods, to ensure that advisers and private funds receive the benefit of the additional time for the fourth quarter statement. Commenters generally agreed with this approach, stating that fiscal periods would more closely align with industry practice.[432] We recognize that this modification may affect comparability for investors across different funds if their fiscal years differ, as funds with different fiscal years will have different reporting periods. However, we view this potential disadvantage as being justified by the benefit investors will obtain by receiving quarterly statements that align with fund fiscal years. This modification will additionally allow funds with fiscal years that do not match the calendar year more time to prepare their fiscal year-end quarterly statements alongside their annual audited financials. It is also our understanding that the majority of private funds' fiscal years match the calendar year, and thus we do not

Investment Advisors, Inc. (Apr. 22, 2022) (''Ullico Comment Letter'').

[426] *See, e.g.,* ILPA Comment Letter I; SBAI Comment Letter; AIC Comment Letter I.

[427] *See, e.g.,* CFA Comment Letter I; AIC Comment Letter I.

[428] Although the rule does not separately require an adviser to issue to investors a reconciled fourth quarterly statement reflecting information updated or corrected in the subsequently delivered audited financials, advisers should consider whether particular updates or corrections to this information under the facts and circumstances could be sufficiently material to implicate other applicable disclosure obligations, *e.g.,* as under rule 206(4)–8.

[429] *See, e.g.,* IAA Comment Letter II; Ropes & Gray Comment Letter; Comment Letter of Colmore (Apr. 25, 2022).

[430] *See, e.g.,* Ullico Comment Letter; Segal Marco Comment Letter; SBAI Comment Letter.

[431] For example, an adviser may experience sudden departures of senior financial employees.

[432] *See, e.g.,* AIMA/ACC Comment Letter; ILPA Comment Letter I; SIFMA–AMG Comment Letter I (suggesting that the SEC only require reporting on an annual basis within 120 days of the fund's fiscal year end); GPEVCA Comment Letter (suggesting that any periodic disclosure requirement be tied to the annual audit process).

expect comparability to be substantially affected in most cases. Accordingly, in a change from the proposal, advisers are required to distribute the required reporting based on a fund's fiscal periods, rather than calendar periods.

Some commenters suggested providing additional time for funds of funds because they would likely need to receive quarterly statements from their private fund investments before being able to prepare their own quarterly statements.[433] We recognize that some funds of funds, which generally invest substantially all of their assets in the equity of private funds advised by third-party advisers, will need to receive quarterly statements or other related information from their underlying investments to prepare their own quarterly statements. We also recognize that such underlying investments may not provide the quarterly statements until the last day of the deadline. Accordingly, we are providing an additional 30 days for funds of funds to deliver each quarterly statement and, as such, only requiring funds of funds to distribute the first three quarterly statements of the year within 75 days after quarter end and the fourth quarterly statement within 120 days after quarter end. We believe this approach strikes an appropriate balance between granting fund of funds advisers additional time to prepare and deliver quarterly statements and not overly delaying such quarterly statements for fund of funds and other private fund investors. Advisers to funds (including funds of funds and, similarly, funds of funds of funds)[434] that do not currently receive information from their underlying investments in a sufficiently timely manner to enable them to prepare and deliver quarterly statements in compliance with the final rule's deadlines will need to consider contractual or other types of arrangements with their underlying investments to attain this information in a timely manner.

An adviser generally will satisfy the requirement to ''distribute'' the quarterly statements when the statements are sent to all investors in the private fund.[435] However, the rule precludes advisers from using layers of pooled investment vehicles in a control relationship with the adviser to avoid meaningful application of the distribution requirement. In circumstances where an investor is itself a pooled vehicle that is controlling, controlled by, or under common control with (*i.e.,* is in a ''control relationship'' with) the adviser or its related persons, the adviser must look through that pool (and any pools in a control relationship with the adviser or its related persons, such as in a master-feeder fund structure), in order to send the quarterly statements to investors in those pools. Additionally, advisers to private funds may from time to time establish special purpose vehicles (''SPVs'') or other pooled vehicles for a variety of reasons, including facilitating investments by one or more private funds that the advisers manage. Without such a control relationship requirement, the adviser could deliver the quarterly statement to itself rather than to the parties the quarterly statement is designed to inform.[436] Outside of a control relationship, such as if the private fund investor is an unaffiliated fund of funds, this same concern is not present, and the adviser would not need to look through the structure to make meaningful delivery of the quarterly statement. The adviser should distribute the quarterly statement to the adviser or other designated party of the unaffiliated fund of funds. We believe that this approach will lead to meaningful delivery of the quarterly statement to the private fund's investors.

Some commenters suggested allowing distribution via a data room instead of requiring delivery to investors.[437] It is important that advisers are effectively delivering quarterly statements to investors on a routine basis. If a quarterly statement is distributed electronically through a data room, this distribution, like other electronic deliveries, should be done in accordance with the Commission's guidance regarding electronic delivery.[438] Accordingly, if an adviser places the quarterly statements in a data room without any notice to investors, advisers would not meet the distribution requirement under the rule. However, if the adviser notifies investors when the quarterly statements are uploaded to the data room within the applicable time period under the rule for preparation and delivery of the quarterly statement and ensures that investors have access to the quarterly statement included therein, an adviser would generally satisfy the distribution requirement.[439]

4. Consolidated Reporting for Certain Fund Structures

The rule requires advisers to consolidate reporting for similar pools of assets to the extent doing so provides more meaningful information to the private fund's investors and is not misleading, as proposed.[440] For example, certain private funds employ master-feeder structures. Typically, investors in such funds invest in onshore and offshore feeder funds, which, in turn, invest all, or substantially all, of their investable capital in a single master fund. The

[433] *See, e.g.,* ILPA Comment Letter I (suggesting additional time of 14 days to prevent the routine use of stale data); MFA Comment Letter I (suggesting additional time of 30 days); Comment Letter of Pathway Capital Management, LP (June 13, 2022) (''Pathway Comment Letter'') (suggesting that funds of funds advisers will rely on reports from underlying investments and require additional time); CFA Comment Letter II (suggesting a deadline of 120 days for the first three quarterly statements and 180 days for the fourth quarterly statement).

[434] Some commenters suggested that we provide further additional time to funds of funds of funds, similar to staff views provided with respect to the audit provision of the custody rule, to permit these funds additional time to receive information from their underlying investments. *See, e.g.,* CFA Comment Letter II. The Commission is not extending further additional time for quarterly statements with respect to funds of funds of funds, as doing so would delay the provision of quarterly statement information to investors too significantly, as discussed above.

[435] *See* final rule 211(h)(1)–1 (defining ''distribute''). For purposes of the rules, any ''in writing'' requirement can be satisfied either through paper or electronic means consistent with existing Commission guidance on electronic delivery of documents. *See* Marketing Release, *supra* footnote 127, at n.346. If any distribution is made electronically for purposes of these rules, it should be done in accordance with the Commission's guidance regarding electronic delivery. *See* Use of Electronic Media by Broker Dealers, Transfer Agents, and Investment Advisers for Delivery of Information; Additional Examples Under the Securities Act of 1933, Securities Exchange Act of 1934, and Investment Company Act of 1940, Release No. 34–37182 (May 9, 1996) [61 FR 24644 (May 15, 1996)] (''Use of Electronic Media Release''); *see also* Commission Interpretation: Use of Electronic Media, Release No. 34–42728 (Apr. 28, 2020) [65 FR 25843 (May 4, 2000)]. In circumstances where an adviser is obligated to rely on a third party, such as a trustee, to deliver quarterly statements to investors, an adviser should use every reasonable effort to effect such delivery in compliance with the final rule.

[436] *See* final rule 211(h)(1)–1 (defining ''control'').

[437] *See, e.g.,* Ropes & Gray Comment Letter; AIMA/ACC Comment Letter; AIC Comment Letter II.

[438] *See* Use of Electronic Media Release, *supra* footnote 435.

[439] *See id.*

[440] *See* final rule 211(h)(1)–2(f). The use of any consolidated reporting is an important criterion for the calculation of expenses, payments, allocations, rebates, waivers, and offsets as well as performance. *See supra* sections II.B.1.c) and II.B.2.c). Accordingly, advisers generally should disclose the basis of any consolidated reporting in the quarterly statement, including, *e.g.,* if the statement includes multiple entities and, if so, which entities and the methods used to calculate the amounts on the statement allocated from each entity. Advisers generally should also disclose any important assumptions associated with consolidated reporting that affect performance reporting as part of the quarterly statement. An example might include how unequal tax expenses are factored into consolidated performance reporting where one fund has greater tax expenses than the other funds in a consolidated fund structure. *See supra* section II.B.2.c).

same adviser typically advises and controls all three funds, and the master fund typically makes and holds the investments. Because the feeder funds are conduits for investors to gain exposure to the master fund and its investments, the rule requires the adviser to provide feeder fund investors with a single quarterly statement covering the applicable feeder fund and the feeder fund's proportionate interest in the master fund on a consolidated basis, so long as the consolidated statement provides more meaningful information to investors and is not misleading.

Due to the complexity of private fund structures, the rule takes a principles-based approach with respect to whether private fund advisers must consolidate reporting for a specific fund structure.

Some commenters supported this principles-based approach to consolidated reporting for certain fund structures, arguing that it will provide more meaningful information to investors.[441] Other commenters argued that this consolidation requirement could undermine the transparency goals of this rulemaking.[442] Some commenters argued that consolidated reporting will confuse investors.[443]

We acknowledge that, in certain circumstances, requiring reporting by each private fund separately may result in more granular information. For example, in certain parallel fund structures, an investor would receive information specific to the parallel fund in which it is invested instead of the consolidated information for all parallel funds. However, in many of these circumstances, consolidated reporting of the cost and performance information by all private funds in the structure would provide a more comprehensive picture of the fees and expenses borne and performance achieved than reporting by each private fund separately. For instance, in a master-feeder fund structure, a quarterly statement that only covers the feeder fund could provide fragmented information that does not reflect the true costs and performance relevant to a feeder fund investor. For example, a feeder fund's returns may be significantly impacted by costs at the master fund-level, but unconsolidated quarterly statements would mean these costs would not necessarily appear in the feeder fund's quarterly statement. Additionally, absent a principles-based consolidation requirement, advisers may be incentivized to establish as many feeder or parallel funds in a particular fund structure as feasible to separate investors. Investors may then each be receiving different fee, expense, and performance information, which could make it difficult for them to communicate and address collective concerns with the adviser. For these reasons, we believe that a principles-based approach to consolidated reporting is superior to a requirement to report by each private fund separately.

Similarly, the absence of any consolidation requirement could lead to differing practices across advisers and result in greater investor confusion. Some advisers could choose to consolidate all fund structures, while other choose to do no consolidation, and still others choose to consolidate some fund structures—such as parallel funds—but not others—such as master-feeder arrangements. Investors with minimal negotiating power may have a difficult time obtaining accurate information on an adviser's approach to consolidation or requiring that an adviser take a consistent approach if the fund structure is expanded over the course of its life. By requiring a similar, principles-based approach to all fund structures, we believe the quarterly statement will be generally easier for investors to understand across advisers.

Some commenters suggested that we should provide additional specific clarification on when consolidated reporting is and is not required.[444] While we recognize that a principles-based approach to consolidated reporting may require some additional consideration on the part of advisers, an overly prescriptive consolidation requirement would have a greater negative effect. The private fund space is diverse. There are many different fund structures, and it is reasonable to expect that more will be devised in the future. We understand that different segments of the private fund adviser industry tend to use some fund structures more than others and, correspondingly, tend to have different views on what kinds of related funds should be considered similar pools of assets for purposes of consolidation. The rule's principles-based approach to consolidated reporting is designed to reflect this diversity by requiring advisers to consolidate when doing so will provide more meaningful information. We recognize that this may lead to some degree of difference across different segments of the private fund adviser industry, but it will ultimately result in more meaningful information for investors. Relatedly, private fund advisers generally should take into account any input received from investors on what approach to consolidation that they view as most meaningful.

5. Format and Content Requirements

As proposed, the rule requires the adviser to use clear, concise, plain English in the quarterly statement.[445] For example, to satisfy the requirement for ''clear'' disclosures, advisers should generally use a font size and type that are legible, and margins and paper size (if applicable) that are reasonable. Likewise, to meet this standard, any information that an adviser chooses to include in a quarterly statement, but is not required by the rule, must be as short as practicable, not more prominent than the required information, and not obscure or impede an investor's understanding of the mandatory information. The rule also requires advisers to present information in the quarterly statement in a format that facilitates review from one quarterly statement to the next. Quarter-over-quarter, an adviser generally should use consistent formats for fund quarterly statements, thereby allowing investors to easily compare fees, expenses, and performance over each quarterly period. We also encourage advisers to use a structured, machine-readable format if advisers believe this format will be useful to the investors in their funds.

Some commenters supported this format and content requirement, stating that consistent formatting for quarterly statements will better enable investors to gauge adviser track records and appropriateness of costs.[446] Some commenters argued that we should adopt *more* prescriptive formatting requirements.[447] Conversely, certain commenters argued that we should not adopt prescriptive formatting requirements.[448] Other commenters suggested that these format and content

[441] *See, e.g.,* GPEVCA Comment Letter; Convergence Comment Letter; CFA Comment Letter II.

[442] *See, e.g.,* SIFMA–AMG Comment Letter I; SBAI Comment Letter; Ropes & Gray Comment Letter (describing, as an example, certain master-feeder fund structures where some of the feeder funds do not invest in the master fund).

[443] *See, e.g.,* Ropes & Gray Comment Letter; PWC Comment Letter (the consolidation requirement could create confusion in instances where U.S. GAAP does not require consolidation for financial reporting purposes); IAA Comment Letter II.

[444] *See, e.g.,* KPMG Comment Letter; LSTA Comment Letter; AIMA/ACC Comment Letter.

[445] Final rule 211(h)(1)–2(g).

[446] *See, e.g.,* CFA Comment Letter II; NYSIF Comment Letter; Consumer Federation of America Comment Letter.

[447] *See, e.g.,* Morningstar Comment Letter; Albourne Comment Letter.

[448] *See, e.g.,* SBAI Comment Letter; AIMA/ACC Comment Letter; Comment Letter of the Private Investment Funds Committee of the State Bar of Texas Business Law Section (Apr. 25, 2022) (''State Bar of Texas Comment Letter'').

requirements are not necessary because investors may already negotiate for specific format and content requirements for investor reporting.[449]

Although some investors may be able to negotiate for bespoke content and formatting for investor reporting, many investors may not have the bargaining power to do so. A goal of the quarterly statement requirement is to better enable all investors to effectively monitor and assess the costs and performance of their private fund investments with an investment adviser over time. The format and content requirements apply to all aspects of a quarterly statement, including the requirements to disclose the manner in which expenses, payments, allocations, rebates, waivers, and offsets are calculated and to cross-reference sections of the private fund's organizational and offering documents.[450] This approach will improve the utility of the quarterly statement by making it easier for investors to review and analyze.

These requirements are intended to support every investor's ability to understand better the context of the information provided in the quarterly statement regarding fees, expenses, and performance and monitor their private fund investments. For instance, providing investors with clear and easily accessible cross-references to the fund governing documents will make it easier for all investors to assess and monitor whether the fees and expenses in the quarterly statement comply with the fund's governing documents.

We believe the final rule strikes an appropriate balance in prescribing the baseline content of the tables and performance information that is required to be included in quarterly statements while also taking a generally principles-based approach with respect to the formatting of such information. This approach will help provide investors with standardized baseline information about their private fund investments and advisers with flexibility in presenting the required information, without being overly prescriptive or sacrificing readability. Additionally, as stated above, advisers under the rule remain able to provide, and investors are free to request and negotiate for, additional information to supplement the required information in the quarterly statement, subject to applicable rules and other disclosure requirements.

We are requiring a tabular format to ensure the information in the quarterly statements is presented in an organized fashion, but we view further prescriptive formatting as potentially more harmful than beneficial in many cases. We considered, but are not adopting, more prescriptive formatting because we recognize it might result in investor confusion if an adviser includes inapplicable line items to satisfy our form requirements, while omitting additional relevant information that might be unique to a particular fund. The private fund space is diverse, and specific reporting formats could be appropriate for certain types of funds but inappropriate for different types of funds. For instance, the fees and expenses associated with a private equity buyout fund will differ from those for a private credit fund.[451] If we were to prescribe formatting that is effective for a buyout fund, such formatting may be misleading or confusing when applied to a private credit fund, a real estate fund or a hedge fund. Moreover, we were concerned that advisers would be unable to report on a consolidated basis if we further prescribed the format of the statements.

6. Recordkeeping for Quarterly Statements

We are amending rule 204–2 (''books and records rule'') under the Advisers Act to require advisers to retain books and records related to the quarterly statement rule.[452] First, we are requiring private fund advisers to make and retain a copy of any quarterly statement distributed to fund investors pursuant to the quarterly statement rule, as well as a record of each addressee and the date(s) the statement was sent.[453] Second, we are requiring advisers to make and retain all records evidencing the calculation method for all expenses, payments, allocations, rebates, offsets, waivers, and performance listed on any quarterly statement delivered pursuant to the quarterly statement rule. Third, we are requiring advisers to make and keep books and records substantiating the adviser's determination that a private fund client is a liquid fund or an illiquid fund pursuant to the quarterly statement rule.[454] These requirements will facilitate our staff's ability to assess an adviser's compliance with the proposed rule and would similarly enhance an adviser's compliance efforts.

Some commenters supported this recordkeeping requirement[455] including one that stated that it would not be overly burdensome for advisers.[456] Other commenters argued that this recordkeeping requirement will be burdensome and/or not beneficial for investors.[457] We do not view this recordkeeping requirement as creating significant, additional burdens. As a practical matter, advisers will need to generate these records to comply with the quarterly statement rule, and we anticipate that they would only need to modify their existing recordkeeping procedures to properly maintain these records as well. Requiring recordkeeping for quarterly statements should also enhance advisers' internal compliance efforts. Moreover, this recordkeeping will help facilitate the Commission's inspection and enforcement capabilities by improving our staff's ability to assess an adviser's compliance with the final rule.

[449] *See, e.g.,* AIC Comment Letter I; Comment Letter of the American Securities Association (May 4, 2022) (''ASA Comment Letter''); State Bar of Texas Comment Letter.

[450] Final rule 211(h)(1)–2(d).

[451] We would generally anticipate the fee and expense line items of a private credit fund to be more associated with loans or other financing activities, and servicing activity related thereto, and the fee and expense line items of a private equity buyout fund to be more associated with the acquisitions and dispositions of portfolio companies.

[452] Final amended rule 204–2(a)(20). For all of the recordkeeping rule amendments in this rulemaking package, advisers are required to maintain and preserve the record in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in an appropriate office of the investment adviser. *See* rule 204–2(e)(1) under the Advisers Act.

[453] We asked in the proposal whether we should require advisers to retain a record of each addressee, the date(s) the statement was sent, address(es), and delivery method(s) for each quarterly statement, as proposed. In response to comments received and in a change from the proposal (as discussed further below in this section), we are not requiring private fund advisers to make and retain records of addresses or the delivery methods used to disseminate quarterly statements. If an adviser distributes a quarterly statement electronically through a data room (*see* discussion of data rooms in *supra* section II.B.3), such adviser must keep records of the notifications provided to investors that such quarterly statement has been made available in the data room. Such notification records must include each addressee and the date(s) the notification was sent.

[454] In certain circumstances, an adviser may change its determination of whether a particular fund it advises is a liquid or illiquid fund pursuant to the quarterly statement rule. For example, an adviser may determine a fund it advises is a liquid fund in year one and then later determine it is an illiquid fund in year four because the nature of such fund's redemption rights have changed. In such cases, advisers should also make and keep books and records substantiating the adviser's determination of such change.

[455] *See, e.g.,* Convergence Comment Letter; AFREF Comment Letter I; CPD Comment Letter.

[456] *See* Convergence Comment Letter.

[457] *See, e.g.,* ATR Comment Letter; Chamber of Commerce Comment Letter; AIMA/ACC Comment Letter.

One commenter suggested that, instead of requiring, for each quarterly statement, recordkeeping of each addressee, the date(s) sent, address(es) and delivery method(s), we should require only records necessary to demonstrate compliance with the quarterly statement distribution requirement.[458] We agree that the addresses and delivery methods used to disseminate quarterly statements are not necessary to demonstrate compliance with the quarterly statement distribution requirement and have removed those obligations accordingly. However, we believe that recordkeeping of each addressee and the dates sent are necessary to demonstrate compliance with the final rule. Records of the distribution dates will demonstrate compliance with the various distribution deadlines set forth in the final rule. Records of the addressees are similarly necessary to demonstrate that each quarterly statement has been sent to each investor. These recordkeeping requirements will permit Commission staff to effectively assess an adviser's compliance with the rule.

C. Mandatory Private Fund Adviser Audits

We are requiring private fund advisers to obtain an annual financial statement audit of the private funds they advise, directly or indirectly.[459] In addition to protecting the fund and its investors against the misappropriation of fund assets, we believe an audit by an independent public accountant provides an important check on the adviser's valuation of private fund assets, which often serves as the basis for the calculation of the adviser's fees. It also provides an important check on certain conflicts of interest between the adviser and the private fund investors, such as potentially problematic sales practices or compensation schemes. For example, during a financial statement audit, an auditor will inquire about related party relationships and transactions, including the identity of any related parties, the nature of the relationships, and the business purpose of entering into any transaction with a related party.[460] Moreover, as part of the auditor's substantive testing, an auditor may review the calculation and presentation of management fees paid to the adviser and may focus on capital allocations to review the adviser's entitlement to performance-based compensation. While the auditor does not have primary responsibility to prevent and detect fraud, it does have a responsibility to obtain reasonable assurance that the financial statements as a whole are free from material misstatement, whether caused by fraud or error.[461]

We are adopting the substance of the mandatory private fund adviser audit rule largely as proposed. The proposed rule was primarily drawn from the Advisers Act custody rule but differed from that rule in several respects.[462] Commenters explained that these differences could create confusion with, and be duplicative of, the custody rule.[463] For example, commenters stated that a staff guidance update on the application to SPVs would apply under the custody rule but not here.[464] Similarly, other commenters stated that staff guidance issued in frequently asked questions would apply under the custody rule but not here.[465] One commenter asserted that the imposition of overlapping and inconsistent standards between the requirements of the custody rule and this rule would not serve to increase investor protection.[466] After considering comments, we are adopting a final rule that addresses those differences. More specifically, we are requiring advisers registered with, or required to be registered with, the Commission to cause their private funds to undergo audits in accordance with the audit provision (and related requirements for delivery of audited financial statements) under the custody rule.[467]

The mandatory private fund adviser audit rule requires a registered investment adviser providing investment advice, directly or indirectly, to a private fund, to cause that fund to undergo a financial statement audit that meets the requirements set forth in paragraphs (b)(4)(i) through (b)(4)(iii) of the custody rule applicable to pooled investment vehicles subject to annual audit and to cause audited financial statements to be delivered in accordance with paragraph (c) of that rule. As a result, each of the following is required under the final rule:

(1) The audit must be performed by an independent public accountant that meets the standards of independence in 17 CFR 210.2–01 (rule 2–01(b) and (c) of Regulation S–X) that is registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by the PCAOB in accordance with its rules;[468]

(2) The audit must meet the definition of audit in 17 CFR 210.1–02(d) (rule 1–02(d) of Regulation S–X);[469]

(3) Audited financial statements must be prepared in accordance with generally accepted accounting principles;[470] and

(4) Annually within 120 days of the private fund's fiscal year-end and promptly upon liquidation, the private fund's audited financial statements are delivered to investors in the private fund.[471]

Additionally, in recognition that a surprise examination under the custody rule does not satisfy the requirements of this rule, we are adopting the proposed

[458] *See* CFA Comment Letter II.

[459] Final rule 206(4)–10. The rule would apply to all investment advisers registered, or required to be registered, with the Commission.

[460] *See* American Institute of Certified Public Accountants' (''AICPA'') auditing standards, AU–C Section 550 and PCAOB auditing standards, AS 2410.

[461] *See* AICPA auditing standards, AU–C Section 240. Audits performed under PCAOB standards provide similar benefits. *See* PCAOB auditing standards, AS 2401, which discusses consideration of fraud in a financial statement audit.

[462] *See* Proposing Release, *supra* footnote 3, at 101–103.

[463] *See* IAA Comment Letter II; NYC Bar Comment Letter II; AIC Comment Letter I.

[464] *See* Comment Letter of Ernst & Young (Apr. 25, 2022) (''E&Y Comment Letter''); Comment Letter of Deloitte & Touche LLP (Apr. 21, 2022) (''Deloitte Comment Letter''); KPMG Comment Letter; PWC Comment Letter; AIC Comment Letter I; TIAA Comment Letter; NSCP Comment Letter. *See also* Private Funds and Application of the Custody Rule to Special Purpose Vehicles and Escrows, Division of Investment Management Guidance Update No. 2014–07 (June 2014).

[465] *See* SIFMA–AMG Comment Letter I. *See also* Staff Responses to Questions about the Custody Rule (''Custody Rule FAQs''), *available at https://www.sec.gov/divisions/investment/custody_faq_030510.htm.*

[466] *See* NYC Bar Comment Letter II.

[467] Rule 206(4)–2(b)(4) and (c). In a change from the proposal, defined terms in rule 206(4)–10 are as defined in the custody rule; they are not defined in rule 211(h)–1. *See* rule 206(4)–10(c). The SEC has proposed to amend and redesignate the custody rule. *See* Safeguarding Advisory Client Assets, Investment Advisers Act Release No. 6240 (Feb. 15, 2023) [88 FR 14672 (Mar. 9, 2023)] (''Safeguarding Release''). We are continuing to consider comments received in response to that proposal.

[468] *See* rule 206(4)–2(b)(4)(ii) and 206(4)–2(d)(3) (defining ''independent public accountant'').

[469] *See* rule 206(4)–2(b)(4). The custody rule requires an accountant performing an audit of a pooled investment vehicle to be an ''independent public accountant'' complying with rule 2–01(b) and (c) of Regulation S–X. Rule 2–01(c) of Regulation S–X references the term ''audit and professional engagement period,'' which is defined in rule 2–01(f)(5) of Regulation S–X.

[470] The SEC has stated that certain financial statements must either be prepared in accordance with U.S. GAAP or prepared in accordance with some other comprehensive body of accounting standards if the information is substantially similar to financial statements prepared in accordance with U.S. GAAP and contain a footnote reconciling any material differences. *See* Custody of Funds or Securities of Clients by Investment Advisers, Investment Advisers Act Release No. 2176 (Sept. 25, 2003) [68 FR 56691 (Oct. 1, 2023)] (''2003 Custody Rule Release'') at n.41. Our staff has taken a similar view. *See* Custody Rule FAQs, *supra* footnote 465, at Question VI.5.

[471] *See* rule 206(4)–2(b)(4) and (c).

exception to this rule for funds and advisers not in a control relationship. Specifically, for a fund that the adviser does not control and that is neither controlled by nor under common control with the adviser (*e.g.,* an adviser to a fund of funds may select an unaffiliated sub-adviser to implement a portion of the underlying investment strategy), the adviser only needs to take all reasonable steps to cause the fund to undergo an audit that meets these elements.[472]

Some commenters supported the proposed rule,[473] while others opposed it[474] and one commenter highlighted the importance of the proposed notification provision explaining that the issuance of a modified opinion or the auditor's termination may be ''serious red flags that warrant early notice to regulators.''[475] Commenters who opposed the proposed rule indicated that it: (i) would eliminate the surprise examination option under the custody rule without evidence that surprise examinations have not adequately protected private fund investors;[476] (ii) might increase costs to investors and be unnecessary;[477] (iii) would not serve the stated policy goals of acting as a check on the adviser's valuation of private fund assets;[478] (iv) may provide investors a false sense of security;[479] and (v) could increase the difficulty of finding an auditor in certain jurisdictions.[480]

While the mandatory private fund adviser audit rule would effectively eliminate the surprise examination option under the custody rule for private fund advisers and may increase costs to some investors, we believe that financial statement audits provide a critical set of additional protections for private fund investors. During a financial statement audit, independent public accountants not only typically verify the existence of pooled investment vehicle investments similar to a surprise examination, but they also test other assertions associated with the pooled investment vehicle investments and other significant accounts (*e.g.,* valuation, presentation and disclosure, rights and obligations, completeness, and accuracy). Importantly, audited financial statements, including the related notes, schedules, and audit opinion, must be distributed to each investor in the pooled investment vehicle, providing investors with additional information about the operation of the private fund.[481] For example, audited financial statements prepared in accordance with U.S. GAAP, which are the responsibility of the private fund adviser or its related person, include disclosures regarding the level of fair value hierarchy within which the fair value measurements are categorized in their entirety and a description of the valuation techniques and inputs used in the fair value measurement of the fund's investments.[482] These audited financial statements also include disclosures regarding material related party transactions.[483] In addition, fund borrowings, such as margin borrowings or fund-level subscription facilities, are disclosed in the financial statements.[484] These are just a few examples of the types of critical information provided to investors in audited financial statements to help them better understand the private fund's operations and financial position. If, in lieu of audited financial statements, an investment adviser obtains a surprise examination of the funds and securities of its client (*e.g.,* a private fund), an investor may not receive this additional important information. Comments from institutional investors generally acknowledged the benefits of annual financial statement audits as providing an important tool for monitoring their investments.[485] These commenters explained that audits enhance investor protection[486] and the mandatory private fund adviser audit rule would introduce a degree of consistency across private funds.[487] One commenter stated that audits are critical to protecting the fund's assets from fraud and malfeasance,[488] while another commenter explained that annual audits provide investors more accurate valuations, which also often serve as the basis for calculation of fees.[489] Accordingly, we continue to believe the benefits of a financial statement audit to private fund investors justify the elimination of the surprise examination option for private fund advisers and the associated costs.

We disagree with commenters' assertions that the audit requirement will not serve the stated policy goals of acting as a check on the adviser's valuation of private fund assets.[490] Financial statement audits provide meaningful protections to private fund investors by increasing the likelihood that fraudulent activity or problems with valuation are uncovered, thereby providing deterrence against fraudulent conduct by fund advisers or their related persons.[491] For example, as noted above, a fund's adviser may use a high level of discretion and subjectivity in valuing a private fund's illiquid investments, which are difficult to value. This creates a conflict of interest if the adviser also calculates its fees as a percentage of the value of the fund's investments and/or an increase in that value (net profit), as is typically the case. Moreover, private fund advisers often rely heavily on existing fund performance when engaging in sales practices: obtaining new investors (in the case of a private fund that makes continuous or periodic offerings), retaining existing investors (in the case of a private fund that offers periodic redemptions or transfer rights), soliciting investors for co-investment opportunities, or fundraising for a new fund. These factors raise the possibility that funds are valued opportunistically and that the adviser's compensation may involve fraud or deception, resulting in an inappropriate

[472] *See* final rule 206(4)–10(b).

[473] *See* Public Citizen Comment Letter; Healthy Markets Comment Letter I; Trine Comment Letter; AFREF Comment Letter I; OPERS Comment Letter; ICM Comment Letter; NASAA Comment Letter; Better Markets Comment Letter; Albourne Comment Letter; ILPA Comment Letter I; Segal Marco Comment Letter; RFG Comment Letter II; Convergence Comment Letter; NCREIF Comment Letter.

[474] *See* PIFF Comment Letter; BVCA Comment Letter; Invest Europe Comment Letter; AIC Comment Letter I; Comment Letter of Steven Utke and Paul Mason (Feb. 26, 2022) (''Utke and Mason Comment Letter''); Dechert Comment Letter; AIMA/ACC Comment Letter; Comment Letter of Canaras Capital Management LLC (Apr. 25, 2022) (''Canaras Comment Letter''); SBAI Comment Letter; Ropes & Gray Comment Letter; IAA Comment Letter II; NYC Bar Comment Letter II.

[475] *See* NASAA Comment Letter.

[476] *See* AIMA/ACC Comment Letter.

[477] *See* PIFF Comment Letter; BVCA Comment Letter; Invest Europe Comment Letter; Utke and Mason Comment Letter; Dechert Comment Letter; AIMA/ACC Comment Letter.

[478] *See* AIC Comment Letter I; BVCA Comment Letter.

[479] *See* Chamber of Commerce Comment Letter.

[480] *See* SBAI Comment Letter; AIMA/ACC Comment Letter; Comment Letter of LaSalle Investment Management, Inc. (Apr. 25, 2022) (''LaSalle Comment Letter''); CFA Comment Letter I; PWC Comment Letter; Ropes & Gray Comment Letter.

[481] Final rule 206(4)–10; *see also* rule 206(4)–2(b)(4) and rule 206(4)–2(c).

[482] FASB ASC Topic 820, *Fair Value Measurement.*

[483] FASB ASC Topic 850, *Related Party Disclosures.*

[484] FASB ASC Topic 470, *Debt* and FASB ASC Subtopic 860–30, *Secured Borrowing and Collateral.*

[485] *See* OPERS Comment Letter; AFSCME Comment Letter; ILPA Comment Letter I; NYC Comptroller Comment Letter; *see generally* Seattle Retirement System Comment Letter; DC Retirement Board Comment Letter.

[486] NYC Comptroller Comment Letter.

[487] *See* OPERS Comment Letter.

[488] *See* ILPA Comment Letter I.

[489] *See* AFSCME Comment Letter.

[490] *See* AIC Comment Letter I; BVCA Comment Letter.

[491] *See* AICPA auditing standards, AU–C Section 240 and PCAOB auditing standards, AS 2401.

compensation scheme.[492] A fund audit includes the evaluation of whether the fair value estimates and related disclosures are in conformity with the requirements of the financial reporting framework (*e.g.,* U.S. GAAP), which may include evaluating the selection and application of methods, significant assumptions, and data used by the adviser in making the estimate.[493] The Commission continues to believe that private fund audits are an important tool to provide a check on private fund valuations.

One commenter expressed concerns that private equity fund audits are unnecessary because ''[p]rivate equity funds typically charge management fees based on capital commitments, or sometimes invested capital, neither of which is affected by subjective valuation methods.'' [494] We, however, have observed instances of advisers to private equity funds overcharging their management fee by failing to write down the value of fund investments.[495] In these cases, the subjective valuation method is particularly important because the adviser may have to decrease invested capital by any permanent impairments or write-downs of portfolio investments in accordance with the fund documents, which, in turn, decreases the management fee paid to the adviser. Also, during an annual period in which a private equity fund has sold a portfolio investment, the auditor typically reviews the fund's waterfall calculation including the calculations for return of invested capital, return of allocable expenses, the preferred return, the general partner catch-up, if applicable, and any incentive allocation, as part of the annual audit. Thus, the Commission continues to believe that the mandatory audit requirement should apply to private fund advisers, including advisers to private equity funds.

One commenter expressed concern that the mandatory audit requirement may give investors a false sense of security because the PCAOB does not have the authority to inspect audit engagements that involve private fund financial statements.[496] Under the PCAOB's current inspection program, we understand that the PCAOB selects audit engagements of audits performed involving U.S. public companies, other issuers, and broker-dealers, so private fund audit engagements would not be selected for review.[497] Even though private fund engagements are not selected for review under the PCAOB's current inspection program, we believe that many accounting firms registered with the PCAOB and subject to the PCAOB's inspection program would implement their quality control systems throughout the accounting firm related to all their assurance engagements. Thus, we continue to believe that registration and regular inspection of an independent public accountant's system of quality control by the PCAOB may provide higher quality audits, resulting in additional investor protection.

Commenters also expressed concerns that advisers may have increased difficulty finding an auditor in certain jurisdictions because requiring independent public accountants conducting the audit to be registered with, and subject to inspection by, the PCAOB would greatly limit the pool of accountants available to conduct audits.[498] As noted above, we do not apply substantive provisions of the Advisers Act and its rules, including the mandatory audit requirement, with respect to non-U.S. clients (including private funds) of an SEC registered offshore investment adviser.[499] We believe that this clarification will reduce many of the concerns expressed by commenters regarding the difficulty for non-U.S. private fund advisers finding an auditor in certain jurisdictions.

In addition, we do not believe that advisers will have significant difficulty in finding an accountant that is eligible under the rule in most jurisdictions because many PCAOB-registered independent public accountants who are subject to regular inspection currently have practices in various jurisdictions, which may ease concerns regarding offshore availability. An independent public accounting firm would not, however, be considered to be ''subject to regular inspection'' if it is included on the list of firms that is headquartered or has an office in a foreign jurisdiction that the PCAOB has determined, in accordance with PCAOB Rule 6100, it is unable to inspect or investigate completely because of a position taken by one or more authorities in that jurisdiction.[500] Based on our experience with the custody rule, we believe registration and the regular inspection of an independent public accountant's system of quality control by the PCAOB may lead to higher quality audits, resulting in additional investor protection. Further, most private funds are already undergoing a financial statement audit, so the increase in demand for these services may be limited.[501] Thus, although we acknowledge commenters' concerns, we still believe it important that the private fund auditors meet SEC independence requirements and be registered with, and subject to regular inspection, by the PCAOB.

Some industry commenters [502] and a commenter representing CLO investors [503] endorsed an alternative compliance option for CLOs, such as an agreed-upon-procedures engagement, instead of requiring such vehicles to undergo an annual audit. As stated above,[504] we believe that SAFs, including CLOs, have certain distinguishing structural and operational features that warrant carving them out of the private fund rules entirely, including the audit rule. We also believe that an agreed-upon-procedures engagement serves a different purpose than an audit. An agreed-upon procedures engagement is an attestation engagement in which a

[492] *See generally* Jenkinson, Sousa, Stucke, *How Fair are the Valuations of Private Equity Funds?* (2013), *available at https://www.psers.pa.gov/About/Investment/Documents/PPMAIRC%202018/27%20How%20Fair%20are%20the%20Valuations%20of%20Private%20Equity%20Funds.pdf. See also In the Matter of Swapnil Rege,* Investment Advisers Act Release No. 5303 (July 18, 2019) (settled action) (alleging that an employee of a private fund adviser mispriced the private fund's investments, which resulted in the adviser charging the fund excess management fees); *SEC* v. *Southridge Capital Mgmt., LLC,* Lit. Rel. No. 21709 (Oct. 25, 2010) (alleging that adviser overvalued the largest position held by the funds by fraudulently misstating the acquisition price of the assets); *see* docket for *SEC* v. *Southridge Capital Mgmt., LLC,* U.S. District Court, District of Connecticut (New Haven), case no. 3:10–CV–01685 (on Sept. 12, 2016 the court granted the SEC's motion for summary judgment and entered a final judgment in favor of the SEC in 2018).

[493] *See* AICPA auditing standards AU–C Section 540A and PCAOB auditing standards, AS 2501.

[494] *See* AIC Comment Letter I.

[495] *See In the Matter of EDG Management Company, LLC, supra* footnote 30; *see also In the Matter of Energy Capital Partners, supra* footnote 30; *Innovation Capital Management, LLC,* Investment Advisers Act Release No. 6104 (Sept. 2, 2022) (settled order).

[496] *See* Chamber of Commerce Comment Letter.

[497] Public Company Accounting Oversight Board, *Basics of Inspections, Inspections: An Overview* (last visited Aug. 13, 2023), *available at https://pcaobus.org/oversight/inspections/basics-of-inspections.*

[498] *See* AIMA/ACC Comment Letter; AIC Comment Letter I.

[499] *See, e.g.,* Exemptions Adopting Release, *supra* footnote 9.

[500] *See, e.g.,* PCAOB Reports of Board Determinations Pursuant to Rule 6100, *available at https://pcaobus.org/oversight/international/board-determinations-holding-foreign-companies-accountable-act-hfcaa.*

[501] For example, more than 90% of the total number of hedge funds and private equity funds currently undergo a financial statement audit. *See infra* section VI.C.4.

[502] *See* LSTA Comment Letter; Canaras Comment Letter.

[503] *See* Fixed Income Investor Network Comment Letter.

[504] *See supra* section II.A (Scope) for additional information. The Commission is not applying all five private fund adviser rules to SAFs advised by SAF advisers.

certified public accountant performs specific procedures agreed upon between the engaging party and the certified public accountant on subject matter and reports findings without providing an opinion or conclusion (*i.e.,* an agreed-upon procedures engagement is not an examination or review engagement).[505] Because the needs of an engaging party may vary widely, the nature, timing, and extent of the procedures may vary, as well.[506] Moreover, the intended users assess for themselves the procedures and findings reported by the certified public accountant and draw their own conclusions from the work performed by the practitioner.[507] An audit, on the other hand, is an examination of an entity's financial statements by an independent public accountant in accordance with either the standards of the PCAOB or generally accepted auditing standards in the United States (''U.S. GAAS'') for purposes of expressing an opinion on those financial statements.[508] Although the final approach we are adopting is not identical to commenters' suggestions, we believe it is responsive to suggestions for the audit requirement not to apply to CLOs.

Commenters also requested clarification about whether advisers would need to obtain a separate audit of an SPV to comply with the mandatory audit requirement.[509] We understand that an adviser to a pooled investment vehicle client may utilize an SPV, organized as a limited liability company, trust, partnership, corporation or other similar vehicle, to facilitate investments for legal, tax, regulatory or other similar purposes. We believe an investment adviser could either treat an SPV as a separate client, in which case the adviser will be advising the SPV directly, or treat the SPV's assets as assets of the pooled investment vehicles that it is advising indirectly through the SPV.[510] If the adviser treats the SPV as a separate client, the mandatory private fund audit rule will require the adviser to comply with the rule's audited financial statement distribution requirements.[511] Accordingly, the adviser will distribute the SPV's audited financial statements to the pooled investment vehicle's beneficial owners. If, however, the adviser treats the SPV's assets as the pooled investment vehicle's assets that it is advising indirectly, the SPV's assets will be required to be considered within the scope of the pooled investment vehicle's financial statement audit.

1. Requirements for Accountants Performing Private Fund Audits

Although there are substantive differences between the proposed rule and the final rule, we do not believe that these differences are significant. The mandatory private fund adviser audit rule includes certain requirements regarding the accountant performing a private fund audit, as currently required under the custody rule.[512] First, the rule requires an accountant performing a private fund audit to meet the standards of independence described in Regulation S–X.[513] Second, the rule requires the independent public accountant performing the audit to be registered with, and subject to regular inspection as of the commencement of the professional engagement period, and as of each calendar year-end, by, the PCAOB in accordance with its rules.[514]

Some commenters suggested that we should allow auditors to meet AICPA standards of independence as opposed to the standards of independence described in rule 2–01(b) and (c) of Regulation S–X.[515] Another commenter suggested that we should require advisers to rotate their auditors and prohibit auditors to private funds from providing any non-audit services.[516] Under the current custody rule, advisers to pooled investment vehicles qualifying for the audit provision must meet the standards of independence described in Regulation S–X.[517] Based on our experience with the audit provision in the custody rule, we continue to believe that an audit by an objective, impartial, and skilled professional contributes to both investor protection and investor confidence.[518] We have long recognized the bedrock principle that an auditor must be independent in fact and appearance, and we believe that the independence standards described in Regulation S–X focus on those relationships or services, including certain non-audit services, that are more likely to threaten an auditor's objectivity or impartiality.[519]

2. Auditing Standards for Financial Statements

Under the mandatory private fund adviser audit rule, an audit must meet the definition in rule 1–02(d) of Regulation S–X, as proposed and as currently required under the custody rule. Pursuant to that definition, financial statement audits performed for purposes of the audit rule would generally be performed in accordance with U.S. GAAS.[520]

Some commenters suggested that we consider whether auditing standards other than U.S. GAAS or PCAOB standards may meet the requirements of the rule,[521] while another commenter stated that ''the rule should require advisers to obtain audits performed under rule 1–02(d) of Regulation S–X, as proposed.'' [522] After considering these comments, we continue to believe that audits should be conducted in accordance with U.S. GAAS for the following reasons. First, U.S. GAAS requires that an auditor evaluate and respond to the risk of material misstatements of the financial statements due to fraud or error.[523]

[505] *See* AICPA AT–C 215.02.

[506] *See id.*

[507] See AICPA AT–C 215.03.

[508] *See* rule 1–02(d) of Regulation S–X.

[509] *See* E&Y Comment Letter; KPMG Comment Letter; PWC Comment Letter; AIC Comment Letter I; TIAA Comment Letter.

[510] *See* Custody of Funds or Securities of Clients by Investment Advisers, SEC Investment Advisers Act Release No. IA–2968 (Dec. 30, 2009) [75 FR 1455 (Jan. 11, 2010)] (''2009 Custody Rule Release''), at 41.

[511] *See* final rule 206(4)–10(a); *see also infra* section II.C.7 (discussing that an adviser needs only to take reasonable steps to cause the private fund, including an SPV, to undergo an audit if the adviser is not in a control relationship).

[512] *See* final rule 206(4)–10(a) and rule 206(4)–2(d)(3) (defining ''independent public accountant'').

[513] *Id.*

[514] *See* final rule 206(4)–10(a) and rule 206(4)–2(b)(4)(ii).

[515] *See* Ropes & Gray Comment Letter; AIC Comment Letter II.

[516] *See* SOC Comment Letter.

[517] *See* rule 206(4)–2(b)(4); *see also* rule 206(4)–2(d)(3) under the Advisers Act.

[518] *See* Revision of the Commission's Auditor Independence Requirements, Release No. 33–7919 (Nov. 21, 2000) [65 FR 76008 (Dec. 5, 2000)]. The custody rule requires all accountants performing services to meet the standards of independence described in rule 2–01(b) and (c) of Regulation S–X. *See* rule 206(4)–2(d)(3) under the Advisers Act.

[519] *See* Revision of the Commission's Auditor Independence Requirements, Release No. 33–7919 (Nov. 21, 2000) [65 FR 76008 (Dec. 5, 2000)], at 5.

[520] Under the definition in rule 1–02(d) of Regulation S–X, an ''audit'' of an entity (such as a private fund) that is not an issuer as defined in section 2(a)(7) of the Sarbanes-Oxley Act of 2002 means an audit performed in accordance with either U.S. GAAS or the standards of the PCAOB. *See* 2003 Custody Rule Release, *supra* footnote 470, at n.41. When conducting an audit of financial statements in accordance with the standards of the PCAOB, however, the auditor would also be required to conduct the audit in accordance with U.S. GAAS because the audit would not be within the jurisdiction of the PCAOB as defined by the Sarbanes-Oxley Act of 2002, as amended, (*i.e.,* not an issuer, broker, or dealer). *See* AICPA auditing standards, AU–C Section 700.46. We believe most advisers will choose to perform the audit pursuant to U.S. GAAS only rather than both standards, though it will be permissible to perform the audit pursuant to both standards.

[521] *See* E&Y Comment Letter; SBAI Comment Letter; AIMA/ACC Comment Letter; Deloitte Comment Letter.

[522] Convergence Comment Letter.

[523] *See* AICPA auditing standards, AU–C Section 240. Audits performed under PCAOB standards provide similar benefits. *See* PCAOB auditing

Continued

Second, audits performed in accordance with U.S. GAAS help detect valuation irregularities or errors, as well as an investment adviser's loss, misappropriation, or misuse of client investments. Third, other standards may use different or more flexible rules and policies (*e.g.,* the option to follow a standard, rather than an obligation to do so), which may be less effective than U.S. GAAS. Finally, we believe that U.S. investors are more familiar with the procedures performed during a financial statement audit conducted in accordance with U.S. GAAS. A financial statement audit conducted in accordance with U.S. GAAS commonly involves an accountant confirming bank account balances and securities holdings as of a point in time and regularly includes the testing of a sample of transactions, including investor subscriptions and redemptions, that have occurred throughout the year. We believe that the common types of audit evidence procedures performed by accountants during a financial statement audit—physical examination or inspection, confirmation, documentation, inquiry, recalculation, re-performance, observation, and analytical procedures—act as an important check to identify erroneous or unauthorized transactions or withdrawals by the adviser. Thus, we continue to believe that audits should generally be conducted in accordance with U.S. GAAS under this rule.[524]

3. Preparation of Audited Financial Statements

The mandatory private fund adviser audit rule also requires the audited financial statements to be prepared in accordance with generally accepted accounting principles as currently required under the custody rule and as proposed.[525] Requiring that financial statements comply with U.S. GAAP or some other comprehensive body of accounting standards similar to U.S. GAAP if the differences are reconciled to U.S. GAAP is designed to help investors receive consistent and quality financial reporting on their investments from the fund's adviser.

We had proposed to require that financial statements of private funds organized under non-U.S. law or that have a general partner or other manager with a principal place of business outside the United States contain information substantially similar to statements prepared in accordance with U.S. GAAP and any material differences must be required to be reconciled to U.S. GAAP. While one commenter suggested that we continue to require audited financial statements prepared in accordance with U.S. GAAP,[526] others suggested that we should recognize other accounting standards outside of the United States, such as International Financial Reporting Standards (IFRS),[527] and not impose a U.S. GAAP requirement.[528] Another commenter indicated that IFRS may be sufficient on their own without also requiring U.S. GAAP financial statements or financials with a reconciliation to U.S. GAAP.[529]

We continue to believe that U.S. GAAP is well understood by U.S. investors. U.S. GAAP also has important industry specific accounting principles for certain pooled vehicles, including private funds, and requires measurement of trades on trade date as opposed to settlement date, presentation of a schedule of investments, and certain financial highlights that may not be required under other accounting standards.[530] Thus, we continue to believe that it is important for audited financial statements to be prepared in accordance with U.S. GAAP or some other comprehensive body of accounting standards similar to U.S. GAAP if the differences are reconciled to U.S. GAAP.[531] Under the custody rule, financial statements of private funds organized under non-U.S. law or that have a general partner or other manager with a principal place of business outside the United States are required to contain information substantially similar to statements prepared in accordance with U.S. GAAP and any material differences are required to be reconciled to U.S. GAAP.[532]

4. Distribution of Audited Financial Statements

The mandatory private fund adviser audit rule requires a fund's audited financial statements to be distributed to current investors within 120 days of the end of a private fund's fiscal year, as currently required under the custody rule.[533] The audited financial statements consist of the applicable financial statements, related schedules, accompanying footnotes, and the audit report.

We proposed that the audited financials be distributed ''promptly'' after the completion of the audit. Commenters requested that we clarify the ''promptly'' standard,[534] with at least one commenter suggesting an outer limit of 120 days after a fund's fiscal year end to distribute audited financial statements,[535] while other commenters requested additional flexibility around the time to distribute audited financial statements.[536] After considering these comments, as well as comments urging us not to create disparity between this rule and the audit provision of the custody rule, we are incorporating the custody rule's timing requirement for the distribution of financial statements into the mandatory private fund adviser audit rule. We believe that, based on our experience with the custody rule, a 120-day time period is generally appropriate to allow the financial statements of a fund to be audited while also balancing the needs of investors to receive timely information.[537] This change will help ensure investors receive the statements in a timely and consistent manner.

In rare instances, an adviser may be unable to distribute a fund's audited financial statements within the required timeframe because of reasonably unforeseeable circumstances. For example, during the COVID–19 pandemic, some advisers were unable to deliver audited financial statements in the timeframe required under the custody rule due to logistical disruptions. Accordingly, because there

standards, AS 2401, which discusses consideration of fraud in a financial statement audit.

[524] *See supra* footnote 520.

[525] *See* final rule 206(4)–10(a) and rule 206(4)–2(b)(4). The SEC has stated that certain financial statements must either be prepared in accordance with U.S. GAAP or prepared in accordance with some other comprehensive body of accounting standards if the information is substantially similar to financial statements prepared in accordance with U.S. GAAP and contain a footnote reconciling any material differences. *See* 2003 Custody Rule Release, *supra* footnote 470, at n.41.

[526] *See* Albourne Comment Letter.

[527] *See* SBAI Comment Letter; Deloitte Comment Letter.

[528] *See* SIFMA–AMG Comment Letter I; AIC Comment Letter I.

[529] *See* Deloitte Comment Letter.

[530] *See* FASB ASC Topic 946, *Financial Services—Investment Companies.*

[531] *See* rule 206(4)–2(b)(4)(i) and rule 206(4)–2(b)(4)(iii).

[532] *See* 2003 Custody Rule Release, *supra* footnote 470, at n.41.

[533] *See* final rule 206(4)–10(a) and rule 206(4)–2(b)(4)(i).

[534] *See* NSCP Comment Letter; AIC Comment Letter I; ILPA Comment Letter I.

[535] *See* Convergence Comment Letter.

[536] *See* Segal Marco Comment Letter; SBAI Comment Letter.

[537] We similarly believe that a 180-day time period is appropriate in the context of a fund of funds and that a 260-day time period is appropriate in the context of a fund of funds of funds because advisers to these types of pooled investment vehicles may face practical difficulties completing their audits before the completion of audits for the underlying funds in which they invest. We note that our staff has expressed a similar view for certain fund of funds for purposes of the custody rule. *See* Custody Rule FAQs, *supra* footnote 465, at Question VI.7, VI.8A, and VI.8B.

is not an alternative method by which to satisfy the rule, the Commission would take the position that, if an adviser is unable to deliver audited financial statements in the timeframe required under the mandatory private fund adviser audit rule due to reasonably unforeseeable circumstances, this would not provide a basis for enforcement action so long as the adviser reasonably believed that the audited financial statements would be distributed by the deadline and the adviser delivers the financial statements as promptly as practicable.

Under the mandatory private fund adviser audit rule, the audited financial statements must be sent to all of the private fund's investors, as proposed and as currently required under the custody rule.[538] We did not receive any comments on this aspect of the proposal. In circumstances where an investor is itself a limited partnership, limited liability company, or another type of pooled vehicle that is a related person of the adviser, it is necessary to look through that pool (and any pools in a control relationship with the adviser or its related persons, such as in a master-feeder fund structure), in order to send to investors in those pools.[539] Without such a requirement, the audited financial statements would essentially be delivered to the adviser rather than to the parties the financial statements are designed to inform. Outside of a control relationship, such as if the private fund investor is an unaffiliated fund of funds, this same concern is not present, and it is not necessary to look through the structure to make meaningful delivery. It will be sufficient to distribute the audited financial statements to the adviser to, or other designated party of, the unaffiliated fund of funds. We believe that this approach will lead to meaningful delivery of the audited financial statements to the private fund's investors.[540]

5. Annual Audit, Liquidation Audit, and Audit Period Lengths

Key to the effectiveness of the audit in protecting investors is timely and regular administration and distribution. We are requiring that an audit be obtained at least annually, as proposed.[541] The final mandatory private fund adviser audit rule incorporates the custody rule requirement that audits must be performed *promptly* upon liquidation.[542]

Requiring the audit on an annual basis will help alert investors within months, rather than years, as to whether the financial statements are free of material misstatements and will increase the likelihood of mitigating losses or reducing exposure to other investor harms. Similarly, a liquidation audit will help ensure the appropriate and prompt accounting of the proceeds of a liquidation so that investors can take timely steps to mitigate losses or protect their rights at a time when they may be vulnerable to misappropriation by the investment adviser. We believe that it becomes increasingly difficult to remediate losses or other investor harms resulting from a material misstatement the longer it goes undetected. The audit requirement addresses these concerns while also balancing the cost, burden, and utility of requiring frequent audits.

Requiring the audit on an annual basis is consistent with current practices of private fund advisers that obtain an audit to comply with the custody rule under the Advisers Act, or to satisfy investor demand for an audit, and will provide investors with uniformity in the information they are receiving.[543] Under U.S. GAAS, auditors have an obligation to evaluate whether the current-period financial statements are consistent with those of the preceding period, and any other periods presented and to communicate appropriately in the auditor's report when the comparability of financial statements between periods has been materially affected by a change in accounting principle or by adjustments to correct a material misstatement in previously issued financial statements.[544] When an investor receives audited financial statements each year from the same private fund, the investor can compare statements year-over-year. Additionally, the investor can analyze and compare audited financial statements across other private funds and similar investment vehicles each year.

With respect to liquidation, we understand that the amount of time it takes to complete the liquidation of a private fund may vary. A number of years might elapse between the decision to liquidate an entity and the completion of the liquidation process. During this time, the fund may execute few transactions and the total amount of investments may represent a fraction of the investments that existed prior to the start of the liquidation process. We further understand that a lengthy liquidation period can lead to circumstances where the cost of an annual audit represents a sizeable portion of the fund's remaining assets.

Commenters suggested that we clarify how these requirements apply to stub period audits.[545] Certain commenters suggested that we should consider a period other than annually for funds that are undergoing a plan of liquidation or a wind down,[546] with at least one commenter expressing concern that the cost of a liquidation audit may outweigh the possible benefits.[547] Although we appreciate commenters' concerns, we are persuaded by commenters who urged us to align the requirements of this rule and the custody rule for several reasons. First, the two rules are substantially similar and have substantially similar policy objectives. Second, aligning this rule and the custody rule avoids confusion because most private fund advisers are already aware of what is required to satisfy the audit provision under the custody rule. Third, aligning this rule and the custody rule avoids additional costs and associated burdens due to the two rules' potential differences. We, however, requested comment on how these requirements apply to stub periods when we recently proposed amendments to the custody rule.[548]

6. Commission Notification

The proposed mandatory private fund adviser audit rule would have required an adviser to enter into, or cause the private fund to enter into, a written agreement with the independent public accountant performing the audit to notify the Commission (i) promptly upon issuing an audit report to the private fund that contains a modified opinion and (ii) within four business days of resignation or dismissal from, or other termination of, the engagement, or

[538] *See* rule 206(4)–2(b)(4)(i) and rule 206(4)–2(b)(4)(iii).

[539] *See* final rule 206(4)–10(a) and rule 206(4)–2(c). In a master-feeder structure, master fund financials may be attached to the feeder fund financials and delivered to investors in the feeder fund. *See* FASB ASC 946–205–45–6.

[540] *See* rule 206(4)–10(a) and rule 206(4)–2(c).

[541] Final rule 206(4)–10(a); *see* Proposing Release, *supra* footnote 3, at 109*; see also* rule 206(4)–2(b)(4)(i).

[542] *See* rule 206(4)–2(b)(4)(iii).

[543] *See* final rule 206(4)–10(a) and rule 206(4)–2(b)(4)(i).

[544] *See* AICPA auditing standards, AU Section 708.

[545] *See* KPMG Comment Letter; AIC Comment Letter II; NCREIF Comment Letter; SBAI Comment Letter.

[546] *See* KPMG Comment Letter; AIC Comment Letter II; Convergence Comment Letter; AIMA/ACC Comment Letter; SBAI Comment Letter.

[547] *See* Ropes & Gray Comment Letter.

[548] *See* Safeguarding Release, *supra* footnote 467; we have recently reopened the comment period on the Safeguarding rulemaking proposal. Safeguarding Advisory Client Assets; Reopening of Comment Period, Investment Advisers Act Release No. 6384 (August 23, 2023).

upon removing itself or being removed from consideration for being reappointed.[549]

Some commenters asserted that the notification requirement would be of limited benefit to the Commission,[550] while one commenter supported the notification requirement stating that a modified opinion or termination of an auditor constitute serious red flags that warrant early notice to regulators.[551] Another commenter even suggested that we should require advisers to notify investors upon the occurrence of a significant event.[552] After carefully considering these comments, we are not adopting the notification requirement at this time because we are persuaded by commenters who urged us to align the requirements of this rule and the custody rule. However, the Commission recently proposed amendments to the custody rule. As part of the proposed rulemaking, the Commission proposed similar amendments that would require advisers to enter into a written agreement with the independent public accountant performing the audit to notify the Commission (i) within one business day upon issuing an audit report to the entity that contains a modified opinion and (ii) within four business days of resignation or dismissal from, or other termination of, the engagement, or upon removing itself or being removed from consideration for being reappointed.[553] We are continuing to consider comments received regarding that proposal. Although we are not adopting a notification requirement as part of this rule, we remind advisers that per the instructions to Form ADV, Part 1A, Schedule D, Section 7.B.23.(h), if a private fund adviser has checked ''Report Not Yet Received,'' the adviser must promptly file an amendment to its Form ADV to update its records once the report is available.[554]

7. Taking All Reasonable Steps To Cause an Audit

We recognize that some advisers may not have requisite control over a private fund client to cause its financial statements to undergo an audit in a manner that satisfies the mandatory private fund adviser rule. This could be the case, for instance, where a sub-adviser is unaffiliated with the fund. In a minor change from proposal, we are clarifying that if a fund is already undergoing an audit, a non-control adviser does not have to take reasonable steps to cause its private fund client to undergo an audit.[555] We made this change to final rule 206(4)–10(b) to be consistent with final rule 206(4)–10(a). Thus, we are requiring that an adviser *take all reasonable steps* to cause its private fund client to undergo an audit that satisfies the rule when the adviser does not control the private fund and is neither controlled by nor under common control with the fund, if the private fund does not otherwise undergo such an audit.[556]

One commenter suggested that the ''all reasonable steps'' standard is unclear.[557] Commenters also suggested that we remove this requirement for sub-advisers [558] and that we apply the mandatory audit rule only to private funds controlled by the adviser.[559] We recognize that what would constitute ''all reasonable steps'' depends on the facts and circumstances. We believe, however, that advisers are in the best position to evaluate their control relationships over private fund clients and should be in a position to determine the appropriate steps to satisfy such standard based on their relationship with the private fund and the relevant control person. For example, a sub-adviser that has no affiliation to the general partner of a private fund could document the sub-adviser's efforts by including (or seeking to include) the requirement in its sub-advisory agreement. Accordingly, we continue to believe that the ''all reasonable steps'' standard is appropriate.

8. Recordkeeping Provisions Related to the Audit Rule

Finally, we are amending the Advisers Act books and records rule to require advisers to keep a copy of any audited financial statements, along with a record of each addressee and the corresponding date(s) sent.[560] In a change from the proposal, we are not requiring private fund advisers to make and retain records of the addresses and delivery methods used to disseminate audited financial statements.[561] Additionally, the adviser will be required to keep a record documenting steps taken by the adviser to cause a private fund client with which it is not in a control relationship to undergo a financial statement audit that complies with the rule.[562] We did not receive comments on the recordkeeping provisions of the mandatory private fund adviser audit rule. This aspect of the rule is designed to facilitate our staff's ability to assess an adviser's compliance with the mandatory private fund adviser audit rule and to detect risks the proposed audit rule is designed to address. We believe it similarly will enhance an adviser's compliance efforts as well.

D. Adviser-Led Secondaries

We are requiring SEC-registered advisers to satisfy certain requirements if they initiate a transaction that offers fund investors the option between selling all or a portion of their interests in the private fund and converting or exchanging them for new interests in another vehicle advised by the adviser or any of its related persons (an ''adviser-led secondary transaction'').[563] First, the adviser must obtain a fairness opinion or a valuation opinion from an independent opinion provider and distribute the opinion to private fund investors prior to the due date of the election form. Second, the adviser must prepare and distribute a written summary of any material business relationships between the adviser or its related persons and the independent opinion provider.[564] Advisers or their

[549] *See* Proposing Release, *supra* footnote 3, at 111.

[550] *See* NYC Bar Comment Letter II; BVCA Comment Letter; Invest Europe Comment Letter.

[551] *See* NASAA Comment Letter.

[552] *See* RFG Comment Letter II.

[553] *See* Safeguarding Release, *supra* footnote 467.

[554] *See* SEC Charges Two Advisory Firms for Custody Rule Violations, One Firm for ADV Violations, and Six Firms for Both, (Sept. 9, 2022), *available athttps://www.sec.gov/news/press-release/2022-156; see also* Form ADV, Section 7.B.(1) Private Fund Reporting, Question 23(h).

[555] Final rule 206(4)–10(b).

[556] *Id.*

[557] *See* Convergence Comment Letter.

[558] *See* BVCA Comment Letter; Invest Europe Comment Letter.

[559] *See* AIMA/ACC Comment Letter.

[560] Final amended rule 204–2(a)(21)(i). *See also supra* footnote 452 (describing the record creation and retention requirements under the books and records rule).

[561] *See* the discussion of recordkeeping requirements above in section II.B.6.

[562] Final amended rule 204–2(a)(21)(ii).

[563] Final rule 211(h)(2)–2. The rule does not apply to advisers that are not required to register as investment advisers with the Commission, such as State-registered advisers and ERAs.

[564] The Commission recently adopted certain new reporting requirements for private funds on Form PF. *See* Form PF; Event Reporting for Large Hedge Fund Advisers and Private Equity Fund Advisers; Requirements for Large Private Equity Fund Adviser Reporting, Investment Advisers Act Release No. 6297 (May 3, 2023) (''Form PF Release'') (17 CFR parts 275 and 279). Among these new reporting requirements is an obligation for certain private equity funds to report adviser-led secondary transactions on Form PF on a quarterly basis. While the adviser-led secondary transaction reporting requirement on Form PF and the adviser-led secondary transaction requirements in the final rule both serve, at least in part, to further investor protection, they do so through different means, entail different burdens, and employ modified definitions. The adviser-led secondary transaction reporting requirement on Form PF is confidential and thus does not provide investors with additional information. The adviser-led secondary transaction requirements in this rule, on the other hand, are designed to, among other things, make investors better informed about adviser-led secondary transactions in which they may be participating.

related persons have a conflict of interest with the fund and its investors when they offer investors the option between selling their interests in the fund, and converting or exchanging their interests in the private fund for interests in another vehicle advised by the adviser or any of its related persons. This rule will provide an important check against an adviser's conflicts of interest in structuring and leading such a transaction from which it may stand to profit at the expense of private fund investors.

Some commenters supported the proposed rule,[565] including some that stated it would help protect investors by providing them with better information.[566] Other commenters generally opposed the proposed rule.[567] Some commenters suggested that we expand the final rule to offer additional protections to investors, such as requiring advisers to use reasonable efforts to allow investors to remain invested on their original terms without the adviser realizing any carried interest on the sale of underlying assets.[568] While we understand that investors have other concerns surrounding these types of transactions,[569] we remain focused on providing investors with information that will enable them to make educated and informed decisions about their investments, particularly when such decisions involve a conflicted transaction, and we believe fairness and valuation opinions address that concern.[570] Fairness opinions and valuation opinions help investors make educated and informed investment decisions because they assist investors in gaining a more complete understanding of the financial aspects of the transaction. Moreover, we believe the opinion requirement is better suited to address the conflicts inherent within adviser-led secondary transactions because the presence of an independent third party reduces the possibility of fraudulent, deceptive, or manipulative activity. It also reduces the possibility that the subject asset may be valued opportunistically and that the adviser's compensation may involve fraud or deception, resulting in an inappropriate compensation scheme.

Some commenters argued that the SEC would exceed its authority if it were to require advisers to obtain a fairness opinion and that the proposed rule conflicts with SEC statements that advisers and clients can shape their relationships by agreement, provided that there is appropriate disclosure.[571] Section 206(4) grants the SEC the authority to prescribe means that are reasonably designed to prevent fraudulent, deceptive, or manipulative acts, practices, and courses of business. The final rule is reasonably designed to achieve this goal because it addresses an adviser's conflicts of interest that arise when leading a secondary transaction. Generally, the adviser is incentivized to recommend for the private fund to participate in the transaction by selling the asset to a new vehicle that survives the transaction, often referred to as the ''continuation vehicle,'' because the adviser and its related persons will typically receive additional management fees and carried interest from managing the continuation vehicle. Specifically, the adviser will be incentivized to seek a lower sale price for the asset to benefit the continuation fund because a lower sale price will increase the potential for more carried interest out of the continuation fund in the future. Additionally, an adviser may seek to undervalue an asset subject to a secondary transaction if the adviser's economics in the continuation fund are greater than its economics in the existing fund. This would harm investors in the existing fund because their cash-out offer would be based on an underlying valuation that is below market value. As another example, if the adviser-led secondary required a ''stapled commitment'' to another vehicle whereby secondary buyers were required to make contemporaneous capital commitments to another vehicle, the price offered to the fund's investors could be adversely affected if the staple requirement reduces the amount prospective buyers are willing to pay. By ensuring that private fund investors that participate in a secondary transaction are offered an appropriate price and provided disclosures about the opinion provider's relationship with the adviser, the rule will help prevent acts that are fraudulent, deceptive, or manipulative. If investors receive the benefit of a third-party check on valuation and are made aware of any conflicts of interest between the opinion provider and the adviser, investors are less likely to be defrauded, deceived, or manipulated by a mis-valuation by the adviser in its own interest.

One commenter argued that the proposed rule would be contrary to Section 211(h) of the Advisers Act because the proposed rule would significantly and needlessly expand an adviser's obligations and would disadvantage investors and the industry.[572] Section 211(h)(2) authorizes the Commission to prohibit or restrict certain sales practices, conflicts of interest, or compensation schemes that the Commission deems contrary to the public interest and the protection of investors. As discussed above in this section, an adviser-led secondary transaction raises certain conflicts of interest because the adviser and its related persons typically are involved on both sides of the transaction. As a result, advisers may seek to undervalue or overvalue an underlying asset involved in the transaction, at the expense of the private funds they advise, depending on how the economics of the transaction most benefit them. The conflicts of interest associated with adviser-led secondary transactions are particularly harmful to investor protection because they are often not made transparent to investors. These conflicts can also harm investors that elect to roll into the new vehicle advised by the same adviser. For example, the conflicts may influence or alter the terms the adviser sets forth in the new vehicle's governing agreement to the detriment of investors. Because investors typically do not have

[565] *See, e.g.,* CFA Comment Letter I; ICM Comment Letter; Morningstar Comment Letter; NEBF Comment Letter; Segal Marco Comment Letter.

[566] *See, e.g.,* Better Markets Comment Letter; Healthy Markets Comment Letter I; NY State Comptroller Comment Letter.

[567] *See, e.g.,* Comment Letter of the National Association of College and University Business Officers (Apr. 25, 2022) (''NACUBO Comment Letter''); SIFMA–AMG Comment Letter I; ATR Letter; PIFF Comment Letter; NYC Bar Comment Letter II; Ropes & Gray Comment Letter.

[568] *See, e.g.,* RFG Comment Letter II; OPERS Comment Letter (asking the Commission to provide additional relief, such as allowing investors to participate in the continuation fund on the same terms that applied to the investor's investment in the initial fund).

[569] For example, one commenter suggested we should encourage private funds to appoint independent transfer administrators and create secondary transfer policies. *See* Comment Letter of NYPPEX Holdings, LLC (Feb. 25, 2022) (''NYPPEX Comment Letter''). Another commenter suggested that we should require advisers to carry forward relevant side letter provisions to any new investment vehicle when those provisions were already negotiated and accepted by an adviser in respect of the original investment fund. *See* NY State Comptroller Comment Letter.

[570] Several commenters stated that providing full and fair disclosure concerning the conflicts and material facts associated with an adviser-led secondary transaction and receiving informed consent from investors is the most effective method to address the associated conflicts. *See, e.g.,* BVCA Comment Letter; Invest Europe Comment Letter. However, it is not possible for an investor to receive full and fair disclosure concerning the material facts associated with an adviser-led secondary transaction if the underlying valuation is determined only by the adviser without any third-party check. We also discuss further economic considerations around the viability of disclosure or consent requirements in the case of adviser-led secondaries below. *See infra* sections VI.C.2, VI.C.4.

[571] *See, e.g.,* ATR Comment Letter; Ropes & Gray Comment Letter; AIC Comment Letter I.

[572] *See* Ropes & Gray Comment Letter.

withdrawal rights, they may be subject to those terms for an extended period of time.

Adviser-led secondary transactions also involve compensation schemes as, typically, the adviser receives compensation as a result of the transaction. Advisers stand to profit from being on both sides of the transaction by earning additional compensation in the form of management fees or carried interest which is ultimately paid by fund investors. For example, in the continuation fund context, when an asset is sold from an existing fund to the continuation fund, the adviser has the potential to realize carried interest as part of that sale, depending on the performance of the existing fund. Advisers are thus incentivized to over- or undervalue the underlying asset depending on how they will receive the most compensation. This rule's requirement that private fund investors receive a third-party check on price via a fairness or valuation opinion and are provided disclosures about the opinion provider's relationship with the adviser will help protect them against such conflicted compensation schemes.

One commenter stated that, if adopted, this rule would be the first and only Federal securities law requiring a fairness opinion.[573] While the Federal securities laws generally do not require fairness opinions, they have required disclosure of fairness findings, including by independent parties, in other conflicted transactions. For example, in certain going-private transactions, Regulation M–A requires the filer to provide information regarding the substantive and procedural fairness of the transaction to address concerns related to self-dealing and unfair treatment, including whether the transaction is fair or unfair to unaffiliated security holders.[574] We believe that, due to these and other requirements applicable to going-private transactions, companies (or their affiliates) often obtain fairness opinions from independent opinion providers as a matter of best practice. Thus, other Federal securities laws, such as Regulation M–A, have required, or otherwise have indirectly caused, fairness findings similar to those required in the opinion provision of the final rule.

After considering comments, we are adopting this rule largely as proposed. In contrast to the proposal, we are providing advisers the option to obtain a valuation opinion *or* a fairness opinion, and we are requiring distribution of the opinion and the summary of material business relationships before the due date of the binding election form.

1. Definition of Adviser-Led Secondary Transaction

Adviser-led secondary transactions are defined as transactions initiated by the investment adviser or any of its related persons that offer the private fund's investors the choice between: (i) selling all or a portion of their interests in the private fund and (ii) converting or exchanging all or a portion of their interests in the private fund for interests in another vehicle advised by the adviser or any of its related persons.[575]

This definition generally includes secondary transactions where a fund is selling one or more assets to another vehicle managed by the adviser, if investors have the option between obtaining liquidity and rolling all or a portion of their interests into the other vehicle. Examples of such transactions may include single asset transactions (such as the fund selling a single asset to a new vehicle managed by the adviser), strip sale transactions (such as the fund selling a portion of multiple assets to a new vehicle managed by the adviser), and full fund restructurings (such as the fund selling all of its assets to a new vehicle managed by the adviser).[576]

We generally would consider a transaction to be initiated by the adviser if the adviser commences a process, or causes one or more other persons to commence a process, that is designed to offer private fund investors the option to obtain liquidity for their private fund interests. However, whether the adviser or its related person initiates a secondary transaction requires a facts and circumstances analysis. We generally would not view a transaction as initiated by the adviser if the adviser, at the unsolicited request of the investor, assists in the secondary sale of such investor's fund interest.

Adviser-led transactions raise certain conflicts of interest because the adviser and its related persons are involved on both sides of the transaction and have interests in the transaction that are different from, or in addition to, the interests of the private fund investors. For example, because the adviser may have the opportunity to earn economic and other benefits conditioned upon the closing of the secondary transaction, such as additional management fees or carried interest (including ''premium'' carry), the adviser generally has a conflict of interest in setting and negotiating the transaction terms. We believe that the definition is sufficiently broad to remain evergreen as secondary transactions continue to evolve and capture transactions that present these or other conflicts of interest. It also is sufficiently narrow to avoid capturing certain types of transactions that would not raise the same regulatory and conflict of interest concerns. For example, some commenters expressed concerns that the definition would capture rebalancing between parallel funds, ''season and sell'' transactions, and other scenarios where it may be unclear whether the adviser initiated the transaction.[577] Rebalancing between parallel funds and season and sell transactions between parallel funds generally will not be captured by the ''adviser-led secondary transaction'' definition because the adviser is not offering investors the choice between selling and converting/exchanging their interests in the private fund. Instead, the adviser is moving or reallocating assets between private funds it advises for legal and/or tax reasons. Rebalancing and season and sell transactions are important tools that assist an adviser in managing a fund's operations. For example, rebalancing allows an adviser to ensure that its fund clients have appropriate exposure to an investment to carry out the funds' investment strategies. Also, season and sell transactions are primarily used to reduce taxes and may allow an adviser to accommodate investors with different tax needs. Advisers and investors will benefit from continuing to access these

[573] *See* NYC Bar Comment Letter II.

[574] *See* 17 CFR 229.1000.

[575] Final rule 211(h)(1)–1. In a change from the proposal and in response to commenters, we are modifying the definition of an ''adviser-led secondary transaction'' from the proposal to exclude tender offers generally by revising the definition to require a choice between clauses (i) *and* (ii). *See* the discussion of the change to this definition in this section below.

[576] One commenter stated that the proposed definition of an ''adviser led secondary transaction'' may inadvertently pick up certain types of routine cross-trades. *See* Ropes & Gray Comment Letter. We would not consider the rule to apply to cross trades (which, generally, include sales of assets from one fund managed by an adviser to another fund managed by the same adviser) where the adviser does not offer the private fund's investors the choice to sell, convert, or exchange their fund interest. Although not subject to this rule, such cross trades may implicate other Federal securities laws, rules, and regulations, such as sections 206(1) and (2) of the Advisers Act.

[577] *See, e.g.,* Ropes & Gray Comment Letter; SBAI Comment Letter. In a typical season and sell transaction, one entity originates a loan and then, after the conclusion of a ''seasoning period,'' sells the loan to an affiliated entity. *See* The Investment Lawyer, Covering Legal and Regulatory Issues of Asset Management, Jessica T. O'Mary (July 2019), at 3–4.

tools, without the need for a fairness opinion.

In the Proposing Release, we classified ''tender offers'' as falling within the definition of ''adviser-led secondary transactions'' and we requested comment on this treatment and asked whether the rule should treat tender offers differently. Some commenters responded that the definition should not capture tender offers where the adviser or its related person is not acting as the purchaser.[578] These commenters stated that a fairness opinion would not add value for these types of transactions because investors typically have discretion to determine whether to remain in the fund on their existing terms or sell their interests for the price offered and that the default in a tender offer is for the investor to maintain its ''*status quo*'' interest in the fund. One commenter suggested that we revise the definition of adviser-led secondaries to more appropriately narrow its scope by clarifying that the definition requires that investors must choose *between* selling their interest in a private fund and converting or exchanging their interest for an interest in another vehicle advised by the same adviser.[579]

We found commenters' statements on this point persuasive in the context of this rule and, in a change from the proposal, are revising the rule text to exclude tender offers generally from the definition of ''adviser-led secondary transactions.'' We have modified the definition from the proposal to establish that the definition contemplates a choice between clauses (i) and (ii) of the definition. Accordingly, tender offers will not be captured by the definition if an investor is not faced with the decision between (1) selling all or a portion of its interest and (2) converting or exchanging all or a portion of its interest. Generally, if an investor is allowed to retain its interest in the same fund with respect to the asset subject to the transaction on the same terms (*i.e.,* the investor is not required to either sell or convert/exchange), as many tender offers permit investors to do, then the transaction would not qualify as an adviser-led secondary transaction.[580]

2. Fairness Opinion or Valuation Opinion

To complete an adviser-led secondary transaction, advisers must either (i) obtain a written opinion stating that the price being offered to the private fund for any assets being sold as part of an adviser-led secondary transaction is fair (a ''fairness opinion''), or (ii) obtain a written opinion stating the value (as a single amount or a range) of any assets being sold (a ''valuation opinion'').[581] In a change from the proposal, and in response to comments, we are allowing advisers to have the option to obtain and distribute to investors a valuation opinion instead of a fairness opinion.

Many commenters supported the proposed requirement that advisers obtain a fairness opinion in part because they believed it would provide investors with important information to inform their decisions.[582] Others stated that requiring fairness opinions would be overly burdensome because they would increase transaction costs.[583] Several commenters suggested that we offer alternatives to the fairness opinion requirement, and some commenters suggested we allow advisers to obtain valuation opinions in lieu of a fairness opinion.[584] We continue to believe that requiring a third-party check on valuation is a critical component of preventing the type of harm that might result from the adviser's conflict of interest in structuring and leading a secondary transaction.[585] Requiring advisers to obtain an independent opinion would provide private fund investors assurance that the price being offered is based on an appropriate valuation. We are receptive to commenters' concerns, however, that requiring a fairness opinion could result in increased costs to investors and that there may be other mechanisms to provide investors with unconflicted, objective data about the value of assets that are the subject to an adviser-led secondary transaction.[586] We understand that, in some cases, the cost of a valuation opinion would be lower than a fairness opinion, but that a valuation opinion would still provide investors with a strong basis to make an informed decision.[587] Namely, a valuation opinion would also provide a third-party check on valuation which is critical to addressing the conflicts of interest inherent in adviser-led secondary transactions.[588] Under the final rule, advisers and investors will have the ability to negotiate whether a fairness opinion or valuation opinion is more appropriate.

Several commenters suggested that we exempt adviser-led transactions where price can otherwise be determined through a market-driven discovery process independent of the adviser, such as when a recent sale of a minority stake in the relevant portfolio investment has occurred or shares of an underlying asset are publicly traded.[589] Although such transactions can provide helpful data that can inform a valuation opinion or fairness opinion, the valuation ascribed to the asset in such a transaction may not represent an accurate value. For example, valuations obtained through a minority stake sale may become stale relatively quickly.[590] In the context of an underlying asset that is publicly traded, the market price may be highly volatile or the publicly traded security may have limited trading volume. In addition to timing, each transaction is unique, and factors such as size of the asset being sold and whether the purchaser is obtaining a controlling interest could result in a

[578] *See, e.g.,* AIC Comment Letter II; NYC Bar Comment Letter II.

[579] *See, e.g.,* Comment Letter of Cravath, Swaine & Moore LLP (Apr. 11, 2022) (''Cravath Comment Letter''); NYC Bar Comment Letter II.

[580] An attempt to avoid any of the rule's requirements, depending on the facts and circumstances, could violate the Act's general prohibition against doing anything indirectly which would be prohibited if done directly. Section 208(d) of the Advisers Act.

[581] *See* final rule 211(h)(1)–1 (defining ''fairness opinion'' and ''valuation opinion'').

[582] *See, e.g.,* Segal Marco Comment Letter (stating that the fairness opinion requirement would ''help investors receive independent price assessments''); Better Markets Comment Letter; NY State Comptroller Comment Letter.

[583] *See, e.g.,* AIC Comment Letter I; AIMA/ACC Comment Letter; PIFF Comment Letter.

[584] *See, e.g.,* SBAI Comment Letter; Comment Letter of Houlihan Lokey, Inc. (Apr. 25, 2022) (''Houlihan Comment Letter''); IAA Comment Letter II.

[585] As a fiduciary, the adviser is obligated to act in the fund's best interest and to make full and fair disclosure to the fund of all conflicts and material facts associated with the adviser-led transaction.

[586] *See, e.g.,* AIMA/ACC Comment Letter; Houlihan Comment Letter.

[587] *See* Houlihan Comment Letter.

[588] We believe that any fairness or valuation opinions provided pursuant to the final rule should nonetheless be in line with market practices and methodologies. For example, we understand that, currently, many fairness and valuation opinions rely on discounted cash flow, similar transaction, similar company, and/or other comparable analyses. We recognize, however, that each of these types of analyses may not be possible in all circumstances or otherwise applicable to the transaction type, and that other types of analysis may be appropriate.

[589] *See, e.g.,* Cravath Comment Letter; Comment Letter of Carta, Inc. (Apr. 25, 2022) (''Carta Comment Letter''); Albourne Comment Letter; Pathway Comment Letter; ILPA Comment Letter I; IAA Comment Letter II; AIC Comment Letter I.

[590] Some commenters suggested that valuations obtained within 12 months of the adviser's solicitation of investor interest in the adviser-led secondary transaction would provide acceptable valuation information. *See* Cravath Comment Letter (suggesting that the final rule exempt from the fairness opinion requirement transactions where an asset was the subject of a liquidity event within the last 12 months, among other requirements); ILPA Comment Letter I. However, we believe that 12 months is too long a period of time and would not allow the price to reflect the market's more recent pricing changes. Significant market changes (for instance, the global spread and response to COVID–19) can occur in a substantially shorter time period than 12 months.

valuation that is not as relevant to an adviser-led secondary transaction involving the same asset, depending on the facts and circumstances. Another example of a distinct transaction is a scenario where a strategic purchaser may be willing to pay more because the purchaser has a plan for realizing synergies with the target company after the acquisition (*e.g.,* reduced costs). In contrast, a purchaser that does not have immediate plans for the target company might only be willing to pay a reduced amount.

Some commenters supported the fairness opinion requirement as a guard against suspect valuations, especially when such valuations determine the carried interest, management fees, and/or other transaction fees an adviser may receive from the transaction.[591] We share these concerns and decline to provide an exemption from the fairness/valuation opinion requirement for market-driven discovery processes. We do not believe that relying solely on market-driven transactions is sufficient to address the policy concerns that motivated this rule. Although commenters argued that a fairness opinion is unnecessary in certain market-driven transactions, such as a minority stake sale, we believe that some of the same conflicts of interest, compensation scheme concerns, and potential for fraud or manipulation that motivated this rulemaking may persist in such market-driven transactions because the adviser is still involved in deciding whether to engage in the transaction and still sets and negotiates the terms of that sale. For example, if a recent sale improperly valued an asset, an adviser could be incentivized to initiate a transaction with the same valuation, which, depending on the terms of the transaction, may benefit the adviser at the expense of the investors. Similarly, if the market price of shares in a publicly traded underlying asset is volatile and drops suddenly or is depressed for an extended period of time, an adviser may be incentivized to seek to execute an adviser-led secondary with respect to such asset as soon as possible to lock in the lower price to the detriment of investors.[592] As a result, our concerns about an adviser's conflicts of interest are not fully addressed by relying on such valuations for such transactions. Instead, we believe that a methodological process performed by a third party (such as that used to produce a fairness/valuation opinion) that takes into account factors when analyzing value, including but not limited to recent market transactions, will provide investors with reliable data to inform their decision-making process.[593] This rule will also serve as a deterrent to harmful conflicts of interest, compensation schemes and fraudulent or manipulative behavior because any valuation proposed by an adviser would need to be checked by an opinion provider. Thus, we believe that advisers will be less likely to propose such valuations if they anticipate that an opinion provider may not support them.

Some commenters suggested that we expand the fairness opinion requirement to cover information in addition to pricing/valuation of the asset (*e.g.,* data and pricing information for the remaining assets in the fund).[594] In contrast, other commenters did not support an expansion in scope on the grounds that requiring transaction terms in an opinion would require the opinion provider to make subjective judgments, and adding other provisions, such as allowing the private fund and/or its investors to rely on the opinion, would increase the cost of fairness opinions.[595] We agree with these commenters that an expansion in scope is not necessary to address the conflict of interest that underlies the need for this rule: concern that an adviser's conflicts of interest (due to being on both sides of the transaction) will result in a price/valuation that does not reflect the true value of the asset. As noted above, an adviser's economic entitlements will likely be based on the asset value and the fairness/valuation opinion requirement is intended to guard against the adviser's incentive to value an asset in a manner that maximizes the adviser's profit.

The final rule requires an adviser to obtain the opinion from an independent opinion provider, which is defined as a person that provides fairness opinions or valuation opinions in the ordinary course of its business and is not a related person of the adviser.[596] The requirement that the opinion provider not be a related person of the adviser reduces the risk that certain affiliations could result in a biased opinion and would further mitigate the potential influence of the adviser's conflicts of interest. The ordinary course of business requirement is intended to capture persons with the experience to value illiquid, esoteric, and other types of assets based on relevant criteria.

One commenter suggested expanding the proposed definition of ''independent opinion provider'' to allow a broader group of opinion providers to satisfy the definition (*i.e.,* beyond entities that provide opinions about assets sold as part of adviser-led secondary transactions in the ordinary course of their business).[597] We decline to broaden the types of entities that can serve as independent opinion providers because it is important that opinion providers have the necessary experience to value assets in connection with adviser-led secondary transactions. We are adopting the definition of ''independent opinion provider'' largely as proposed.[598]

3. Summary of Material Business Relationships

We also are requiring advisers to prepare a written summary of any material business relationships the adviser or any of its related persons has, or has had, with the independent opinion provider within the two-year period immediately prior to the issuance date of the fairness opinion or valuation opinion. We are adopting this requirement largely as proposed, but we are specifying that the lookback period for which disclosures must be provided for material business relationships that existed during the two-year period is measured from *immediately prior to the issuance of the fairness opinion or valuation opinion.* We believe that specifying how the lookback period is measured will facilitate the effective operation of the rule and will ensure that investors receive relevant information about an adviser's conflicts at the time the opinion was issued by the independent opinion provider. Moreover, we believe it is important to measure this two-year period from immediately prior to the issuance of the fairness opinion or valuation opinion to

[591] *See, e.g.,* Healthy Markets Comment Letter I; Better Markets Comment Letter; OPERS Comment Letter.

[592] We recognize, however, that most adviser-led transactions do not involve publicly traded securities and typically involve financial assets that are valued using unobservable inputs as described in FASB ASC Topic 820, *Fair Value Measurement, i.e.,* level 3 inputs.

[593] *See supra* the discussion of appropriate methodologies in footnote 588.

[594] *See, e.g.,* NYPPEX Comment Letter; Segal Marco Comment Letter.

[595] *See, e.g.,* Houlihan Comment Letter (stating that the final rule should not require the fairness opinion to state that the private fund and/or its investors may rely on the fairness opinion); AIMA/ACC Comment Letter; Cravath Comment Letter.

[596] *See* final rule 211(h)(1)–1 (defining ''independent opinion provider''). *See supra* section II.B.1 for a discussion of the definition of ''related person.''

[597] *See* Ropes & Gray Comment Letter.

[598] In a minor change from the proposed definition of ''independent opinion provider,'' we are replacing ''an entity'' with ''a person.'' ''Person,'' as defined under the Advisers Act includes natural persons as well as entities. Section 202(a)(16) of the Act [15 U.S.C. 80b–2(a)(16)].

capture any new material business relationships that may have developed only shortly before the issuance of such opinion.

We are adopting this requirement because other business relationships may have the potential to result, or appear to result, in a biased opinion, particularly if such relationships are not disclosed to private fund investors. For example, an opinion provider that receives an income stream from an adviser for performing services unrelated to the issuance of the opinion might not want to jeopardize its business relationship with the adviser by alerting the private fund investors that the price being offered is unfair (or by otherwise refusing to issue the opinion). By requiring disclosure of such material relationships, the rule puts private fund investors in a position to evaluate whether any conflicts associated with such relationships may cause the opinion provider to deliver a biased opinion. This required disclosure would also deter advisers from seeking opinions from highly conflicted opinion providers as it may raise objections from investors. Whether a business relationship is material requires a facts and circumstances analysis; however, for purposes of the rule, audit, consulting, capital raising, investment banking, and other similar services would typically meet this standard.

Some commenters stated that this requirement is unnecessary because advisers are already required to disclose material conflicts of interest to private fund investors.[599] We recognize that an adviser has an obligation to comply with rule 206(4)–8 under the Advisers Act and avoid omitting material facts, but that rule does not impose an affirmative obligation on advisers to provide specific disclosure on their conflicts of interest. In contrast, the final rule would mandate disclosure that covers a discrete time period and that must be provided to investors at a time when investors can use the information to make investment decisions. These specific requirements are necessary to address the conflicts of interest that adviser-led secondary transactions present.

4. Distribution of the Opinion and Summary of Material Business Relationships

Under the final rule, an adviser must distribute[600] the fairness opinion or valuation opinion as well as the summary of material business relationships to private fund investors. In a change from the proposal, and in response to comments, we are requiring that the adviser distribute both the opinion and summary of material business relationships to private fund investors prior to the *due date of the election form* for the transaction instead of prior to *the closing of the transaction*.[601] We requested comment on the distribution of the fairness opinion and summary of material business relationships.[602] Several commenters suggested that the final rule specify the timing required for delivery of the opinion to ensure that investors have sufficient time to use the information to inform their investment decisions.[603] One commenter stated that it is common for advisers to obtain the opinion well in advance of the closing of the transaction because the adviser delivers it to the investors or the LPAC at an earlier stage of a transaction to provide such persons with the relevant information to make a determination as to whether to waive conflicts and allow the transaction to proceed.[604] We agree that specifying the timing for delivery will ensure that investors receive the benefit of an independent price assessment at the time they make an investment decision with respect to the transaction, which will make them better informed about the transaction. Moreover, this will make the rule a more effective deterrent to conflicts and excessive compensation and help prevent fraud, deception, and manipulation than our proposed approach because it will better ensure that investors have access to important information regarding valuation and conflicts at the time they make a binding decision to participate in the transaction, rather than after this decision has been made.

5. Recordkeeping for Adviser-Led Secondaries

We are amending rule 204–2 under the Advisers Act to require advisers to make and retain books and records to support their compliance with the adviser-led secondaries rule and facilitate the Commission's inspection and enforcement capabilities.[605] Advisers must make and retain a copy of the fairness opinion or valuation opinion and material business relationship summary distributed to investors, as well as a record of each addressee and the date(s) the opinion and summary was sent. In a change from the proposal, we are adding a reference to the valuation opinion consistent with the change discussed above allowing an adviser to obtain a valuation opinion in lieu of a fairness opinion. In another change from the proposal, we are not requiring private fund advisers to make and retain records of the addresses or delivery methods used to disseminate fairness opinions, valuation opinions, or material business relationship summaries.[606]

Some commenters supported the recordkeeping requirement.[607] Another commenter stated that the requirement would be overly burdensome for advisers to funds with a significant number of investors.[608] While we understand that the rule imposes an additional recordkeeping obligation on advisers, ultimately advisers are not obligated to engage in adviser-led secondary transactions. Because these transactions are optional and up to the adviser's discretion, an adviser can consider the associated recordkeeping requirements when deciding whether to initiate such a transaction. Also, as noted above, we are not adopting the proposed address and delivery method recordkeeping requirements; thus, the final rule lessens the recordkeeping burden on advisers compared to the proposal. Further, we view these requirements as necessary to facilitate our staff's ability to assess an adviser's compliance with the final rule and enhance an adviser's compliance efforts.

E. Restricted Activities

In a modification from the proposal, final rule 211(h)(2)–1 restricts advisers to a private fund from engaging in the following activities, unless they satisfy

[599] *See, e.g.,* PIFF Comment Letter; Ropes & Gray Comment Letter.

[600] Advisers may distribute the fairness opinion or valuation opinion as well as the summary of material business relationships to private fund investors electronically, including through a data room, provided that such distribution is done in accordance with the Commission's views regarding electronic delivery. *See* Use of Electronic Media Release, *supra* footnote 435; *see also* t *supra* section II.B.3- for a discussion of the distribution requirements.

[601] We also have added the defined term ''election form'' which means a written solicitation distributed by, or on behalf of, the adviser or any related person requesting private fund investors to make a binding election to participate in an adviser-led secondary transaction. *See* final rule 211(h)(1)–1.

[602] *See* Proposing Release, *supra* footnote 3, at 130.

[603] *See, e.g.,* Predistribution Initiative Comment Letter II; ILPA Comment Letter I.

[604] *See* Ropes & Gray Comment Letter.

[605] Final amended rule 204–2(a)(23).

[606] *See* the discussion of recordkeeping requirements above in section II.B.6.

[607] *See, e.g.,* ILPA Comment Letter I; Convergence Comment Letter.

[608] *See* AIMA/ACC Comment Letter.

certain disclosure and, in some cases, consent requirements:

- Charging or allocating to the private fund fees or expenses associated with an investigation of the adviser or its related persons by any governmental or regulatory authority; however, regardless of any disclosure or consent, an adviser may not charge or allocate fees and expenses related to an investigation that results or has resulted in a court or governmental authority imposing a sanction for violating the Investment Advisers Act of 1940 or the rules promulgated thereunder;
- Charging the private fund for any regulatory, examination, or compliance fees or expenses of the adviser or its related persons;
- Reducing the amount of any adviser clawback by actual, potential, or hypothetical taxes applicable to the adviser, its related persons, or their respective owners or interest holders;
- Charging or allocating fees and expenses related to a portfolio investment on a non-pro rata basis when more than one private fund or other client advised by the adviser or its related persons have invested in the same portfolio company; and
- Borrowing money, securities, or other private fund assets, or receiving a loan or extension of credit, from a private fund client.

We proposed to prohibit these activities without disclosure or consent exceptions.[609] Like the proposal, the final rule applies even if the activities are performed indirectly, for example by an adviser's related persons, because the activities have an equal potential to harm the fund and its investors when performed indirectly without the specified disclosure, and in some cases, consent.[610]

We requested comment on the proposed prohibitions, including on whether the final rule should prohibit these activities unless the adviser satisfies certain governance or other conditions, such as disclosures to the private fund's investors, approval by an independent representative of the fund, or approval by a majority (by number and/or in interest) of investors.[611] Many commenters disagreed with our proposed approach of prohibiting certain activities as *per se* unlawful, and some commenters suggested that the existing full and fair disclosure and informed consent framework for conflicts of interest with advisory clients under the Advisers Act was sufficient to address the Commission's concerns with these activities.[612]

Other commenters generally supported the proposed prohibitions, stating that they would prevent advisers from engaging in activities that generally disadvantage and shift costs to funds and their investors.[613] Some commenters who supported the Commission's concerns with these activities suggested that enhanced disclosure or consent requirements would be sufficient to address them and would help avoid some of the unintended consequences that could result from strictly prohibiting the activities (*e.g.,* potentially discouraging advisers from engaging in complex strategies which, according to commenters, would result in decreased competition and diversification).[614] For example, some commenters supported, as an alternative to the proposed prohibition on advisers' charging regulatory and compliance expenses, requiring advisers to disclose all compliance costs and whether the adviser or fund pays them.[615] Other commenters suggested that we should not prohibit advisers from charging fully disclosed, and consented to, fees and expenses to their private fund clients[616] and that we should provide an exception for non-pro rata fee and expense charges or allocations if they were appropriately disclosed to investors.[617]

We continue to believe that these activities involve conflicts of interest (*e.g.,* borrowing directly from a private fund client may benefit the adviser while not being in the best interest of the fund) and compensation schemes (*e.g.,* passing certain expenses[618] on to funds, which increases the adviser's revenue and decreases the fund's profits) that are contrary to the public interest and the protection of investors. In addition, adopting protective restrictions on these activities is reasonably designed to prevent fraud and deception.

Many of our concerns with these activities have persisted despite our related enforcement actions, and we believe therefore that further regulation is required. Investors often lack sufficient insight into the nature, scope, and impact of these activities, given that advisers do not frequently or consistently provide investors with sufficiently detailed information about them. In this regard, some commenters stated that many advisers do not provide disclosure of the activities covered by the restrictions and, when disclosure is provided about those activities, it is often incomplete or includes unhelpful information.[619] In addition, the limitations of private fund governance structures, discussed in detail above, warrant enhanced investor protection with respect to these activities.[620] For example, current private fund governance mechanisms, such as the LPAC, may not have sufficient independence, authority, or accountability to effectively oversee and consent to conflicts or other harmful practices.

After considering comments, and for the reasons discussed below in

[609] *See* proposed rule 211(h)(2)–1.

[610] Any attempt to evade any of the rules' restrictions, depending on the facts and circumstances, would violate the Act's general prohibitions against doing anything indirectly which would be prohibited if done directly. Section 208(d) of the Advisers Act.

[611] *See* Proposing Release, *supra* footnote 3, at 135 and 161.

[612] *See, e.g.,* Comment Letter of Joseph A. Grundfest, Professor of Law and Business, Stanford Law School Commissioner (Apr. 22, 2022) (''Grundfest Comment Letter'') (stating the Commission has traditionally a disclosure-based philosophy); Cartwright et al. Comment Letter (discussing the SEC's ability to address activity that is the subject of the proposal through its existing antifraud authority); AIMA/ACC Comment Letter (stating its preference for an ''implied consent'' framework but also that ''disclosure to and more explicit consent—whether by the relevant governing body . . . or by investors individually . . . or collectively (*e.g.,* through an investor consent obtained in the manner prescribed by, and subject to the terms of, a private funds' governing documents)—to be significantly better (and more in line with the best interests of investors) than an outright ban on such activities'' and that ''such a disclosure and express consent model would eliminate any residual confusion regarding what is or is not permissible''); MFA Comment Letter I (stating that the Commission has departed from its longstanding approach which was to allow advisers and clients/investors to shape their relationships through disclosure and informed consent); IAA Comment Letter II; AIC Comment Letter II (stating that ''requiring separate consent (let alone an outright prohibition) with respect to such activities [in addition to the existing consent framework] would be unnecessary and duplicative'').

[613] *See, e.g.,* NEBF Comment Letter; Predistribution Initiative Comment Letter II; NY State Comptroller Comment Letter; Take Medicine Back Comment Letter; IFT Comment Letter.

[614] *See, e.g.,* Comment Letter of Canada Pension Plan Investment Board (June 22, 2022) (''Canada Pension Comment Letter'') (suggesting that the SEC require disclosure of certain activities rather than prohibiting them outright); SBAI Comment Letter; MFA Comment Letter I.

[615] *See, e.g.,* Schulte Comment Letter; ILPA Comment Letter I.

[616] *See* MFA Comment Letter I.

[617] *See* Convergence Comment Letter; Invest Europe Comment Letter.

[618] *See supra* section I (discussing ''reimbursements'' as a form of ''compensation'').

[619] *See* Healthy Markets Comment Letter I (stating that information is often unavailable or incomplete regarding these activities that may simply serve to enrich persons related to their investment advisers); ILPA Comment Letter I (stating that itemized disclosure of compliance costs is currently insufficient); NEBF Comment Letter (stating that it is difficult for investors to observe, track, and evaluate the costs and expenses that advisers shift to private funds); IFT Comment Letter (stating that some fund advisers have ignored requests for baseline information about fees and expenses).

[620] *See supra* section I.A.

connection with each restricted activity, we have determined that investors will be better informed and receive enhanced protection, while still potentially benefiting from these activities when they are carried out in the best interests of the fund, if investors are provided with disclosures and, in some cases, consent rights regarding these activities. Accordingly, the final rule generally will provide either a disclosure-based exception or a disclosure- and consent-based exception for each restricted activity. The non-pro rata restriction will be subject to a before-the-fact disclosure-based exception (in addition to the requirement that the allocation be fair and reasonable), while the certain fees and expenses restrictions and the post-tax clawback restriction will be subject to after-the-fact disclosure-based exceptions. The borrowing restriction and the investigation restriction will be subject to a consent-based exception, which will require an adviser to receive advance consent from at least a majority in interest of a fund's investors in order to engage in these activities.[621] Specifically, each consent-based exception will require an adviser to seek consent for the restricted activity from all of the fund's investors and obtain consent from at least a majority in interest of investors that are not related persons of the adviser.[622] A fund's governing documents may establish that a higher threshold of investor consent is necessary in order for the adviser to engage in these restricted activities and may generally prescribe the manner and process by which the applicable threshold of investor consent is obtained.[623] However, in light of the limitations posed by fund governance bodies, such as LPACs, advisory boards, or boards of directors, which do not generally have a fiduciary obligation to the private fund investors, as discussed above,[624] the consent-based exceptions will require that the relevant consent be sought and obtained specifically from fund investors.

In light of this change from the proposal to allow an adviser to satisfy disclosure and, in some cases, consent requirements, as applicable, instead of being prohibited from certain activities, we are amending rule 204–2 under the Advisers Act to require SEC-registered investment advisers to retain books and records to document their compliance with the disclosure and consent aspects, as applicable of the restricted activities rule. This will help facilitate the Commission's inspection and enforcement capabilities. Accordingly, we are requiring SEC-registered investment advisers to retain a copy of any notification, consent, or other document distributed to or received from private fund investors pursuant to this rule, along with a record of each addressee and the corresponding date(s) sent for each such document distributed by the adviser.[625] Similarly, in a change from the proposal, we are not requiring private fund advisers to make and retain records of the addresses or delivery methods used to disseminate any such notifications or other documents distributed to private fund investors pursuant to this rule.[626]

The exceptions require advisers to ''distribute'' certain written notices or consent requests to investors.[627] An adviser generally will satisfy the requirement to ''distribute'' a written notice or consent request when it has been sent to all investors in the private fund. However, the definition of ''distribute,'' ''distributes,'' and ''distributed'' precludes advisers from using layers of pooled investment vehicles in a control relationship with the adviser to avoid meaningful application of the distribution requirement.[628] In circumstances where an investor is itself a pooled vehicle that is controlling, controlled by, or under common control (a ''control relationship'') with the adviser or its related persons, the adviser must look through that pool (and any pools in a control relationship with the adviser or its related persons, such as in a master-feeder fund structure) and send the written notice or consent request to investors in those pools. Outside of a control relationship, such as if the private fund investor is an unaffiliated fund of funds, this same concern is not present, and the adviser would not need to look through the structure to make delivery that satisfies the definition of ''distribute.'' This approach will lead to meaningful distribution of the written notices and consent requests to the private fund's investors.

In addition, the disclosure-based exceptions to the restrictions on certain regulatory, compliance, and examination fees and expenses and post-tax clawbacks require advisers to distribute written notices to investors within 45 days after the end of the fiscal quarter in which the relevant activity occurs. This disclosure timeline is appropriate because it emphasizes the need for the notices to be distributed to investors within a reasonable period of time to help ensure their timeliness, while affording advisers a limited degree of flexibility. The 45-day timeline generally matches the timeline required for advisers to distribute quarterly statements under the quarterly statement rule, except for quarterly statements distributed at fiscal year-end or quarterly statements prepared for a fund of funds. This will allow advisers that are subject to the quarterly statement rule to include disclosures related to the restricted activities rule in their quarterly reports, subject to those exceptions.

1. Restricted Activities With Disclosure-Based Exceptions

(a) Regulatory, Compliance, and Examination Expenses

We proposed to prohibit advisers from charging their private fund clients for (i) regulatory or compliance fees and expenses of the adviser or its related persons and (ii) fees and expenses associated with an examination of the adviser or its related persons by any governmental or regulatory authority. We are adopting these provisions[629] but, after considering comments, are providing an exception from the proposed prohibitions if an adviser distributes a written notice of any such fees or expenses, and the dollar amount thereof,[630] to investors in a private fund

[621] However, the exception for the investigation restriction does not apply to fees and expenses related to an investigation that results or has resulted in a court or governmental authority imposing a sanction for a violation of the Act or the rules promulgated thereunder.

[622] With respect to a private fund whose investors are solely related persons of the fund's adviser, such as an internal fund whose investors are limited to the adviser's employees, the requirement in the consent-based exceptions to seek and obtain consent from non-related person investors will not apply.

[623] For instance, the terms of a fund's governing documents may provide for the issuance of both voting and non-voting interests, where the non-voting interests are generally excluded for purposes of constituting a majority in interest (or a higher threshold) of investors. The fund's governing documents may also provide for the exclusion of defaulting investors for voting purposes.

[624] *See supra* section I.A.

[625] *See* final amended rule 204–2(a)(24).

[626] *See* the discussion of recordkeeping requirements above in section II.B.6.

[627] *See supra* footnote 435 (discussing electronic delivery).

[628] *See* final rule 211(h)(1)–1. See *supra* section II.B.3 (''Preparation and Distribution of Quarterly Statements'') for a discussion of the ''distribution'' requirement generally.

[629] In a change from the proposal, we are revising this requirement to capture not only amounts ''charged'' to the private fund but also fees and expenses ''allocated to'' the private fund. We believe that this clarification is necessary in light of the various ways that a private fund may be caused to bear fees and expenses.

[630] Such a written notice should generally include a detailed accounting of each category of such fees and expenses. Advisers should generally list each specific category of fee or expense as a separate line item and the dollar amount thereof, rather than

Continued

in writing on at least a quarterly basis.[631]

Some commenters supported the proposed prohibition, stating that advisers should not be charging examination, regulatory, and compliance fees and expenses to the fund.[632] Other commenters stated that this prohibition is unnecessary, at least in part because investors already negotiate what fees may or may not be charged to funds.[633] A number of commenters suggested that we should require disclosure of these expenses instead of prohibiting these practices.[634] In particular, as an alternative to the proposed prohibition, one commenter recommended that any such expenses should be fully disclosed to investors as separate line items [635] while another commenter recommended that we should require clear empirical disclosure of such expenses.[636] Some commenters argued that the proposed prohibition would harm investors because it would disincentivize advisers from investing in compliance.[637] Another commenter argued that compliance costs increase with diversification of an adviser's portfolio, and that requiring advisers to bear costs of compliance would therefore discourage portfolio diversification (and remove the ability for investors to decide for themselves whether they are willing to pay extra compliance costs to achieve better diversification).[638] Others predicted that advisers would assess higher management fees if they could not allocate these fees and expenses to funds.[639]

It is in investors' best interest for advisers to develop robust regulatory and compliance programs that enable advisers to comply with their legal and regulatory obligations. Regulatory, compliance, and examination fees and expenses are customary costs of doing business that enable advisers to operate and attract clients as well as investors. For example, advisers may incur filing and other fees associated with SEC filings, such as Form ADV and Form PF, as well as certain state filings. Advisers may also pay fees and expenses for a compliance consultant to help them with mock or real examinations. Most private fund advisers charge management fees, in part, to pay for costs incurred as a result of legal and regulatory obligations imposed on them in connection with providing advisory services. These and other costs of doing business are integral to managing a private fund and are generally considered overhead payable by the adviser out of its own resources. Charging investors separately for regulatory or compliance fees and expenses of the adviser or its related persons, or fees and expenses associated with an examination of the adviser or its related persons by any governmental or regulatory authority, is therefore a compensation scheme contrary to the public interest and protection of investors because an investment adviser, despite the management fees, is taking additional compensation for these fees and expenses.[640] Moreover, such allocations create a conflict of interest because they provide an incentive for an adviser to place its own interests ahead of the private fund's interests and allocate expenses away from the adviser to the fund.[641] We also believe that allocation of these types of fees and expenses to private fund clients can be deceptive in current market practice. For example, investors may generally expect an adviser to bear fees and expenses directly related to its advisory business, similar to how investors typically bear fees and expenses directly related to their own investment activity. Further, while certain investors may contractually agree, with appropriate initial disclosure, to bear an adviser's specified fees and expenses, they may be deceived to the extent the adviser does not disclose the total dollar amount of such fees and expenses after the fact. Investors may also be deceived if advisers describe such fees and expenses so generically as to conceal their true nature and extent.[642] Restrictions on the charging of these fees and expenses are, therefore, merited.

The requirement to disclose these charges for regulatory, compliance, and examination fees and expenses within 45 days after the end of the fiscal quarter is also appropriate. This timeline emphasizes the need for the notices to be distributed to investors within a reasonable period of time to help ensure their timeliness, while affording advisers a limited degree of flexibility. The 45-day timeline generally matches the timeline required for advisers to distribute quarterly statements under the quarterly statement rule, except for quarterly statements distributed at fiscal year-end or quarterly statements prepared for a fund of funds. This structure will allow advisers that are subject to the quarterly statement rule to generally include disclosures related to the restricted

---

group such fees and expenses into broad categories such as ''compliance expenses.''

[631] Final rule 211(h)(2)–1(a)(2). We are also reiterating that charging these expenses without authority in the governing documents is inconsistent with an adviser's fiduciary duty. See the introduction of this section II.E above for a discussion of the distribution requirement. Advisers may, but are not required to, provide such disclosure in the statements they must deliver to investors under the quarterly statement rule, if they are subject to that rule. Although we generally do not consider information in the quarterly statement required by the rule to be an ''advertisement'' under the marketing rule, an adviser that offers new or additional investment advisory services with regard to securities in the quarterly statement would need to consider whether such information is subject to the marketing rule. A communication to a current investor is an ''advertisement'' when it offers new or additional investment advisory services with regard to securities. *See* rule 206(4)–1.

[632] *See, e.g.,* AFR Comment Letter I; OPERS Comment Letter; NY State Comptroller Comment Letter.

[633] *See, e.g.,* Sullivan and Cromwell LLP Comment Letter (Apr. 25, 2022) (''Sullivan & Cromwell Comment Letter''); NYC Bar Comment Letter II; ASA Comment Letter. One commenter stated that this prohibition is unnecessary because there is strong alignment of interests between advisers and investors with respect to regulatory, compliance, and examination-related expenses. This commenter noted that investments from principals and employees of its adviser account for over 20% of total assets under management and that these principals and employees pay the same fees and expenses as third-party investors. *See* Citadel Comment Letter. However, this is just one example and we understand that different private fund advisers have different alignments of interests with their investors depending on the amount of proprietary capital invested in the funds, fee arrangements, and other factors. Moreover, this commenter's argument does not address whether the private fund should be charged for the fees and expenses in the first place; rather, it focuses on the fact that certain advisers, especially advisers with significant investments in their private funds, have an incentive to limit such fees and expenses because they have the potential to reduce the adviser's returns alongside the investors' returns.

[634] *See, e.g.,* Schulte Comment Letter; AIMA/ACC Comment Letter; SBAI Comment Letter. One commenter suggested that, to the extent no management fees are charged, disclosure and approval by the governing body for that private fund may be a more appropriate avenue in ensuring the expenses passed on are appropriate. *See* Albourne Comment Letter. We believe it is more appropriate to require disclosure to investors as private fund governing bodies can vary considerably in structure, representation and legal responsibility.

[635] *See* SBAI Comment Letter.

[636] *See* NYC Bar Comment Letter II.

[637] *See, e.g.,* NVCA Comment Letter; Chamber of Commerce Comment Letter; Comment Letter of Andrew M. Weiss, Professor Emeritus, Boston University, Chief Executive Officer, Weiss Asset Management (Apr. 23, 2022) (''Weiss Comment Letter'').

[638] Comment Letter of Eric S. Maskin, Professor of Economics, Harvard University (Apr. 21, 2022) (''Maskin Comment Letter'').

[639] *See, e.g.,* Dechert Comment Letter; Haynes & Boone Comment Letter; Chamber of Commerce Comment Letter.

[640] *See supra* section I for a discussion of the definition of ''compensation scheme''.

[641] *See, e.g., In the Matter of NB Alternatives Advisers, supra* footnote 29 (alleging private fund adviser allocated employee compensation-related expenses to three private equity funds it advised in violation of their organizational documents).

[642] For example, if an adviser charges a fund for fees and expenses associated with the preparation and filing of the adviser's Form ADV but only identifies such charges broadly as ''legal expenses.''

activities rule in their quarterly reports, subject to those exceptions.

After reviewing responses from commenters, we acknowledge that a prohibition of certain of these charges without an exception for instances in which the adviser provides effective disclosure could result in unfavorable outcomes for investors. For example, as some commenters also suggested,[643] we anticipate that some advisers may be disincentivized from diversifying their portfolios to the extent that compliance costs (that will now be borne by the adviser) increase with portfolio diversification. As other commenters also stated,[644] some advisers may attempt to increase management or other fees if they were no longer able to charge such fees and expenses to fund clients, and the increase in management fees may have been more than the increase in any fees or expenses already being passed through to the private fund. We also recognize that whether such fees and expenses can be charged to the private fund can be highly negotiated by investors in certain instances [645] (*e.g.,* investors may be more receptive to bearing registration and other compliance expenses for a first-time manager).[646] As a result, we believe it is necessary to prohibit these practices unless advisers distribute written notice of any such fees or expenses, and the dollar amount thereof, to investors in any such private funds in writing on at least a quarterly basis. In short, advisers must notify investors of such actual allocation practices on a regular, ongoing basis to help ensure that investors are able to negotiate effectively for their own interests and avoid the compensation schemes that are contrary to the public interest and the protection of investors.

To illustrate, an adviser may charge a private fund client for fees it pays to a compliance consultant to assess the adviser's compliance program, provided the adviser discloses those fees pursuant to this rule. An adviser may also charge a private fund client for fees and expenses associated with an examination of the adviser or its related persons, such as by staff from our Division of Examinations, provided those fees and expenses are adequately disclosed pursuant to this rule.

Some commenters expressed concerns about how the proposed prohibition would adversely impact funds with ''pass-through'' expense models.[647] Since we are providing a disclosure-based exception from this prohibition, we no longer anticipate that this aspect of the proposed prohibited activities rule will cause a significant disruption in practice for funds with pass-through expense models. We understand that most pass-through funds already provide ongoing, regular disclosure of the fees and expenses that are being ''passed through'' to investors.

Some commenters suggested that we should explicitly clarify which compliance fees and expenses are related to the adviser's activities or the fund's activities.[648] As we are not flatly prohibiting advisers from passing on compliance, regulatory, and examination expenses, we do not believe it is necessary to describe which fees and expenses are related to the adviser's activities or the fund's activities. Advisers and investors may negotiate whether certain compliance, regulatory, or examination fees and expenses are charged to a fund, provided that the disclosure of such fees and expenses satisfies the requirements of the rule.

(b) Reducing Adviser Clawbacks for Taxes

We proposed to prohibit an adviser from reducing the amount of any adviser clawback by actual, potential, or hypothetical taxes applicable to the adviser, its related persons, or their respective owners or interest holders.[649] This proposed provision was designed to protect investors by ensuring that they receive their share of fund profits, without any reduction for tax obligations of the adviser or its related persons.[650] However, as discussed further below, the final rule will not prohibit advisers from engaging in after-tax adviser clawback reductions, if advisers satisfy certain disclosure requirements designed to better inform private fund investors of the impact of after-tax adviser clawback reductions.[651]

Some commenters supported the proposal to prohibit advisers from reducing the amount of any adviser clawback by actual, potential, or hypothetical taxes.[652] Some also encouraged the Commission to expand the scope of the rule to require advisers to provide affirmatively, whether in the governing agreement or otherwise, a clawback mechanism to restore excess performance-based compensation, rather than only prohibiting advisers from reducing clawbacks by taxes applicable to the adviser.[653]

The majority of commenters, however, opposed this aspect of the proposal. Many commenters suggested that our proposal was unnecessary to ensure that private fund investors receive their full share of fund profits, because clawback mechanisms are structured to restore private funds with

[643] *See, e.g.,* Chamber of Commerce Comment Letter; Weiss Comment Letter; Maskin Comment Letter.

[644] *See, e.g.,* Dechert Comment Letter; Haynes & Boone Comment Letter; Chamber of Commerce Comment Letter.

[645] However, even in such circumstances where fee and expense allocation provisions are highly negotiated, we believe such negotiation is only effective if investors are receiving timely and detailed disclosure of any such allocations when they occur.

[646] Some commenters also stated that the proposed prohibition would put underrepresented private fund advisers, such as those advisers that are minority-owned, at a disadvantage when competing with more established firms that can waive fees for services. *See, e.g.,* Blended Impact Comment Letter; CozDev LLC Comment Letter; BAM Ventures Comment Letter.

[647] Certain private fund advisers utilize a pass-through expense model where the private fund pays for most, if not all, expenses, including the adviser's expenses, but the adviser does not charge a management, advisory, or similar fee. *See, e.g.,* BVCA Comment Letter; Sullivan & Cromwell Comment Letter; SBAI Comment Letter.

[648] *See, e.g.,* NSCP Comment Letter; NYC Bar Comment Letter II; Ropes & Gray Comment Letter.

[649] The proposed rule defined: (i) ''adviser clawback'' as any obligation of the adviser, its related persons, or their respective owners or interest holders to restore or otherwise return performance-based compensation to the private fund pursuant to the private fund's governing agreements, and (ii) ''performance-based compensation'' as allocations, payments, or distributions of capital based on the private fund's (or its portfolio investments') capital gains and/or capital appreciation. Commenters generally did not provide comments with respect to the proposed definitions of ''adviser clawback'' and ''performance-based compensation.'' We are adopting the definition of ''adviser clawback'' as proposed. However, in a change from the proposed rule, we are making a technical revision to the ''performance-based compensation'' definition to include allocations, payments, or distributions of profit. *See supra* section II.B.1.a. *See also* final rule 211(h)(1)–1.

[650] *See* Proposing Release, *supra* footnote 3, at 146–147.

[651] For the avoidance of doubt, the rule does not change the applicability to the adviser of any other applicable disclosure and consent obligation, whether they exist under law, rule, regulation, contract, or otherwise.

[652] *See, e.g.,* AFL–CIO Comment Letter; Albourne Comment Letter; Better Markets Comment Letter; Convergence Comment Letter; NASAA Comment Letter; NYC Comptroller Comment Letter; OPERS Comment Letter; Predistribution Initiative Comment Letter II; Comment Letter of Reinhart Boerner Van Deuren (Apr. 12, 2022) (''Reinhart Comment Letter''); RFG Comment Letter II. Because many entities that receive performance-based compensation are fiscally transparent for U.S. Federal income tax purposes and thus not subject to entity-level taxes, determining the actual taxes paid on ''excess'' performance-based compensation can be challenging, particularly for larger advisers that have not only a significant number of participants that receive such compensation but also have participants subject to non-U.S. tax regimes. Moreover, investors may be in different U.S. States as well, each with their State tax nuances. To address these considerations, advisers typically use a ''hypothetical marginal tax rate'' to determine the tax reduction amount, which is usually based on the highest marginal U.S. Federal, State, and local tax rates.

[653] *See* NACUBO Comment Letter; Reinhart Comment Letter.

the full amount of any excess performance-based compensation received by the adviser (or its related persons), except in the rare circumstances where such excess amount is so significant as to be greater than the total amount of performance-based compensation retained by the adviser (or its related persons) on an after-tax basis.[654] These commenters suggested that post-tax clawbacks reflect a widely accepted and negotiated position between advisers and their private fund clients (and, indirectly, their private fund investors).[655] They stated that the prevailing market practice is to allocate the economic risk of a post-tax clawback to private fund clients, rather than to advisers, because if this economic risk were allocated to advisers, it could leave them worse off than if they had not received any performance-based compensation at all.[656] These commenters stated that advisers could be worse off because taxes paid in respect of excess performance-based compensation generally cannot be recouped by amending prior tax returns, and the ability to realize a tax benefit from subsequent losses is in practice limited. Additionally, these commenters indicated that both applicable tax rules and portfolio management considerations (such as determining at what time the disposal of a portfolio investment would be in a private fund client's best economic interest) limit the actual discretion that advisers otherwise might have to defer or delay payments of performance-based compensation to prevent the need for a clawback.[657] For example, because U.S. tax laws require a partner of a partnership to pay annual tax based on the amount of partnership income allocated to the partner, rather than based on the amount of actual partnership distributions received by the partner in the applicable year, an adviser may not necessarily be in a position to delay or defer payments or allocations of performance-based compensation to prevent the need for a clawback.

We believe that reducing the amount of any adviser clawback by taxes applicable to the adviser presents an opportunity for an adviser to put its own interests ahead of its clients' interests by allocating to the client (and indirectly, to fund investors) the risk of a tax liability otherwise attributable to and borne by the adviser, which reduces its client's (and indirectly, fund investors') returns. We therefore believe that, unless this practice is adequately disclosed to investors, it creates a compensation scheme that is contrary to the public interest and the protection of investors.[658] Furthermore, although investors may contractually agree, per a fund's governing documents and with appropriate initial disclosure, to an adviser's ability to reduce an adviser clawback by applicable taxes, investors may be deceived to the extent that an adviser does not disclose information relating to the total dollar amount of the adviser clawback and its reduction after the fact.[659] To the extent that their private fund investments are opaque, investors can lack insight into this potentially conflicted practice by advisers and its impact on the returns of their private fund investments.

We appreciate commenters' concerns that the proposed rule could ultimately result in unintended consequences that would be inconsistent with our proposal's purpose, such as, among others, the following: fewer advisers choosing to offer clawback mechanisms in their private funds when such mechanisms benefit investors; restructuring performance-based compensation arrangements in a way that would be less favorable for investors (*e.g.,* adopting incentive fee structures that reduce or eliminate the potential for a clawback but are less favorable to certain investors from a tax treatment perspective, or implementing higher carried interest rates); offsetting changes to other economic terms applicable to investors (*e.g.,* implementing higher management fees); adjusting the timing of portfolio management decisions to avoid potential clawback liabilities (*i.e.,* potentially incentivizing advisers to make portfolio management decisions for reasons other than a private fund client's best interests); and disproportionate burdens on smaller investment advisers that may be more reliant on the receipt of performance-based compensation on a deal-by-deal basis to remunerate their employees and fund their operations.[660] In view of these potential unintended consequences, several commenters suggested that the Commission adopt disclosure requirements relating to the use of after-tax adviser clawbacks rather than an outright prohibition of the practice,[661] and we agree, as described below.

Many investors lack information regarding adviser clawbacks and their impact on fund profits. For example, many fund agreements only require advisers to restore the excess performance-based compensation (less taxes) to the fund, without requiring them to provide investors with any information regarding the adviser's related determinations and calculations, such as whether a clawback was triggered and the aggregate amount of the clawback. Without adequate disclosure, investors are unable to

[654] *See, e.g.,* AIC Comment Letter I; Dechert Comment Letter; Ropes & Gray Comment Letter.

[655] *See, e.g.,* AIC Comment Letter I; AIMA/ACC Comment Letter; ASA Comment Letter; Comment Letter of Baird Capital (Apr. 25, 2022) (''Baird Comment Letter''); Carta Comment Letter; IAA Comment Letter II; Comment Letter of PROOF Management, LLC (May 25, 2022) (''Proof Comment Letter''); Ropes & Gray Comment Letter.

[656] *See, e.g.,* AIC Comment Letter I; Baird Comment Letter; GPEVCA Comment Letter; IAA Comment Letter II; Invest Europe Comment Letter; Comment Letter of National Association of Private Fund Managers (Apr. 25, 2022); Proof Comment Letter; Ropes & Gray Comment Letter.

[657] *See, e.g.,* AIC Comment Letter I; GPEVCA Comment Letter; Dechert Comment Letter; IAA Comment Letter II; Invest Europe Comment Letter; Proof Comment Letter; Ropes & Gray Comment Letter; SIFMA–AMG Comment Letter I.

[658] The after-tax reduction of an adviser clawback constitutes a compensation scheme within the meaning of section 211(h) of the Advisers Act because it is a method by which an investment adviser may take additional compensation indirectly that otherwise its private fund clients would be entitled to as investment proceeds.

[659] *Cf.* Form PF; Event Reporting for Large Hedge Fund Advisers and Private Equity Fund Advisers; Requirements for Large Private Equity Fund Adviser Reporting, Investment Advisers Act Release No. 6279 (May 3, 2023) [88 FR 38146 (June 12, 2023)], at 73–74 (discussing conflicts of interest that may arise from general and limited partner clawbacks and noting that ''clawbacks are negotiated early on in a fund's life, long before the inciting event occurs'').

[660] *See, e.g.,* AIC Comment Letter I; AIC Comment Letter II; AIMA/ACC Comment Letter; ATR Comment Letter; CCMR Comment Letter I; Comment Letter of Correlation Ventures (June 13, 2022) (''Correlation Ventures Comment Letter''); Comment Letter of Canadian Venture Capital and Private Equity Association (Apr. 25, 2022) (''CVCA Comment Letter''); Comment Letter of Landspire Group (Apr. 25, 2022); Lockstep Ventures Comment Letter; Comment Letter of the National Association of Investment Companies (Apr. 25, 2022) (''NAIC Comment Letter''); PIFF Comment Letter; Proof Comment Letter; Ropes & Gray Comment Letter; SBAI Comment Letter; Schulte Comment Letter; SIFMA–AMG Comment Letter I; Comment Letter of Top Tier Capital Partners, LLC (June 13, 2022) (''Top Tier Comment Letter'').

[661] *See* NVCA Comment Letter (stating that the Commission should consider the alternative of using enhanced disclosures instead of banning clawback reduction provisions); Comment Letter of OPSEU Pension Plan Trust (Aug. 18, 2022) (stating that investment terms are a negotiation between advisers and institutional investors and that the final rules should generally focus on disclosure rather than prohibitions); SIFMA–AMG Comment Letter I (stating that, if adopted, the final rule should require advisers to include estimated clawback calculations reflecting any adjustments for taxes as part of the quarterly statement reporting requirements, which would enable investors to assess a potential clawback situation and any potential reductions for taxes, that may arise); AIC Comment Letter I (stating that, if adopted, the final rule should require only quarterly disclosures to private fund investors of the potential clawback payable and the amount of carried interest distributions that have been reserved against the potential clawback).

understand and assess the magnitude and scope of the clawback, as well as its impact on fund performance and investor returns. Further, not all investors may be able to ask questions successfully or seek more information about a clawback on a voluntary basis from their private fund's adviser. We believe that disclosure will achieve the rule's policy goal of protecting investors, while preventing unintended consequences that may have resulted from a flat prohibition.

Accordingly, the final rule will not prohibit advisers from engaging in after-tax adviser clawback reductions, if advisers satisfy certain disclosure requirements designed to better inform private fund investors of the impact of after-tax adviser clawback reductions.[662] Specifically, the final rule restricts advisers from reducing the amount of an adviser clawback by actual, potential, or hypothetical taxes applicable to the adviser, its related persons, or their respective owners or interest holders, unless the adviser distributes a written notice to the investors of the impacted private fund client that sets forth the aggregate dollar amounts of the adviser clawback both before and after any such reduction of the clawback for actual, potential, or hypothetical taxes within 45 days after the end of the fiscal quarter in which the adviser clawback occurs.[663]

In order to satisfy the disclosure requirement, within 45 days after the end of the fiscal quarter in which the clawback occurs, an adviser must distribute a written notice to the investors of the affected private fund client that sets forth the aggregate dollar amounts of the adviser clawback both before and after the application of any tax reduction. These aggregate dollar amounts should reflect the gross amount of excess compensation received by the adviser (or its related persons) that is being clawed back. The aggregate dollar amount of the clawback before the application of any tax reductions must not be reduced by taxes paid, or deemed paid, by the recipients or other persons on their behalf, whereas the aggregate dollar amount of the clawback after the application of any tax reduction needs to be so reduced. As an example of disclosure that an adviser can make to satisfy this requirement, an adviser that is subject to a clawback could at the end of a private fund's term include disclosure in the fund's quarterly statement regarding the aggregate dollar amounts of the adviser clawback before and after the application of any tax reduction (if the adviser is subject to the quarterly statement requirement and to the extent that the quarterly statement is delivered within 45 days following the end of the relevant fiscal quarter). An investor will be able to compare these reported aggregate dollar amounts of the adviser clawback both before and after any tax reduction to evaluate the actual impact of a tax reduction on the clawback.

An investment adviser may wish to consider providing private fund client investors with, and investors may request and negotiate for, additional information that is not specifically required by the final rule. For example, advisers that routinely monitor their potential clawback liability could provide their private fund client investors with information regarding their currently estimated clawback amounts.[664] Additionally, in situations where an adviser's tax reduction serves to reduce the clawback amount received by a private fund client, an adviser could consider providing investors in such fund with information clarifying their respective shares of the reduction.

(c) Certain Non-Pro Rata Fee and Expense Allocations

We proposed to prohibit an adviser from directly or indirectly charging or allocating fees and expenses related to a portfolio investment (or potential portfolio investment) on a non-pro rata basis when multiple private funds and other clients advised by the adviser or its related persons have invested (or propose to invest) in the same portfolio investment.[665] Charging or allocating fees and expenses related to a portfolio investment (or potential portfolio investment) on a non-pro rata basis when multiple private funds and other clients advised by the adviser or its related persons have invested (or propose to invest) in the same portfolio investment presents an opportunity for an adviser to put its interests ahead of its clients' interests (and, by extension, their investors'), and can result in private funds and their investors, particularly smaller investors that may not have as much influence with the adviser or its related persons, being misled, deceived, or otherwise harmed. As discussed in greater detail below, any such non-pro rata charge or allocation can create a conflict of interest and operate as a compensation scheme, both of which we deem contrary to the public interest and the protection of investors.[666] This practice may also violate antifraud provisions if an adviser contravenes representations within the fund governing documents, and the adviser, faced with a conflict of interest, may seek to charge or allocate fees and expenses to one fund client as opposed to another client in a manner that benefits the adviser.[667] Despite the number of enforcement actions brought by the Commission, we believe that this practice still exists among private fund advisers. Accordingly, we believe it is appropriate to promulgate a rule that restricts it.[668] The adopted rule therefore restricts this practice unless (i) the non-pro rata charge or allocation is fair and equitable under the circumstances and (ii) prior to charging or allocating such fees or expenses to a private fund client, the investment adviser *distributes* to each investor of the private fund a written notice of the non-pro rata charge or allocation and a description of how it is fair and equitable under the circumstances.[669]

Charging or allocating fees and expenses related to a portfolio investment (or potential portfolio investment) on a non-pro rata basis presents a conflict of interest because advisers have economic and/or other

[662] For the avoidance of doubt, this does not change the applicability to the adviser of any other applicable disclosure and consent obligations, whether they exist under law, rule, regulation, contract, or otherwise.

[663] *See* final rule 211(h)(2)–1(a)(3).

[664] One commenter stated that, if adopted, the final rule should require advisers to include estimated clawback calculations reflecting any adjustments for taxes as part of the quarterly statement reporting requirements, which would enable investors to assess a potential clawback situation, and any potential reductions for taxes, that may arise. *See* SIFMA–AMG Comment Letter I. Including such information in the quarterly statement is not necessary to satisfy the specific disclosure requirements and transparency objectives of the final restrictions rule.

[665] Proposed rule 211(h)(2)–1(a)(6).

[666] *In the Matter of Energy Capital Partners, supra* footnote 30; *In the Matter of Rialto Capital Management, LLC, supra* footnote 222; *In the Matter of Lightyear Capital, LLC,* Investment Advisers Release No. 5096 (Dec. 26, 2018) (settled action); *In the Matter of WL Ross & Co. LLC,* Investment Advisers Act Release No. 4494 (Aug. 24, 2016) (settled action); *In the Matter of Kohlberg Kravis Roberts & Co., supra* footnote 28; *In the Matter of Lincolnshire, supra* footnote 26; *see In the Matter of Platinum Equity Advisors, LLC,* Investment Advisers Release No. 4772 (Sept. 21, 2017) (settled action). Our staff has also observed instances of advisers charging or allocating fees and expenses related to a portfolio investment on a non-pro rata basis when multiple private funds and other clients advised by the adviser or its related persons have invested (or propose to invest) in the same portfolio investment during examinations. *See* EXAMS Private Funds Risk Alert 2020, *supra* footnote 188.

[667] *See, e.g., In the Matter of Platinum Equity Advisors, LLC, supra* footnote 666.

[668] *See, e.g., In the Matter of Energy Capital Partners, supra* footnote 30; *see also* Healthy Markets Comment Letter I (stating that investors are very unlikely to be willing or able to negotiate on their own the end of these practices, such as charging certain non-pro-rata fees and expenses).

[669] Final rule 211(h)(2)–1(a)(4). In a change from the proposal, we are making a revision to the rule text to clarify that the prohibition is against charging either fees, or expenses, or both.

business reasons to charge or allocate fees and expenses to one fund client as opposed to another client (*e.g.,* differences in a private fund's fee structure, ownership structure, lifecycle, and investor base).[670] For example, when determining how to charge or allocate fees and expenses related to a portfolio investment where multiple private fund clients have invested (or propose to invest), the adviser may choose to charge or allocate less fees and expenses to its higher fee-paying client to the detriment of its lower fee-paying client because the higher fee-paying client pays more to the adviser. Not only would this decision to charge or allocate less fees and expenses to its higher fee-paying client benefit the adviser but it could also disadvantage the lower fee-paying client and its investors who bear more than a pro rata share of expenses while supporting the value of the higher fee-paying client's investment.[671]

We have observed these considerations leading advisers to favor one private fund client (and its investors) over another private fund client (and its investors) because of the fund's investor base. For example, as part of their strategy, some advisers agree to perform certain services, *e.g.,* asset-level due diligence, accounting, valuation, legal, either in-house or through a captive consulting firm, for portfolio investments at costs that are at or below market rates rather than hire a third party to perform these services.[672] To facilitate a portfolio investment, the adviser may set up a co-investment vehicle that invests alongside the adviser's main fund.[673] If the main fund and the co-investment vehicle have both invested (or propose to invest) in the same portfolio investment that engages the adviser for these services, the adviser may decide not to allocate the costs of these services to the co-investment vehicle, which is often made up of favored or larger investors and may have specific fee and expense limits, and may instead allocate the costs of these services to the main fund, causing the main fund to pay more in expenses than it otherwise would under a pro-rata allocation.

Charging or allocating fees and expenses related to a portfolio investment (or potential portfolio investment) on a non-pro rata basis when multiple private funds and other clients advised by the adviser or its related persons have invested (or propose to invest) in the same portfolio investment is a conflict of interest for the adviser and can also lead, and in our experience often does lead, to a compensation scheme that we deem contrary to the public interest and protection of investors, unless this practice is fair and equitable and is adequately disclosed to investors in advance. It also may be fraudulent or deceptive, and result in investor harm. For instance, if two funds invest in the same portfolio investment but only one fund pays an incentive allocation, the adviser may have an incentive to avoid charging or allocating fees and expenses to the fund paying an incentive allocation in an effort to increase the adviser's incentive allocation. Similarly, if the adviser's ownership interests vary from fund to fund, the adviser may have an incentive to charge or allocate fees and expenses away from the fund in which the adviser holds a greater interest.[674] Because of these differences in ownership or compensation structures, an adviser may have an incentive to charge or allocate fees and expenses in a way that maximizes its economic entitlements at the expense of its fund client's (and investors') economic entitlements.

Moreover, this practice can result in a conflict of interest and compensation scheme contrary to the protection of investors by favoring not only the adviser but also the adviser's related persons. For example, an adviser may set up co-investment vehicles for related persons, such as executives, family members, and certain consultants, that invest alongside the adviser's main fund.[675] These co-investment vehicles may receive a set percentage of each portfolio investment made by the adviser's main fund without having to share in any research expenses, travel costs, professional fees, and other expenses incurred in deal sourcing activities related to portfolio investments that never materialize. For the adviser to allow its related persons, such as executives, family, and certain consultants, to participate in consummated portfolio investments without having to bear the cost of these expenses may be an undisclosed form of compensation to the adviser and its related persons. It also may defraud, deceive, or harm the fund that bore the co-investment vehicle's share of expenses.

Some commenters supported the proposed prohibition and stated it would protect investors, including those who do not benefit from co-investment opportunities.[676] In contrast, other commenters opposed the proposed prohibition and stated that it could result in inequitable outcomes[677] and would be disruptive.[678] Commenters stated that allowing advisers to allocate expenses on a non-pro rata basis is essential for the fair treatment of investors because it allows advisers to allocate expenses appropriately to the relevant investors that generated the additional cost.[679] Commenters asserted that the prescriptive nature of the proposed rule would result in unintended consequences, indicating there may be circumstances, whether due to tax, regulatory, accounting, or other reasons, where a pro rata expense allocation would lead to inequitable results.[680] For example, they questioned whether the proposed rule would prevent an adviser from fairly allocating tax liabilities that are attributable to a specific investor in the private fund (*e.g.,* withholding taxes and partnership-level assessments resulting from a tax audit) and whether the adviser absorbing certain expenses of a specific investor where that investor is unable to pay for the expense in the private fund would be seen as non-pro rata allocation under the proposed rule.[681]

Many commenters suggested that we instead allow advisers to allocate fees and expenses related to portfolio expenses in a fair and equitable manner.

[670] In some instances, a fund may not have the resources to bear its pro rata share of expenses related to a portfolio investment (whether due to insufficient reserves, the inability to call capital to cover such expenses, or otherwise).

[671] The final rule does not prohibit an adviser from paying a fund's pro rata portion of any fee or expense with its own capital. In addition, to the extent a fund does not have resources to pay for its share, the final rule does not prohibit an adviser from diluting such fund's interest in the portfolio investment in a manner that is fair and equitable, subject to applicable laws, rules, or regulations and applicable provisions of the fund's governing documents.

[672] *See, e.g., In the Matter of Rialto Capital Management, LLC, supra* footnote 222.

[673] *Id.*

[674] Although the adviser's interest (or its affiliate's interest, such as the general partner's interest) may not be charged a management fee or an incentive allocation, they are often allocated or charged fund expenses, directly or indirectly, in a manner that is similar to a third party investor's interest in the fund.

[675] *See, e.g., In the Matter of Kohlberg Kravis Roberts & Co, supra* footnote 28.

[676] *See* Healthy Markets Comment Letter I; NY State Comptroller Comment Letter; AFL–CIO Comment Letter; ILPA Comment Letter I; ICCR Comment Letter; RFG Comment Letter II. *See also* IAA Comment Letter II.

[677] *See* SBAI Comment Letter; IAA Comment Letter II; Ropes & Gray Comment Letter.

[678] *See* Dechert Comment Letter; AIC Comment Letter I; MFA Comment Letter I; NYC Bar Comment Letter II.

[679] *See* Dechert Comment Letter (discussing scenarios where a particular investment structure, tax structure and/or regulatory position or status for an investment exists solely to benefit one or more particular investors); Ropes & Gray Comment Letter.

[680] *See* Dechert Comment Letter.

[681] *See* Dechert Comment Letter; OPERS Comment Letter.

Some suggested that we refrain from rulemaking on this issue because advisers are already required to allocate fees and expenses on a fair and equitable basis,[682] while others urged the Commission to adopt an exception for non-pro rata fee and expense charges or allocations that are appropriately disclosed and consented to by investors [683] or an alternative approach that involves disclosure to investors to avoid unfair outcomes.[684] For example, some commenters suggested that, as an alternative to the proposed prohibition, advisers disclose their policies and procedures regarding the allocation of fees and expenses among private funds to each fund investor.[685] In another example, a commenter suggested that we should require disclosure only where fees and expenses are not split on a pro-rata basis.[686] One commenter stated that advisers typically allocate expenses on a pro rata basis, unless it would otherwise be fair and equitable to allocate non-pro rata under the circumstances.[687] This commenter suggested that a disclosure-based approach would afford more flexibility and accommodate the diversity of investment structures used by advisers for private funds.

After considering comments, we are adopting a rule that focuses on ensuring that clients are treated fairly and equitably, which we recognize may not always mean clients must be treated identically. Accordingly, in a change from the proposal, the final rule prohibits a private fund adviser from charging or allocating fees and expenses related to a portfolio investment (or potential portfolio investment) on a non-pro rata basis, unless the adviser meets two requirements.[688]

First, the adviser's non-pro rata allocation must be fair and equitable under the circumstances. Whether it is fair and equitable will depend on factors relevant for the specific expense. For example, it would be relevant whether the expense relates to a specific type of security that one private fund client holds. In another example, a factor could be whether the expense relates to a bespoke structuring arrangement for one private fund client to participate in the portfolio investment. As yet another example, another factor could be that one private fund client may receive a greater benefit from the expense relative to other private fund clients, such as the potential benefit of certain insurance policies.

Second, before charging or allocating such fees or expenses to a private fund client, the adviser must *distribute* to each investor a written notice of the non-pro rata charge or allocation and a description of how it is fair and equitable under the circumstances. The written notice will allow an investor to understand better how the adviser is treating the private fund relative to other private funds or clients advised by the adviser. For instance, the written notice may help the investor understand whether the adviser's allocation approach creates any conflicts of interest, results in any additional direct or indirect compensation to the adviser or its related parties, creates the risk of potential harms, or results in other disadvantages related to such activity. In this notice, advisers should consider addressing relevant factors, which might include the adviser's allocation approach and the reason(s) why the adviser believes that its non-pro rata allocation approach is fair and equitable under the circumstances. This change is responsive to comments that we received suggesting that adviser's allocations are or should be fair and equitable [689] and that a more disclosure-based approach in certain instances rather than a strict requirement to charge or allocate fees and expenses solely on a pro rata basis.[690] This disclosure setting forth how the adviser's allocation is fair and equitable must be distributed to all investors in the private fund.

We believe that it is important for all investors in the private fund to receive this disclosure before the adviser charges or allocates non-pro rata fees or expenses to a private fund client. Private fund investors generally do not have insight into (and the quarterly statement rule will not require advisers to disclose) the amounts of joint fees or expenses that the adviser allocated to its other clients, and investors are unable to compare amounts borne by their fund with amounts borne by the adviser's other clients to assess whether the adviser allocated joint costs consistently with the fund's terms and other disclosures and representations made by the adviser. To make this assessment, an investor would need access to information regarding the terms of the adviser's relationships with its clients other than the fund, as well as certain information (including potentially accounting information) about those other clients. This advance disclosure timeline therefore is appropriate because it provides investors with access to important fee and expense information to enable investors to discuss the non-pro rata allocation with the adviser before being charged.

As explained above, we believe it is important to restrict the practice of charging or allocating fees and expenses related to a portfolio investment (or potential portfolio investment) on a non-pro rata basis because this practice presents a conflict of interest and can result in a compensation scheme that is contrary to the public interest and the protection of investors. We have not, however, prohibited this practice where an adviser's non-pro rata allocation would be fair and equitable under the circumstances. We recognize that private fund advisers may structure investments for specific tax, regulatory, accounting, or other reasons for the benefit of certain investors, creating a diversity of investment structures. We believe this framework offers investors additional protections while simultaneously offering advisers the flexibility to execute investment strategies and offer a diversity of investment structures in a way that may benefit investors.

This framework will also encourage advisers, as fiduciaries, to review their approach to allocating fees and expenses to their clients, particularly if advisers must disclose to investors why an allocation is fair and equitable. This framework provides more comprehensive information for investors so that investors can evaluate the adviser's allocation approach.

Several commenters, including a commenter that generally supported this rule, expressed concern that the proposed rule could impair co-investment opportunities.[691] They

[682] *See* NYC Bar Comment Letter II; MFA Comment Letter I; Comment Letter of the Managed Funds Association (June 13, 2022) (''MFA Comment Letter II'').

[683] *See* Convergence Comment Letter; Invest Europe Comment Letter.

[684] *See* Comment Letter of the Securities Industry and Financial Markets Association Asset Management Group (June 13, 2022); GPEVCA Comment Letter; SIFMA–AMG Comment Letter I; SBAI Comment Letter; Ropes & Gray Comment Letter; AIMA/ACC Comment Letter.

[685] *See* IAA Comment Letter II; *see generally* NY State Comptroller Comment Letter (suggesting the disclosure of written expense allocation and control policies to investors).

[686] *See* SBAI Comment Letter.

[687] *See* GPEVCA Comment Letter.

[688] Final rule 211(h)(2)–1(a)(4).

[689] GPEVCA Comment Letter; NYC Bar Comment Letter II; MFA Comment Letter I; MFA Comment Letter II.

[690] *See* SIFMA–AMG Comment Letter I; GPEVCA Comment Letter; SBAI Comment Letter. *See generally* IAA Comment Letter II (suggesting the disclosure of written fee and expense allocation policies to investors); NY State Comptroller Comment Letter (suggesting the disclosure of written expense allocation and control policies to investors).

[691] *See* Schulte Comment Letter; OPERS Comment Letter; PIFF Comment Letter; AIC Comment Letter I; Ropes & Gray Comment Letter;

Continued

stated that co-investment opportunities benefit the fund and its investors, and that such transactions are critical to enabling the fund to execute its investment strategy.[692] Commenters suggested that the proposed rule would severely impact the availability of co-investment opportunities because these are time-sensitive opportunities and increasing the regulatory burden on advisers would only heighten the chance that private funds would miss out on an opportunity to participate.[693] They also stated that the rule would interrupt the commercial speed of co-investment transactions because potential co-investors would wait until a transaction is certain before committing to the transaction to avoid broken deal expenses.[694] Also, these commenters expressed concern that advisers could lack the leverage necessary to require co-investors to share in fees and expenses on a pro rata basis and that some co-investors may decline to participate in the transaction rather than bear additional fees and expenses. These commenters asserted that the rule would inhibit capital formation by preventing funds from completing larger deals because they would not be able to find co-investment capital to invest alongside the fund. Because the final rule restricts (rather than prohibits) this practice if the adviser makes certain disclosures, we believe the final rule generally addresses these concerns. For example, although we acknowledge that many co-investments are executed on short notice, co-investors typically review and negotiate co-investment documentation, such as fund agreements, side letters, and subscription agreements, prior to the closing of the transaction. We believe that the final rule's requirements can generally be completed during this period (and prior to the adviser completing the non-pro rata charge or allocation). We believe restricting this practice while requiring disclosure and that it be fair and equitable balances the burdens on the adviser with the interests of investors to be treated fairly and receive timely access to important information about non-pro rata fee and expense allocations. While we acknowledge that this approach imposes some incremental burden on co-investment deals, we do not believe the burdens created by these requirements will significantly deter investor appetite for co-investments or inhibit capital formation.[695]

We requested comment on whether we should define ''pro rata.'' In the past, we have generally observed that advisers implement pro rata allocations based on ownership percentages.[696] For example, one adviser allocated a fund more than its pro rata share of bridge facility commitment fees relative to its ownership of a portfolio investment.[697] In another example, a co-investment vehicle's governing documents provided that the co-investment vehicle would pay its pro rata share of expenses for any portfolio company investments made by the co-investment vehicle.[698] Although the co-investment vehicle agreed to pay its pro rata share of expenses of any consummated portfolio company investment and the co-investment vehicle invested on a predetermined amount in each consummated portfolio company investment, the adviser did not allocate broken deal expenses to the co-investment vehicles.[699] We have alleged in settled enforcement actions that an adviser has allocated transaction fees in a way that benefited the adviser rather than pro rata among the adviser's funds and co-investors invested in the portfolio company investment.[700]

A commenter specifically suggested that we refrain from defining ''pro rata'' to allow advisers flexibility because there are multiple methods that can be used to allocate pro rata.[701] We agree that there may be multiple methods to determine pro rata allocations, and we have therefore declined to define ''pro rata.'' We recognize that the framework we are adopting could result in some subjectivity regarding how advisers calculate pro rata and when an allocation is fair and equitable. Nonetheless, we believe that this framework offers additional protection to investors in situations where an adviser may have an incentive to favor one client (or a group of investors) over another client (or another group of investors). This framework requires an adviser to evaluate its conflicts of interest when multiple private funds and other clients advised by the adviser or its related persons have invested (or propose to invest) in the same portfolio investment and enhances protections and disclosures made to investors when an adviser allocates or charges fees and expenses in a non-pro rata manner.

2. Restricted Activities With Certain Investor Consent Exceptions

(a) Investigation Expenses

We proposed to prohibit advisers from charging their private fund clients for fees and expenses associated with an investigation of the adviser or its related persons by any governmental or regulatory authority. We are adopting this provision[702] but, after considering comments, we are providing an exception from the proposed prohibition if an adviser seeks consent from all investors of a private fund, and obtains written consent from at least a majority in interest of the fund's investors that are not related persons of the adviser, for charging the private fund for such investigation fees or expenses.[703] However, the exception does not apply to fees or expenses related to an investigation that results or has resulted in a court or governmental authority imposing a sanction for a violation of the Act or the rules promulgated thereunder.

The heightened protection of investor consent is particularly appropriate with respect to the investigation restriction because such investigations are focused on the adviser's own potential or actual wrongdoing. If an adviser is able to pass on expenses associated with an investigation related to its own misfeasance, without providing

BVCA Comment Letter; Invest Europe Comment Letter; Dechert Comment Letter; GPEVCA Comment Letter. *See also* ILPA Comment Letter I.

[692] *See* Schulte Comment Letter; OPERS Comment Letter.

[693] *See* Schulte Comment Letter; PIFF Comment Letter.

[694] *See* AIC Comment Letter I; Ropes & Gray Comment Letter.

[695] *See infra* section VI.E.3 (where we discuss several factors that may mitigate these potentially negative effects, including reasons why the disclosure requirements could promote capital formation).

[696] *See In the Matter of Energy Capital Partners, supra* footnote 30; *In the Matter of Platinum Equity Advisors, LLC, supra* footnote 666; *In the Matter of WL Ross & Co. LLC, supra* footnote 666.

[697] *See In the Matter of Energy Capital Partners, supra* footnote 30.

[698] *See In the Matter of Platinum Equity Advisors, LLC, supra* footnote 666.

[699] *See id.*

[700] *See In the Matter of WL Ross & Co. LLC, supra* footnote 666 (the adviser retained for itself the portion of transaction fees attributable to the co-investors' ownership of the portfolio company, without subjecting such fees to any management fee offsets).

[701] *See* IAA Comment Letter II; AIC Comment Letter I. *But see* Ropes & Gray Comment Letter (suggesting that we define the concept of ''pro rata'' to make the rule easier to apply in certain circumstances).

[702] In a change from the proposal, we are revising this requirement to capture not only amounts ''charged'' to the private fund but also fees and expenses ''allocated to'' the private fund. We believe that this clarification is necessary in light of the various ways that a private fund may be caused to bear fees and expenses.

[703] Final rule 211(h)(2)–1(a)(1). We are also reiterating that charging these expenses without authority in the governing documents is inconsistent with an adviser's fiduciary duty and may violate the antifraud provisions of the Act. For purposes of requesting consent under this rule, advisers generally should list each category of fee or expense as a separate line item, rather than group fund expenses into broad categories, and describe how each such fee or expense is related to the relevant investigation.

disclosure of the specific fees and expenses actually being passed through to funds relating to a particular investigation and securing consent from investors, such adviser has adverse incentives to engage in conduct likely to trigger an investigation and may not be adequately incentivized to limit the legal fees incurred on its own behalf.[704] An adviser faces a conflict of interest when charging investors for fees and expenses associated with an investigation of the adviser by any governmental or regulatory authority because these fees and expenses are related to the adviser's potential or actual wrongdoing.

We recognize that governmental or regulatory bodies may not formally notify an adviser that it is under investigation. In such a circumstance, whether an adviser is under investigation would be determined based on the information available.

Some commenters supported the proposed prohibition, stating that advisers should not be charging investigation fees and expenses to the fund.[705] Other commenters stated that this prohibition is unnecessary, at least in part because investors are already able to agree on what fees may or may not be charged to funds.[706] Several commenters suggested that we should require disclosure of these expenses instead of prohibiting these practices.[707] In particular, as an alternative to the proposed prohibition, one commenter recommended that any such expenses should be fully disclosed to investors as separate line items [708] while another commenter recommended that we should require clear empirical disclosure of such expenses.[709] Others predicted that advisers would assess higher management fees if they could not allocate these fees and expenses to funds.[710] Some commenters suggested that we should clarify that certain costs and expenses resulting from settlements and judgments with governmental authorities are not indemnifiable.[711]

Charging investors separately for fees and expenses associated with an investigation of the adviser or its related persons by any governmental or regulatory authority is a compensation scheme contrary to the public interest, unless this practice is consented to, in writing, by investors who are not related persons of the adviser. Such fees and expenses are related to the adviser's potential or actual wrongdoing and should be borne by the adviser unless investors consent in writing to paying them for each specific investigation. Accordingly, the allocation or charging of these types of expenses to private fund clients constitutes a compensation scheme within the meaning of section 211(h) of the Advisers Act because it is a method by which an investment adviser may take additional compensation in the form of reimbursement for expenses that the adviser should bear.[712] Moreover, such allocations create a conflict of interest because they provide an incentive for an adviser to place its own interests ahead of the private fund's interests and allocate expenses away from the adviser to the fund.[713] In such a case where an adviser incurs expenses as a result of an investigation into the adviser's conduct, then uses investor assets to pay the expenses associated thereto, investors have the potential to be doubly harmed if the adviser's alleged misconduct harms investors.[714] We also believe that allocation of these types of fees and expenses to private fund clients can be deceptive in current market practice. For example, investors may generally expect an adviser to bear fees and expenses directly related to its own wrongdoing. Regarding fees and expenses associated with investigation of the adviser or its related persons, we do not believe it is appropriate for an adviser to enrich itself by charging for investigation fees and expenses related to its own actual or potential wrongdoing, unless investors consent to such fees and expenses. Thus, we believe that, unless this practice is consented to, in writing, by investors, it creates a compensation scheme that is contrary to the public interest and the protection of investors.

After reviewing responses from commenters, however, we acknowledge that a prohibition of certain of these charges without an exception for instances in which the adviser obtains investor consent could result in unfavorable outcomes for investors. For example, as some commenters suggested,[715] some advisers may attempt to increase management or other fees if they were no longer able to charge such fees and expenses to fund clients, and the increase in management fees might have been more than the increase in any fees or expenses already being passed through to the private fund. We also recognize that whether such fees and expenses can be charged to the private fund can be highly negotiated by investors in certain instances.[716] As a result, we believe it is necessary to prohibit these practices unless advisers get requisite written consent from investors.

The final rule, however, does not contain a consent-based exception for an adviser to charge a fund for fees or expenses related to an investigation that results or has resulted in a court or governmental authority imposing a sanction for a violation of the Act or the rules promulgated thereunder. Such charges will be outright prohibited. If an adviser were to charge a client for such fees and expenses, we would view that adviser as requiring its client to acquiesce to the adviser's violation of the Act. Advisers must comply with all applicable provisions of the Act, and the SEC would view a waiver of any provision of the Act as invalid under section 215(a) of the Act. Section 215(a) of the Act provides that any condition, stipulation, or provision binding any person to waive compliance with any provision of the Act shall be void.[717] An adviser that charges its private fund client for fees and expenses related to the adviser's violation of the Act, or the

[704] *See infra* sections VI.C.2 and VI.D.3.

[705] *See, e.g.,* AFR Comment Letter I; United for Respect Comment Letter I; NYC Comptroller Comment Letter.

[706] *See, e.g.,* Sullivan & Cromwell Comment Letter; NYC Bar Comment Letter II; ASA Comment Letter.

[707] *See, e.g.,* AIMA/ACC Comment Letter; SBAI Comment Letter.

[708] *See* SBAI Comment Letter.

[709] *See* NYC Bar Comment Letter II.

[710] *See, e.g.,* Dechert Comment Letter; Haynes & Boone Comment Letter; Chamber of Commerce Comment Letter.

[711] *See, e.g.,* CalPERS Comment Letter; NYC Comptroller Comment Letter; ILPA Comment Letter I.

[712] *See supra* section I for a discussion of the definition of "compensation scheme".

[713] *See, e.g., See, e.g., In the Matter of Cherokee Investment Partners, LLC and Cherokee Advisers, LLC, supra* footnote 26 (alleging that the adviser improperly shifted expenses related to an examination and an investigation away from itself).

[714] One commenter stated that the proposed prohibition on advisers charging their private fund clients for these expenses is unnecessary because the Commission has the authority, as a condition of the settlement, to require advisers to bear the costs associated with a settlement or penalty. *See* Citadel Comment Letter. We view this authority as supporting the need for a broader rule in this area rather than relying on invocations of this authority in each separate instance. In addition, relying on imposing this condition as a condition of settlement, by which point an adviser who has committed fraud may have dissipated its money and be unable to reimburse investors for the investigation expenses already charged, provides inadequate and lesser protection to investors compared to the rule's consent requirement.

[715] *See, e.g.,* Dechert Comment Letter; Haynes & Boone Comment Letter; Chamber of Commerce Comment Letter.

[716] However, even in such circumstances where investigation fee and expense allocation provisions are highly negotiated, we believe such negotiation is only effective if investors explicitly consent to any such allocations in each specific instance.

[717] *See* section 215(a) of the Advisers Act. *See also* section 215(b) of the Advisers Act (stating that any contract made in violation of the Act or rules thereunder is void).

rules promulgated thereunder, would operate as a waiver of its liability for such violation. While other types of investigations may involve a great variety of potential or actual wrongdoing that may differ in nature and severity, compliance with the Act is core to the existence and activities of investment advisers. Accordingly, an adviser charging its private fund client for fees and expenses related to an investigation that results or has resulted in a court or governmental authority imposing a sanction for a violation of the Act, or the rules promulgated thereunder, is impermissible.[718]

To illustrate, an adviser may charge a private fund client for fees and expenses associated with an investigation by the SEC of the adviser or its related persons for a potential violation of Section 206 of the Act or the rules thereunder, provided those fees and expenses are consented to by investors pursuant to this rule. However, if the investigation results in a court or governmental authority imposing a sanction on the adviser for a violation of the Act or the rules promulgated thereunder, then the adviser must refund the fund for the fees and expenses associated with the investigation, such as lawyer's fees.

Some commenters also expressed concerns about how the proposed prohibition related to investigation expenses would adversely impact funds with ''pass-through'' expense models.[719] First, investigations of advisers by governmental authorities are uncommon, and thus we do not expect expenses related to investigations to pose a threat to the majority of advisers using pass-through expense models. Second, since we are providing a consent-based exception from this prohibition, advisers with pass-through expense models are still able to charge investigation expenses to the funds they advise, provided they obtain investor consent pursuant to this rule (subject to compliance with other applicable disclosure and consent requirements). Thus, the final rule generally does not prohibit advisers from continuing to utilize such models. Such advisers, like any other private fund adviser, would nonetheless be prohibited from allocating to such funds fees or expenses related an investigation that results or has resulted in a court or governmental authority imposing a sanction for a violation of the Act, or the rules promulgated thereunder.[720]

(b) Borrowing

We proposed to prohibit an adviser directly or indirectly from borrowing money, securities, or other fund assets, or receiving a loan or an extension of credit, from a private fund client (collectively, a ''borrowing'').[721]

Some commenters opposed the prohibition,[722] while others supported it.[723] One commenter encouraged the Commission to expand the scope of the proposed prohibition by preventing an adviser from borrowing from co-investment vehicles or other accounts.[724] Another commenter that opposed the proposed prohibition stated that the prohibition was unnecessary because advisers and their related persons rarely borrow from fund clients.[725] These commenters asserted that the proposed prohibition could inadvertently prohibit activity that could benefit investors, such as tax advances,[726] borrowing arrangements outside of the fund structure,[727] and the activity of service providers that are affiliates of the adviser, especially with large financial institutions that play many roles in a private fund complex.[728] Commenters also stated that the rule could prohibit certain types of transactions that are permitted (*e.g.,* an adviser purchasing securities from a client), with appropriate disclosure and consent, under section 206(3) of the Advisers Act.[729] One commenter stated that we should instead require disclosure of adviser borrowings on Form PF and Form ADV,[730] while other commenters stated that we should provide exemptions for borrowings disclosed to investors or LPACs to ensure that these arrangements are entered into on arm's length terms.[731]

Under section 211(h)(2) of the Advisers Act, the Commission has the authority to promulgate rules to prohibit or restrict certain conflicts of interest that the Commission deems contrary to the public interest and the protection of investors. We believe it is important to restrict the practice of borrowing from a private fund client because it presents a conflict of interest that is contrary to the public interest and the protection of investors. When an adviser borrows from a private fund, that adviser has a conflict of interest because it is on both sides of the transaction (*i.e.,* the adviser benefits from the loan and manages the client lender). As discussed above, a private fund rarely has employees of its own. The fund typically relies on the investment adviser (and, in certain cases, affiliated entities) to provide management, investment, and other services, and such persons usually have general authority to take actions on behalf of the private fund without further consent or approval of any other person. This structure causes a conflict of interest between the private fund (and, by extension, its investors) and the investment adviser because the interests of the fund are not necessarily aligned with the interests of the adviser. For example, when determining the interest rate for the borrowing, an investment adviser's interest in maximizing its own profit by negotiating (or setting) a low rate may conflict with the private fund's (and, by extension, its investors') interest in seeking to maximize the profits of the fund. As another example, if the adviser becomes insolvent or suffers financial distress, the interests of the fund in seeking to protect its interests (whether through enforcing a default against, or renegotiating the terms of the loan with, the adviser) may conflict with the interests of the adviser in seeking to discharge the liability or otherwise renegotiate more favorable terms for itself.

Additionally, this practice may prevent the fund client from using those assets to further the fund's investment strategy. Even where disclosed to

[718] For example, if the Commission sanctioned an adviser pursuant to a settled order finding that the adviser violated the Act or the rules promulgated thereunder, including an order to which the adviser consented without admitting or denying the Commission's findings, the adviser would not be permitted to seek investor consent to charge any fees and expenses related to the Commission's investigation to the fund, including any penalties or disgorgement.

[719] *See, e.g.,* BVCA Comment Letter; Sullivan & Cromwell Comment Letter; SBAI Comment Letter.

[720] The obligation of an adviser to a pass-through fund to pay fees or expenses associated with a sanction under the Act is attenuated to the extent such adviser has other assets (*e.g.,* balance sheet capital), sources of revenue (*e.g.,* performance-based compensation), or access to capital (*e.g.,* loans) to pay any such fees or expenses. As the Commission may already require advisers to pass-through funds to pay penalties associated with a sanction under the Act, we anticipate that this rule will not cause a significant disruption from current practice for advisers to pass-through funds.

[721] Proposed rule 211(h)(2)–1(a)(7).

[722] *See* SIFMA–AMG Comment Letter I; NYC Bar Comment Letter II; IAA Comment Letter II.

[723] *See* OPERS Comment Letter; Convergence Comment Letter; AFL–CIO Comment Letter; ILPA Comment Letter I; RFG Comment Letter II; American Association for Justice Comment Letter.

[724] *See* Convergence Comment Letter.

[725] *See* NYC Bar Comment Letter II.

[726] Tax advances occur when the private fund pays or distributes amounts to the general partner to allow the general partner to cover tax obligations.

[727] *See* SBAI Comment Letter; CFA Comment Letter I; AIC Comment Letter I.

[728] *See* IAA Comment Letter II.

[729] *See, e.g.,* SIFMA–AMG Comment Letter I (stating that borrowing securities can be structured as a purchase subject to section 206(3) of the Advisers Act); NYC Bar Comment Letter II. To the extent that a borrowing under the final rule involves a purchase under section 206(3) of the Advisers Act, the requirements of that section will continue to apply to the adviser.

[730] *See* Convergence Comment Letter.

[731] *See, e.g.,* IAA Comment Letter II; AIC Comment Letter I.

investors (or to an advisory board of the private fund, such as an LPAC), this practice presents a conflict of interest that can be harmful to investors because, as a result of the unique structure of private funds, only certain investors with specific information or governance rights (such as representation on the LPAC) may be in a position to discuss, diligence, negotiate, consent to, or monitor the borrowing with the adviser, rather than all of the private fund's investors, depending on the facts and circumstances.

Further, section 206(4) of the Advisers Act permits the Commission to prescribe a means to prevent acts, practices, and courses of business that are fraudulent, deceptive, or manipulative. Restricting the ability of an adviser to borrow from a private fund client would help prevent fraud, deception, and manipulation that can occur when an adviser engages in this practice. The Commission has previously settled enforcement actions against advisers that directly or indirectly borrowed from private fund clients without providing appropriate disclosure or obtaining approval.[732] For example, the Commission brought charges against a private fund adviser and its owner for, among other things, improperly borrowing money from a private fund.[733] Specifically, the Commission order alleged that the owner breached his fiduciary duty when he borrowed from the fund to settle a personal trade. In another example, the Commission found that an investment adviser, through its owner, improperly borrowed money from private funds to pay the adviser's expenses.[734] In both instances, the advisers did not timely disclose or obtain approval for the borrowings. The advisers also defrauded the private funds and their investors by illegally using the private funds' assets to serve their personal interests. Despite the Commission's enforcement efforts, adviser borrowing practices continue to pose harmful risks to private funds (and, by extension, their investors) in light of the conflicts of interests that arise between a fund and its adviser when the adviser has a direct or indirect interest on both sides of a borrowing arrangement.

After considering comments and in a change from the proposal, the final rule prohibits advisers from engaging in borrowings from a private fund client unless the adviser distributes a written notice and description of the material terms of the borrowing to the investors of the private fund, seeks their consent for the borrowing, and obtains written consent from at least a majority in interest of the fund's investors that are not related persons of the adviser (as described above).[735] The final rule does not enumerate specific terms of the borrowing that must be disclosed in connection with an adviser's consent request; rather, it requires advisers to disclose the prospective borrowing and the material terms related thereto. This could include, for example, the amount of money to be borrowed, the interest rate, and the repayment schedule, depending on the facts and circumstances. We believe that this approach will help prevent activity that is potentially harmful unless accompanied by specific and timely disclosure that can be meaningfully evaluated and acted upon by investors. By not enumerating specific terms that must be disclosed and instead incorporating a materiality standard, the final rule will also afford investors and advisers the flexibility to negotiate for disclosures and terms that are tailored to their unique needs and relationships.[736]

The heightened protection of investor consent is particularly appropriate with respect to the borrowing restriction. Borrowing from a private fund creates a conflict of interest where the adviser is incentivized to favor its own interest over the interest of the fund. Additionally, there are other potential conflicts that arise in the event that the adviser is unable to repay the borrowing, or it has to choose whether to repay the borrowing among other uses of the capital when funds are limited. This restriction will not apply to borrowings from a third party on the fund's behalf or to the adviser's borrowings from individual investors outside of the fund, such as a bank that is invested in the fund; instead the restriction focuses on the types of borrowings that, based on our experience, present the greatest opportunities for an adviser to abuse its control over a client's assets; namely, when an adviser borrows its client's assets, directly or indirectly, for its own use. However, we recognize that, in certain instances, such as in connection with enabling a smaller adviser to satisfy a sponsor commitment to the fund, investors may under certain terms be willing to accept a borrowing from the fund by the adviser.[737] Rather than prescribe these terms, the final rule will require that advisers disclose and obtain advance written consent for them from investors, as discussed above. In this way, the rule will enable investors to have an opportunity to evaluate whether a proposed borrowing would be favorable for the fund (as opposed to only for the adviser) and, relatedly, to negotiate for changes to the terms of the borrowing as appropriate.

Because we are providing a consent-based exception from this prohibition, the revised approach is responsive to commenters who stated that the rule should be based on more express disclosure to, and consent from, investors rather than prohibition-based. We were not persuaded, however, by comments suggesting that the *manner* of disclosure about adviser borrowings should be through Form ADV or Form PF. We believe that disclosure directly to investors, in the format contemplated by the final rule and in connection with an adviser's consent request, will better ensure that existing investors have timely access to information that will assist those investors in determining the conflicts related to such borrowings and how they impact the adviser's relationship with the private fund, whether the borrowing would be in the fund's or the adviser's interest, and

[732] *See SEC* v. *Philip A. Falcone, et al.,* Civil Action 12–CV–5027 (S.D.N.Y) (Aug. 16, 2013) (consent of defendants) (admitting that a hedge fund adviser borrowed from a hedge fund client, at an interest rate lower than the fund's borrowing rate, in order to repay the adviser's personal taxes, and that the adviser failed to disclose the loan to investors for five months); *In the Matter of Wave Equity Partners LLC,* Investment Advisers Act Release No. 6146 (Sept. 23, 2022) (settled action) (alleging that the adviser (i) borrowed money from a private equity fund that it managed in order to pay placement agent fees to a third-party vendor; and (ii) without adequate disclosure, failed promptly to repay the fund through an offset of quarterly management fees as required by fund documents); *In the Matter of SparkLabs Global Ventures Management, LLC, et al.,* Investment Advisers Act Release No. 6121 (Sept. 12, 2022) (settled action) (alleging that exempt reporting advisers and their owner (i) directed certain funds they managed to make more than 50 unauthorized loans totaling over $4.4 million, at below-market interest rates, to other funds under their management and certain affiliates of the adviser and/or its related persons; (ii) failed to enforce the terms of the loans when they were due; and (iii) failed to disclose to their clients or investors the conflicts of interest associated with the loans and to seek approval for them).

[733] *See In the Matter of Monsoon Capital, LLC,* Investment Advisers Act Release No. 5490 (Apr. 30, 2020) (settled action).

[734] *See In the Matter of Resilience Management, LLC, et al.,* Investment Advisers Act Release No. 4721 (June 29, 2017) (settled action).

[735] Final rule 211(h)(2)–1(a)(5). *See supra* section II.E. (Restricted Activities) for discussions of the "distribution" requirement and of the type and manner of investor consent required under the final rule.

[736] Advisers may also consider providing additional information, including, to the extent relevant, updated post-borrowing disclosure to reflect increases, decreases, or other changes in the borrowing, to help investors understand the nature of the conflict of interest and its potential influence on the adviser.

[737] *See, e.g.,* ILPA Comment Letter I.

whether to ultimately approve or disapprove of the borrowing. Additionally, the related books and records requirement in final rule 204–2(a)(24) will require advisers to maintain this information in a manner that permits easy location, access, and retrieval of any particular record.

Finally, in response to commenters, we are clarifying that we did not intend for the proposed rule to prohibit certain practices that have the potential to benefit investors, and we would not interpret ordinary course tax advances and management fee offsets as borrowings that are subject to this final rule, as discussed below.

A tax advance occurs when a fund provides an adviser or its affiliate an advance of money against the adviser's actual or expected future share of the fund's assets (*e.g.,* the adviser's accrued performance fees or carried interest) to allow the adviser or its affiliate to meet certain of its tax obligations (or its investment professionals' tax obligations) as they are due. Such advances are used to enable an adviser, its affiliates, and its investment professionals to pay taxes derived from their interest in a fund (*e.g.,* taxes associated with performance fees or carried interest that have been allocated to the affiliated general partner), because such tax liabilities frequently arise and are due before these parties are actually entitled to a cash distribution from the fund. This practice can benefit investors because it allows advisers to pay their tax liabilities while continuing to manage the fund and, accordingly, to avoid the potential misalignment of interests that can occur if advisers were instead to seek higher amounts of compensation from a fund (or from fund portfolio investments) to create a reserve amount covering their potential tax liabilities or to begin timing portfolio investment transactions in consideration of the resulting tax impacts on the adviser and its affiliates and their personnel (as opposed to managing the fund with a focus solely on the best interests of the fund).[738] Some commenters suggested that such arrangements are widely disclosed to and understood by investors.[739] We do not interpret the final rule to apply to tax advances as a type of restricted borrowing because they are tax payments that are attributable to and made against the unrealized income (or other amounts) allocated to in respect of the private fund. As such, they are not structured to include the repayment of advanced amounts to the fund, but rather only the reduction of the future income to be received by the adviser. However, to the extent that a tax advance is structured to contemplate amounts that will be repaid to the fund, as opposed to amounts that only reduce an adviser's future income, it would generally be a restricted borrowing under the final rule, subject to the rule's consent requirement.

Similarly, management fee offsets are not borrowings subject to the final rule because they do not involve the adviser or its affiliates taking fund assets and promising to repay such assets at a later date. Management fee offsets typically occur when an adviser reduces the management fee owed by the fund by other amounts that the fund has already paid to, or on behalf of, the adviser, its affiliates, or certain other persons. For example, fund governing documents may require an adviser to reduce the management fee by any amounts the adviser's affiliates receive for providing services to a portfolio company that the fund invests in. Also, some private fund governing documents limit organizational expenses and provide that any amount of organizational expenses paid by the fund above the expense cap may be offset against the adviser's management fee. Management fee offsets benefit investors because they reduce the fees and expenses the fund pays to the adviser and its affiliates, typically on a dollar-for-dollar basis with the amount initially paid, directly or indirectly, by the fund. We therefore consider a management fee offset to be a calculation methodology that reduces the amount a fund pays the adviser and its affiliates in the future.

We also remind advisers of their fiduciary obligations when engaging in transactions with private fund clients and of their antifraud obligations when engaging with private fund investors. To satisfy its fiduciary duty, an adviser must eliminate or at least expose through full and fair disclosure all conflicts of interest which might incline an investment adviser to provide advice that is not disinterested.[740] Full and fair disclosure should be sufficiently specific so that a client is able to understand the material fact or conflict of interest and make an informed decision whether to provide consent.[741] The disclosure must be clear and detailed enough for the client to make an informed decision to consent to the conflict of interest or reject it.[742] When making disclosures to private fund investors, advisers should also be mindful of their antifraud responsibilities per rule 206(4)-8 under the Advisers Act.

F. Certain Adviser Misconduct

1. Fees for Unperformed Services

We are not adopting the proposed prohibition on charging a portfolio investment for monitoring, servicing, consulting, or other fees in respect of any services the investment adviser does not, or does not reasonably expect to, provide to the portfolio investment.[743] As discussed below, we believe that it is unnecessary for the final rule to prohibit an adviser from charging fees without providing a corresponding service to its private fund client because such activity already is inconsistent with the adviser's fiduciary duty.

Some commenters supported this prohibition.[744] Commenters generally stated that charging fees for unperformed services to the fund is against the public interest and inconsistent with the Advisers Act by placing the interests of the advisers ahead of those of investors.[745] A commenter suggested that because of the substantial conflicts of interest faced by advisers charging fees for unperformed services no amount of disclosure should be enough to enable an investor to provide informed consent to these practices.[746] Another commenter indicated that an adviser should refund prepaid amounts attributable to unperformed services where an adviser is paid in advance for services that it reasonably expects to perform but ultimately does not provide.[747] A commenter expressed concern that advisers have not historically provided enough transparency into certain payments, such as monitoring fees.[748]

[738] Commenters state that prohibiting this practice would harm smaller advisers and raise barriers to entry because such advisers would not be able to fund such tax payments. *See* SBAI Comment Letter; AIMA/ACC Comment Letter; AIC Comment Letter III.

[739] *See, e.g.,* MFA Comment Letter II; SBAI Comment Letter; AIMA/ACC Comment Letter; AIC Comment Letter I; AIC Comment Letter II.

[740] *See* 2019 IA Fiduciary Duty Interpretation, *supra* footnote 5, at 23.

[741] *See id.*

[742] *See id.,* at 25–26.

[743] Proposing Release, *supra* footnote at 3, at 136.

[744] Comment Letter of Eileen Appelbaum and Jeffrey Hooke (Mar. 17, 2022); Comment Letter of Senators Sherrod Brown and Jack Reed (Aug. 4, 2022) (''Senators Brown and Reed Comment Letter''); Trine Comment Letter; AFREF Comment Letter I; OPERS Comment Letter; Morningstar Comment Letter; ILPA Comment Letter I; For The Long Term Comment Letter; Healthy Markets Comment Letter I; Predistribution Initiative Comment Letter II; NYSIF Comment Letter.

[745] Morningstar Comment Letter; Healthy Markets Comment Letter I.

[746] Senators Brown and Reed Comment Letter.

[747] ILPA Comment Letter I.

[748] *See generally* AFREF Comment Letter I.

Other commenters opposed this prohibition for several reasons. First, commenters stated that this prohibition may be unnecessary because it is generally market practice for fund documents to prohibit advisers from charging fees for unperformed services or, less commonly, to disclose such practices.[749] Second, a commenter indicated that certain advisers may structure fee arrangements based on the value expected to be created, rather than based on a time-worked model.[750] Third, a commenter expressed concerns that the ''reasonably expect'' standard is inappropriate because of the risk that advisers would be second-guessed afterwards.[751]

Fees for unperformed services may incentivize an adviser to cause a private fund to exit a portfolio investment earlier than anticipated. We stated in the proposal that such fees may cause an adviser to seek portfolio investments for its own benefit rather than for the private fund's benefit.[752] In addition, we noted that such fees have the potential to distort the economic relationship between the private fund and the adviser because the adviser receives the benefit of such fees, at the expense of the fund, without incurring any costs associated with having to provide any services.

We believe that charging a client fees for unperformed services (including indirectly by charging fees to a portfolio investment held by the fund) where the adviser does not, or does not reasonably expect to, provide such services is inconsistent with an adviser's fiduciary duty.[753] Typically by its nature charging a client fees for unperformed services, directly or indirectly, involves a misrepresentation or an omission of a material fact, whether in the private fund's offering memorandum or otherwise, regarding the amount being charged to the client, directly or indirectly, by the adviser or the adviser's related person, the nature of the services being provided by the adviser or the adviser's related person, or both. An adviser's fiduciary duty under the Advisers Act comprises a duty of care and a duty of loyalty. This fiduciary duty requires an adviser ''to adopt the principal's goals, objectives, or ends.'' [754] This means the adviser must, at all times, serve the best interest of its client and not subordinate its client's interest to its own.[755] In other words, the adviser cannot place its own interests ahead of its client's interests. Because charging fees without providing or reasonably expecting to provide a corresponding service to its private fund client, in our view, would cause the adviser to place its own interests ahead of its client's interests, as more fully described in the paragraph below, we have determined that it is unnecessary to prohibit activity that is already indirectly inconsistent with the adviser's fiduciary duty.[756] Thus, we are not adopting the rule as originally proposed. Commenters' statements that it is generally market practice for fund documents to prohibit advisers from charging fees for unperformed services may suggest that market participants are acting consistent with the adviser's fiduciary duty and that private fund advisers do not engage in these compensation practices.

Previously, we have charged advisers for violating section 206(2) of the Advisers Act when improperly charging monitoring, servicing, consulting, or other fees, which may accelerate upon the occurrence of certain events, to a portfolio investment.[757] These fees reduce the value of the fund's portfolio investment, which, in turn, reduces the amount available for distribution to the fund's investors. Because the adviser or its related person receives these fees, it faces a significant conflict of interest and cannot effectively consent on behalf of the fund. The conflict of interest from these fee arrangements can lead an adviser in other ways to act to serve its interest over its client's interest, in breach of its fiduciary duty. For example, fees for unperformed services may incentivize an adviser to cause a private fund to exit a portfolio investment earlier than anticipated or cause an adviser to seek portfolio investments for its own benefit rather than for the private fund's benefit. If the adviser reasonably expects to provide services to a portfolio investment, the adviser may attempt to provide full and fair disclosure to all investors or a group representing all investors, such as a fund board or an LPAC.[758] But, in some instances, disclosure may be insufficient. We have long brought enforcement actions based on the view that an adviser, as a fiduciary, may not keep prepaid advisory fees for services that it does not, or does not reasonably expect to, provide to a client.[759] And an adviser cannot do indirectly what it is not permitted to do directly.[760] Thus, where the adviser does not, or does not reasonably expect to, provide services to the portfolio investment, the adviser would be violating its fiduciary duty by using its position to extract payments indirectly from a fund, through a portfolio investment.

Under our interpretation, an adviser could receive payment for services actually provided. An adviser could also receive payments in advance for services that it reasonably expects to provide to the portfolio investment in the future, whether such arrangements are based on a time-worked model (*i.e.,* where fees are determined based on a fixed dollar amount and the amount of time worked) or a value-add model (*i.e.,* where the fees are determined based on the value contributed by the adviser's services).[761] For example, if an adviser expects to provide monitoring services to a portfolio investment, the adviser is not prohibited from charging for those services. Rather, an adviser is not permitted to charge for services that it does not reasonably expect to provide. Further, to the extent that the adviser ultimately does not provide the services, the adviser would need to refund any

[749] *See* SIFMA–AMG Comment Letter I; Invest Europe Comment Letter; *see generally* Dechert Comment Letter.

[750] AIC Comment Letter I.

[751] Dechert Comment Letter.

[752] *See* Proposing Release, *supra* footnote 3, at 137.

[753] We proposed to adopt this rule under sections 206 and 211 of the Advisers Act. Proposing Release, *supra* footnote 3, at 134. *See also* 2019 IA Fiduciary Duty Interpretation, *supra* footnote 5, at 1 and n.2–3 (discussing an adviser's fiduciary duty under Federal law).

[754] *See* 2019 IA Fiduciary Duty Interpretation, *supra* footnote 5, at 7–8.

[755] *See* 2019 IA Fiduciary Duty Interpretation, *supra* footnote 5, at n.58.

[756] Section 206(1) and section 206(2) of the Advisers Act. Depending on the facts and circumstances, we believe that this conduct may also violate other Federal securities laws, rules, and regulations, such as rule 206(4)–8, which prohibits advisers to pooled investment vehicles from, among other things, defrauding investors or prospective investors.

[757] *See, e.g., In the Matter of THL Managers V, LLC and THL Managers VI, LLC,* Investment Advisers Act Release No. 4952 (June 29, 2018) (settled action); *In the Matter of TPG Capital Advisors, LLC,* Investment Advisers Act Release No. 4830 (Dec. 21, 2017) (settled action); *In the Matter of Apollo Management V, L.P., et al.,* Investment Advisers Act Release No. 3392 (Aug. 23, 2016) (settled action); *In the Matter of Blackstone, supra* footnote 26.

[758] Advisers that are subject to the quarterly statement rule discussed above will also need to disclose these amounts in the quarterly statement provided to investors, to the extent such compensation meets the definition of portfolio-investment compensation.

[759] *See Jason Baker Tuttle, Sr.,* Initial Decision Release No. 13 (Jan. 8, 1990); *Monitored Assets Corp.,* Investment Advisers Act Release No. 1195 (Aug. 28, 1989) (settled order); *In the Matter of Beverly Hills Wealth Mgmt., LLC,* Investment Advisers Act Release No. 4975 (July 20, 2018) (settled order).

[760] Section 208(d) of the Advisers Act.

[761] *See* AIC Comment Letter I (stating that ''[i]f monitoring fees are charged based on the deal size, periodic payments instead of a lump sum payment can provide the portfolio company with liquidity management by spreading the costs over time, even though the services and resulting value creation may not correspond to the same time period of payments.'').

prepaid amounts attributable to unperformed services.

2. Limiting or Eliminating Liability

We proposed to prohibit an adviser to a private fund, directly or indirectly, from seeking reimbursement, indemnification, exculpation, or limitation of its liability by the private fund or its investors for a breach of fiduciary duty, willful misfeasance, bad faith, negligence, or recklessness in providing services to the private fund (''waiver or indemnification prohibition'').[762] As discussed further below, we are not adopting this prohibition, in part, because we believe that it is not necessary to achieve our goal to address this problematic practice. Rather, we discuss below our views on how an adviser's fiduciary duty applies to its private fund clients and how the antifraud provisions apply to the adviser's dealings with clients and fund investors.

Some commenters supported this prohibition[763] stating that the prohibition is necessary to protect private fund investors, address the increasing erosion of private fund advisers' fiduciary duties,[764] and save investors time and legal fees when negotiating fund documents.[765] One commenter that represents several limited partners and historically advocated for increased protections regarding fiduciary terms[766] supported allowing indemnification for an adviser's simple negligence but maintaining the proposed prohibition on indemnification for simple negligence in scenarios where there is a material breach of the limited partnership agreement and side letters.[767] Some commenters suggested narrowing this provision to align with the Commission's statement in the 2019 IA Fiduciary Duty Interpretation, instead of adopting a broader prohibition that, according to commenters, would implicate State and local law.[768]

In contrast, most commenters opposed it.[769] Some commenters stated that the proposed prohibition would increase costs for investors[770] (including through insurance premiums, higher management fees, and revising existing agreements),[771] increase the threat of private litigation,[772] and cause advisers to take less risk, which could result in lower investor returns and fewer available strategies.[773] Many commenters stated that the proposed prohibition would result in more onerous liability standards for sophisticated investors than for retail investors and that such a difference would result in better protection for institutional investors than for investors in retail products.[774]

After considering comments, we are not adopting this prohibition, in part, because we believe that it is not needed to address this problematic practice. Rather, we are reaffirming and clarifying our views on how an adviser's fiduciary duty applies to its private fund clients and how the antifraud provisions apply to the adviser's dealings with clients and fund investors. We remind advisers of their obligation to act consistently with their Federal fiduciary duty and their legal obligations under the Advisers Act, including the antifraud provisions.[775] A waiver of an adviser's compliance with its Federal antifraud liability for breach of its fiduciary duty to the private fund or otherwise, or of any other provision of the Advisers Act, or rules thereunder, is invalid under the Act.[776]

An adviser's Federal fiduciary duty is to its clients and the obligations that flow from the adviser's fiduciary duty depend upon what functions the adviser, as agent, has agreed to assume for the client, its principal.[777] In addition, full and fair disclosure for an institutional client (including the specificity, level of detail, and explanation of terminology) can differ, in some cases significantly, from full and fair disclosure for a retail client because institutional clients generally have a greater capacity and more resources than retail clients to analyze and understand complex conflicts and their ramifications.[778] Regardless of the nature of the client, the disclosure must be clear and detailed enough for the client to make an informed decision to consent to the conflict of interest or reject it. Accordingly, while the fiduciary duty itself applies to all clients of an adviser, the application of the fiduciary duty of an adviser to a retail client can be different from the specific application of the fiduciary duty of an adviser to a registered investment company or private fund.[779] Whether contractual clauses that purport to limit an adviser's liability (also known as ''hedge clauses'' or ''waiver clauses'') in an agreement with an institutional client (*e.g.,* private fund) would violate the Advisers Act's antifraud provisions will be determined based on the particular facts and circumstances.[780] To the extent that a hedge clause creates a conflict of interest between an adviser and its client, the adviser must address the conflict as required by its duty of loyalty.

After considering comments on the waiver or indemnification prohibition, we provide the following examples, partly based on staff observations, of how this interpretation applies to certain facts and circumstances. We have taken the position that an adviser violates the antifraud provisions of the

[762] Proposed rule 211(h)(2)–1(a)(5).

[763] *See, e.g.,* Comment Letter of Phil Thompson (Mar. 8, 2022) (''Thompson Comment Letter''); OPERS Comment Letter; CalPERS Comment Letter; Morningstar Comment Letter.

[764] *See, e.g.,* NYC Comptroller Comment Letter; OPERS Comment Letter; Thompson Comment Letter; Better Markets Comment Letter.

[765] *See* NACUBO Comment Letter.

[766] *See* ILPA Letter to Chairman Gensler (Apr. 21, 2021).

[767] *See* ILPA Comment Letter I.

[768] *See* Invest Europe Comment Letter; MFA Comment Letter I.

[769] *See, e.g.,* SBAI Comment Letter; Thin Line Capital Comment Letter; ATR Comment Letter; ILPA Comment Letter I; Chamber of Commerce Comment Letter; Comment Letter of Real Estate Roundtable Comment Letter (Apr. 25, 2022); CVCA Comment Letter; AIMA/ACC Comment Letter.

[770] *See, e.g.,* Chamber of Commerce Comment Letter; MFA Comment Letter I.

[771] *See, e.g.,* Schulte Comment Letter; Comment Letter of Real Estate Board of New York (Apr. 21, 2022) (''REBNY Comment Letter''); CVCA Comment Letter.

[772] *See, e.g.,* Invest Europe Comment Letter; Schulte Comment Letter; MFA Comment Letter I.

[773] *See, e.g.,* TIAA Comment Letter; SIFMA–AMG Comment Letter I; ILPA Comment Letter I; AIC Comment Letter I; NYC Bar Comment Letter II.

[774] *See, e.g.,* Invest Europe Comment Letter; Schulte Comment Letter; SBAI Comment Letter; SIFMA–AMG Comment Letter I; AIC Comment Letter I; MFA Comment Letter I; AIMA/ACC Comment Letter.

[775] *See* 2019 IA Fiduciary Duty Interpretation, *supra* footnote 5; section 206 of the Advisers Act.

[776] *See* section 215(a) of the Advisers Act; 2019 IA Fiduciary Duty Interpretation, *supra* footnote 5, at n.29 (stating that an adviser's Federal fiduciary obligations are enforceable through section 206 of the Advisers Act and that the SEC would view a waiver of enforcement of section 206 as implicating section 215(a) of the Advisers Act. Section 215(a) of the Advisers Act provides that any condition, stipulation or provision binding any person to waive compliance with any provision of the title shall be void.). *See* section 215(b) of the Advisers Act (stating that any contract made in violation of the Act or rules thereunder is void).

[777] *See* 2019 IA Fiduciary Duty Interpretation, *supra* footnote 558, at section I (reaffirming and clarifying the fiduciary duty that an adviser owes to its clients under section 206 of the Advisers Act).

[778] *See id.* and accompanying text.

[779] *See* 2019 IA Fiduciary Duty Interpretation, *supra* footnote 5, at n.87. *See also In the Matter of Comprehensive Capital Management, Inc.,* Investment Advisers Act Release No. 5943 (Jan. 11, 2022) (settled action) (alleging adviser included in its investment advisory agreement liability disclaimer language (*i.e.,* a hedge clause), which could lead a client to believe incorrectly that the client had waived a non-waivable cause of action against the adviser provided by State or Federal law. Most, if not all, of the adviser's clients were retail investors.).

[780] *See* 2019 IA Fiduciary Duty Interpretation, *supra* footnote 5, at n.31 (discussing the now-withdrawn Heitman no-action letter that analyzed an indemnification provision in an institutional client's investment management agreement).

Advisers Act, for example, when (i) there is a contract provision waiving any and all of the adviser's fiduciary duties or (ii) there is a contract provision explicitly or generically waiving the adviser's Federal fiduciary duty, and in each case there is no language clarifying that the adviser is not waiving its Federal fiduciary duty or that the client retains certain non-waivable rights (also known as a ''savings clause'').[781] A breach of the Federal fiduciary duty may involve conduct that is intentional, reckless, or negligent.[782] Finally, we believe that an adviser may not seek reimbursement, indemnification, or exculpation for breaching its Federal fiduciary duty because such reimbursement, indemnification, or exculpation would operate effectively as a waiver, which would be invalid under the Act.[783]

We continue to not take a position on the scope or substance of any fiduciary duty that applies to an adviser under applicable State law.[784] However, to the extent that a waiver clause is unclear as to whether it applies to the Federal fiduciary duty, State fiduciary duties, or both, we will interpret the clause as waiving the Federal fiduciary duty.

[781] *In the Matter of Comprehensive Capital Management.,* Investment Advisers Act Release No. 5943 (Jan. 11, 2022) (settled action). Also, we note that our staff has expressed the view that it would violate the antifraud provisions of the Advisers Act for an adviser to enter into a limited partnership agreement stating that the adviser to the private fund or its related person, which is the general partner of the fund, to the maximum extent permitted by applicable law, will not be subject to any duties or standards (including fiduciary or similar duties or standards) existing under the Advisers Act or that the adviser can receive indemnification or exculpation for breaching its Federal fiduciary duty. *See, e.g.,* EXAMS Risk Alert: Observations from Examinations of Private Fund Advisers (Jan. 27, 2022), at 5 (discussing hedge clauses).), *available at https://www.sec.gov/files/private-fund-risk-alert-pt-2.pdf. See also* Comment Letter of the Institutional Limited Partners Association on the Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation (Aug. 6, 2018) at 6, *available at https://ilpa.org/wp-content/uploads/2018/08/ILPA-Comment-Letter-on-SEC-Proposed-Fiduciary-Duty-Interpretation-August-6-2018.pdf.*

[782] *See, e.g.,* 2019 IA Fiduciary Duty Interpretation, *supra* footnote 5, at n.20 (explaining that claims arising under Section 206(1) of the Advisers Act require a showing of scienter but claims under Section 206(2) of the Advisers Act are not scienter based and can be adequately pled with only a showing of negligence).

[783] *See supra* section II.E.2.a) (Investigation Expenses) (stating that charging fees and expenses related to a breach of an adviser's Federal fiduciary duty to a private fund would effectively operate as a waiver of such duty, which would be invalid under the Act).

[784] *See* 2019 IA Fiduciary Duty Interpretation, *supra* footnote 558.

G. Preferential Treatment

We proposed to prohibit all private fund advisers, regardless of whether they are registered with the Commission, from: (i) granting an investor in a private fund or in a substantially similar pool of assets the ability to redeem its interest on terms that the adviser reasonably expects to have a material, negative effect on other investors in that private fund or in a substantially similar pool of assets and (ii) providing information regarding portfolio holdings or exposures of a private fund or of a substantially similar pool of assets to any investor if the adviser reasonably expects that providing the information would have a material, negative effect on other investors in that private fund or in a substantially similar pool of assets.[785] We also proposed to prohibit these advisers from providing any other preferential treatment to any investor in the private fund unless the adviser delivers certain written disclosures to prospective and current investors regarding all preferential treatment the adviser or its related persons provide to other investors in the same fund.[786] The timing of the proposed rule's delivery requirements differed depending on whether the recipient is a prospective or existing investor in the private fund. For a prospective investor, the proposed rule required the adviser to deliver the notice prior to the investor's investment. For an existing investor, the notice was required to be delivered annually, to the extent the adviser provided preferential treatment to other investors since the last notice.

Some commenters supported the proposed rule.[787] Some of these commenters stated that the rule would benefit investors by increasing transparency for all investors about the terms offered to other investors [788] and by ensuring that investors have the requisite information to determine whether they are being harmed by agreements between the adviser and other investors.[789] Some commenters opposed the proposed rule.[790] Some commenters, including fund investors, expressed concern that it would curtail their ability to enter into side letters because advisers may refuse to offer certain provisions.[791] One commenter noted that this could negatively impact smaller investors because they would not be able to ''piggy back'' off of certain provisions negotiated by larger investors.[792] Some commenters also expressed concern that requiring advisers to determine whether a provision has a material, negative effect on other investors may cause advisers to assert regulatory risk as a way to justify the adviser's rejection of fund terms required by applicable law, rule, or regulation for public pension funds.[793]

After considering comments, we are adopting the preferential treatment rule in a modified form.[794] First, we are adopting the prohibition on certain preferential redemption rights partly as proposed, but with two exceptions: (i) for redemptions required by applicable law, rule, regulation, or order of certain governmental authorities and (ii) if the adviser has offered the same redemption ability to all existing investors and will continue to offer the same redemption ability to all future investors in the private fund or similar pool of assets. These exceptions are designed to address commenters' concerns that the rule would curtail their ability to secure important side letter provisions, especially ones required by applicable law. We also believe that the exception for terms offered to all investors will continue to allow smaller investors to benefit from rights negotiated by larger investors, such as different share classes offering different redemption terms. Second, we are adopting the prohibition on preferential information rights about portfolio holdings or exposures, but with an exception where the adviser offers such information to all other existing investors in the private fund and any similar pool of assets at the same time or substantially the same time. In response to commenters, this exception should allow advisers to discuss their portfolio holdings during investor meetings so long as all investors have access to the same information. Third, we are limiting the advance written notice requirement to prospective investors to apply only to

[785] Proposed rules 211(h)(2)–3(a)(1) and (2).

[786] Proposed rule 211(h)(2)–3(b).

[787] *See, e.g.,* Meketa Comment Letter; Albourne Comment Letter; NEBF Comment Letter; ILPA Comment Letter I; American Association for Justice Comment Letter; AFSCME Comment Letter; Segal Marco Comment Letter; Pathway Comment Letter.

[788] *See* AFSCME Comment Letter; American Association for Justice Comment Letter.

[789] *See* United for Respect Comment Letter I; Healthy Markets Comment Letter I.

[790] *See* AIC Comment Letter I; CCMR Comment Letter II; NYC Bar Comment Letter II; IAA Comment Letter II; ICM Comment Letter; Dechert Comment Letter; Comment Letter of Tech Council Ventures (June 14, 2022); Proof Comment Letter; NVCA Comment Letter; Canada Pension Comment Letter.

[791] *See* NYC Comptroller Comment Letter; NY State Comptroller Comment Letter; Thin Line Capital Comment Letter; OPERS Comment Letter.

[792] *See* Ropes & Gray Comment Letter.

[793] *See* NY State Comptroller Comment Letter; OPERS Comment Letter; SIFMA–AMG Comment Letter I.

[794] Final rule 211(h)(2)–3.

material economic terms. We are still requiring advisers to provide to current investors comprehensive, annual disclosure of all preferential treatment provided by the adviser or its related persons since the last annual notice.

However, in a change from the proposal, the final rule requires the adviser to distribute to current investors a written notice of all preferential treatment the adviser or its related persons has provided to other investors in the same private fund (i) for an illiquid fund, as soon as reasonably practicable following the end of the fund's fundraising period and (ii) for a liquid fund, as soon as reasonably practicable following the investor's investment in the private fund. Fourth, we are changing the defined term ''substantially similar pool of assets'' to ''similar pool of assets'' as used throughout the preferential treatment rule so that the term better reflects the breadth of the definition. Fifth, we are revising the rule text to apply the disclosure obligations in final rule 211(h)(2)–3(b) to all preferential treatment, including any preferential treatment granted in accordance with final rule 211(h)(2)–3(a). We discuss each of these changes and provisions below.

Under section 211(h)(2) of the Advisers Act, the Commission shall examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for investment advisers that the Commission deems contrary to the public interest and the protection of investors. Our staff has examined private fund advisers to assess both the investor protection risks presented by their business models in terms of compensation schemes, conflicts of interest, and sales practices and the firms' compliance with their existing legal obligations. As discussed below, the Commission deems granting preferential treatment a sales practice and conflict of interest under section 211(h)(2), that is contrary to the public interest and the protection of investors and is restricting the practice and conflict by (i) prohibiting investment advisers from providing certain preferential treatment that the adviser reasonably expects to have a material negative effect on other investors and (ii) requiring investment advisers to disclose any other preferential treatment to prospective and current investors. We believe these activities give advisers an incentive to place their interests ahead of their clients' (and, by extension, their investors'), and can result in private funds and their investors, particularly smaller investors that are not able to negotiate preferential deals with the adviser and its related persons, being misled, deceived, or otherwise harmed.

Granting preferential treatment is a conflict of interest because advisers have economic and/or other business incentives to provide preferential terms to one or more investors (*e.g.,* based on the size of the investor's investment, the ability of the investor to provide services to the adviser, or the potential to establish or cultivate relationships that have the potential to provide benefits to the adviser). These incentives have the potential to cause the adviser to provide preferential terms to one or more investors that harm other investors or otherwise put the other investors at a disadvantage. For example, an adviser may agree to waive all or part of the confidentiality obligation set forth in the private fund's governing agreement for one investor. Such a waiver has the potential to harm other investors because proprietary information may be made available to third parties, such as competitors of the private fund, which could negatively affect the fund's competitive advantage in, for example, seeking and securing investments. There may be cases where preferential information may be reasonably expected to have a material, negative effect on other investors in the fund even when the preferred investor does not have the ability to redeem its interest in the fund, and so whether preferential information violates the final rule requires a facts and circumstances analysis. For example, a private fund may make an investment into an asset with certain trading restrictions, and then later receive notice that the investment is underperforming. If the private fund gives that information to a preferred investor before others, the preferred investor could front-run other investors in taking a (possibly synthetic) short position against the asset, driving its price down, and causing losses to other investors in the fund. An adviser could also operate multiple funds with overlapping investments but offer redemption rights only for one fund containing its preferred investors. An adviser granting preferential information to certain investors in its less liquid fund, which those preferred investors could use to redeem their interests in the more liquid fund, could harm the investors in the less liquid fund even though the preferred investors do not have redemption rights in the less liquid fund.

Granting preferential treatment also involves a sales practice under section 211(h)(2) of the Advisers Act. Advisers typically attract preferred, strategic, or large investors to invest in the fund by offering preferential terms as part of negotiating with those investors. The adviser typically enters into a separate agreement, commonly referred to as a ''side letter,'' with the particular investor in connection with such investor's admission to a fund. Side letters have the effect of establishing rights, benefits, or privileges under, or altering the terms of, the private fund's governing agreement, which advisers offer to certain prospective investors to secure their investments in the private fund. Because advisers induce investors to invest in the private fund based on those rights, benefits, or privileges, the practice of granting preferential treatment is a sales practice under section 211(h)(2).

The practice of granting certain preferential treatment (or, in some cases, granting preferential treatment without sufficient disclosure) is contrary to the public interest and the protection of investors because it can harm, mislead, or deceive other investors. For example, to the extent an investor has negotiated limitations on its indemnification obligations, other investors may be required to bear an increased portion of indemnification costs. As another example, to the extent an investor negotiates to limit its participation in a particular investment, the aggregate returns realized by other investors could be more adversely affected than otherwise by the unfavorable performance of such investment. Moreover, other investors will have a larger position in such investment and, as a result, their holdings will be less diversified.

Like the proposed rule, the final rule includes a prohibitions component and a disclosure component that address activity across the spectrum of preferential treatment. We recognize that advisers provide a range of preferential treatment, some of which does not necessarily have a material, negative effect on other fund investors. In this case, we believe that disclosure effectively addresses our concerns related to this practice because transparency will provide investors with helpful information they otherwise may not receive. Investors can use this information to protect their interests, including through negotiations regarding new investments and re-negotiations regarding existing investments, and make more informed business decisions. For example, an investor could seek to limit its liability or otherwise negotiate an expense cap if it knows that other investors have been granted similar rights by the adviser. In

addition to informing current decisions, investors can use this information to inform future investment decisions, including how to invest other assets in their portfolio, whether to invest in private funds managed by the adviser or its related persons in the future, and, for a liquid fund, whether to redeem or remain invested in the private fund. We are concerned that an adviser's current sales practices often do not provide all investors with sufficient detail regarding preferential terms granted to other investors so that these investors can protect their interests and make informed decisions. We believe that disclosure of preferential treatment is necessary to guard against deceptive practices because it will ensure that investors have access to information necessary to diligence the prospective investment and better understand whether, and how, such terms affect the private fund overall.

Other types of preferential treatment, however, have a material, negative effect on other fund investors or investors in a similar pool of assets. We are prohibiting these types of preferential treatment because they involve sales practices and conflicts of interest that are contrary to the public interest and protection of investors. These practices are contrary to the public interest because they have the potential to harm private funds and their investors, which include, among other investors, public and private pension plans, educational endowments, non-profit organizations, and high net worth individuals. [795] In addition, these practices are further contrary to the protection of investors to the extent that advisers stand to profit from advantaging a subset of investors over the broader group of investors. For example, in granting preferential terms to large investors as a way of inducing their investment in the fund, the adviser stands to benefit because its fees increase as fund assets under management increase. Further, in negotiating preferential terms with prospective investors, the interests of the adviser are not necessarily aligned with those of the fund or the fund's existing investors. This results in a conflict between the adviser's interests in seeking to secure the investment, on the one hand, and the interests of the fund (and its investors) to help ensure that the terms provided to a prospective investor do not harm the fund or its existing investors, on the other hand.

Section 206(4) of the Advisers Act also authorizes the Commission to adopt rules and regulations that ''define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.'' [796] We have observed instances of advisers granting preferential treatment to an investor or a group of investors in a way that directly favors the adviser's interest or seeks to win favor with the preferred investor in hopes of inducing the preferred investor to take a certain action desired by the adviser to the detriment of other investors.[797] For example, we have charged an adviser for engaging in fraud by secretly offering certain investors preferential redemption and liquidity rights in exchange for those investors' agreement to vote in favor of restricting the redemption rights of the fund's other investors and by concealing this arrangement from the fund's directors and other investors.[798] We have also charged an adviser for engaging in fraud by contravening the fund's governing documents regarding liquidation and allowing preferred investors to exit the fund at the then current fair value in exchange for an agreement to invest in a similar fund offered by the adviser.[799] In another example, we have charged an adviser for engaging in fraud by improperly failing to write down the value of a hedge fund's private placement investments, even after some of those companies had declared bankruptcy, while simultaneously allowing certain investors to redeem their shares in the hedge fund based on those inflated valuations.[800] These cases typically involve the adviser concealing its conduct by acting in contravention of the private fund's governing documents or the adviser's policies and procedures [801] and by failing to disclose its conduct to other investors or a fund governing body.[802] These side arrangements with preferred investors may also financially benefit the adviser, leaving the remaining investors to bear the costs and market risk of any remaining assets in the fund.[803] Thus, this practice of granting an investor in a private fund the ability to redeem its interest on terms that the adviser reasonably expects to have a material, negative effect on other investors is fraudulent and deceptive.

The final rule applies to preferential treatment provided through various means, including written side letters. Side letters or side arrangements are generally agreements among the investor, general partner, adviser, and/or the private fund that provide the investor with different or preferential terms than those set forth in the fund's governing documents. Side letters generally grant more favorable rights and privileges to certain preferred investors (*e.g.,* seed investors, strategic investors, those with large commitments, and employees, friends, and family) or to investors subject to government regulation (*e.g.,* ERISA, BHCA, or public records laws). The final rule also applies even if the preferential treatment is provided indirectly, such as by an adviser's related persons, because granting of preferential treatment also has the potential to harm the fund and its investors when performed indirectly. For example, the rule applies when the adviser's related person is the general partner (or similar control person) and is a party (and/or caused the private fund to be a party, directly or indirectly) to a side letter or other arrangement with an investor, even if the adviser itself (or any related person of the adviser) is not a party to the side letter or other arrangement. The final rule will still apply under those circumstances because it prohibits an adviser from providing preferential treatment *directly or indirectly.*

We are adopting the preferential treatment rule because all investors would benefit from information regarding the preferred terms granted to other investors in the same private fund (*e.g.,* seed investors, strategic investors, those with large commitments, and employees, friends, and family) because, in some cases, these terms disadvantage certain investors in the private fund, impact the adviser's decision making (*e.g.,* by altering or changing incentives for the adviser), or otherwise impact the terms of the private fund as a whole. This new rule will help investors better understand marketplace dynamics and potentially improve efficiency for future investments, for example, by expediting the process for reviewing and

[795] *See supra* section I (discussing pension plan assets invested in private funds).

[796] Section 206(4) of the Advisers Act.

[797] *See In the Matter of Aria Partners GP, LLC,* Investment Advisers Release No. 4991 (Aug. 22, 2018) (settled action); *Harbinger Capital, supra* footnote 60; *SEC* v. *Joseph W. Daniel,* Litigation Release No. 19427 (Oct. 13, 2005) (settled action); *In the Matter of Schwendiman Partners, LLC,* Investment Advisers Act Release Nos. 2083 (Nov. 21, 2002) and 2043 (July 11, 2002) (settled action).

[798] *See Harbinger Capital, supra* footnote 60.

[799] *See In the Matter of Schwendiman Partners, LLC, supra* footnote 797.

[800] *See SEC* v. *Joseph W. Daniel, supra* footnote 797.

[801] *See, e.g., In the Matter of Aria Partners GP, LLC, supra* footnote 797.

[802] *See, e.g., Harbinger Capital, supra* footnote 60.

[803] *See Harbinger Capital, supra* footnote 60; *see also In the Matter of Schwendiman Partners, LLC, supra* footnote 797.

negotiating fees and expenses. This has the potential to reduce the cost of negotiating the terms of future investments.[804]

Except in limited circumstances, the final rule prohibits preferential information and redemption terms when the adviser reasonably expects the terms to have a material, negative effect. Some commenters argued that the ''adviser reasonably expects'' standard is unworkable because an adviser cannot predict how others will react to information[805] and the adviser's decisions will be judged in hindsight.[806] Other commenters suggested only applying the prohibition when the adviser ''knows'' the preferential treatment will have a material, negative effect or imposing a good faith standard.[807] As proposed, we are adopting the rule with the ''reasonably expects'' standard, which imposes an objective standard that takes into account what the adviser reasonably expected at the time. This standard is designed to facilitate the effective operation of the rule and to help ensure that preferential treatment granted to one investor does not have deleterious effects on other investors. We were not persuaded by commenters that argued the standard is unworkable because an adviser cannot predict how others will react to information. This standard does not require advisers to make such predictions; rather, it requires advisers to form only a reasonable expectation based on the facts and circumstances. We were also not persuaded by commenters that stated the standard will result in adviser's decisions being unfairly judged in hindsight. An adviser's actions will be judged based on the facts and circumstances at the time the adviser grants or provides the preferential treatment, as set forth in the final rule.

Other commenters asked us to provide more specificity around what constitutes a ''material, negative effect,'' and they stated that if advisers broadly interpret this term, then advisers could lack incentive to offer certain side letter terms to investors, including, for example, necessary investor-specific rights.[808] Because many side letter terms generally do not harm other investors and are not related to liquidity rights (including investor-specific provisions relating to tax, legal, regulatory, or accounting matters), we do not believe that even a broad interpretation of this standard would discourage advisers from offering such side letter terms to investors.

Another commenter stated that the materiality of preferential redemption terms or information rights should be assessed in the ''basic framework under the securities laws (*i.e.,* whether there is a substantial likelihood that a reasonable investor would consider such terms significant in its decision to invest or remain in the fund).''[809] This commenter stated that such a standard would allow the adviser to objectively assess the relevant facts and circumstances and consider both quantitative and qualitative factors in determining whether the prohibition should apply to the particular term. We believe, however, that requiring only a ''materiality'' standard has the potential to result in a broader prohibition than the one we proposed, and we do not believe a broader prohibition is needed to address the conduct that the rule is intended to address.[810]

Commenters did not offer specific examples of what types of activity or information would have a ''material, negative effect,'' and we believe it is important for this standard to remain evergreen so that it can be applied to various types of arrangements between advisers and investors and fund structures. For example, we believe an adviser could form a reasonable expectation that certain redemption terms would have a material, negative effect on other fund investors if a majority of the portfolio investments were not likely to be liquid.

One commenter stated that requiring advisers to determine whether a preferential term has a material, negative effect on other ''investors'' suggests that advisers are required to second-guess each investor's individual circumstances rather than the impact such term has on the private fund as a whole.[811] This commenter argued that such a requirement runs contrary to the DC Circuit Court's decision in *Goldstein* v. *SEC.* However, the exercise of our statutory authority under sections 211(h)(2) and 206(4) is consistent with the court's ruling in *Goldstein* v. *SEC* because section 206(4) is not limited in its application to ''clients'' and section 211(h) by its terms provides protection to ''investors.'' A plain interpretation of the statute supports a reading that the provision authorizes the Commission to promulgate rules to directly protect investors generally (rather than only the clients) and does not contradict the court's ruling in *Goldstein* v. *SEC.*[812]

1. Prohibited Preferential Redemptions

We proposed to prohibit a private fund adviser from, directly or indirectly, granting an investor in the private fund or in a substantially similar pool of assets the ability to redeem its interest on terms that the adviser reasonably expects to have a material, negative effect on other investors in that private fund or in a substantially similar pool of assets.[813]

One commenter stated that the proposed prohibition on preferential redemption terms would establish helpful baseline protections for all investors, including those who cannot negotiate for sufficient protections[814] due to bargaining power dynamics or lack of information or resources. One commenter stated that this provision would protect remaining fund investors who could find themselves invested in a materially different portfolio after other, preferred investors redeemed.[815] Other commenters stated that the prohibition on preferential redemption terms would limit investor choice[816] and suggested excluding scenarios in which an investor elects to receive less liquidity in exchange for other rights or terms.[817] Other commenters stated that the treatment of multi-class funds is unclear under the proposed rule.[818] They expressed concern that the prohibition would result in less liquidity for investors[819] and that investors should be permitted to negotiate favorable liquidity terms since those investors might also negotiate other liquidity terms that benefit all investors.[820] Some commenters recommended that we not move forward with the proposed prohibition[821] and

[804] *See infra* sections VI.D.4 and VI.E.

[805] *See* Haynes & Boone Comment Letter.

[806] *See* PIFF Comment Letter.

[807] *See* AIMA/ACC Comment Letter; Dechert Comment Letter.

[808] *See* Comment Letter of Structured Finance Association (June 13, 2022) (''SFA Comment Letter II''); ILPA Comment Letter I; RFG Comment Letter II; AIMA/ACC Comment Letter; Schulte Comment Letter; Meketa Comment Letter.

[809] *See* AIMA/ACC Comment Letter.

[810] Information is material if there is a substantial likelihood that the information would have been viewed by a reasonable investor as having significantly altered the total mix of information available. *See TSC Industries, Inc.* v. *Northway, Inc.,* 426 U.S. 438, 449 (1976).

[811] *See* SIFMA–AMG Comment Letter I.

[812] *See supra* section I (Introduction and Background).

[813] Proposed rule 211(h)(2)–3(a)(1).

[814] *See* ICCR Comment Letter.

[815] *See* United for Respect Comment Letter I.

[816] *See* SBAI Comment Letter; MFA Comment Letter I.

[817] *See* MFA Comment Letter I.

[818] *See* Comment Letter of Curtis (Apr. 25, 2022) (''Curtis Comment Letter''); PIFF Comment Letter.

[819] *See* PIFF Comment Letter; Comment Letter of the Regulatory Fundamentals Group (Dec. 3, 2022) (''RFG Comment Letter III'').

[820] *See* Ropes & Gray Comment Letter; RFG Comment Letter III.

[821] *See* NYC Comptroller Comment Letter; AIMA/ACC Comment Letter; IAA Comment Letter II.

instead require disclosure of preferential liquidity terms.[822] These commenters stated that a disclosure-based regime would be more consistent with market practice,[823] and it would avoid unintended consequences, such as blanket bans on liquidity rights granted due to certain laws (*e.g.,* the U.S. Employee Retirement Income Security Act of 1974).[824]

We understand, based on staff experience, that preferential terms provided to certain investors or one investor do not necessarily benefit the fund or other investors that are not party to the side letter agreement and, at times, we believe these terms can have a material, negative effect on other investors.[825] For example, selective disclosure of certain information may entitle the investor privy to such information to avoid a loss (*e.g.,* by submitting a redemption request) at the expense of the non-privy investors.

After considering comments, we are adopting the prohibition on certain preferential redemption terms, but with two exceptions. In general, we believe that granting preferential liquidity rights on terms that the adviser reasonably expects to have a material, negative effect on other investors in the private fund or in a similar pool of assets is a sales practice that is harmful to the fund and its investors. An adviser can attract preferred investors to invest in the fund by offering preferential terms, such as more favorable liquidity rights.[826] Such practices often have conflicts of interest, however, that can harm other investors in the private fund. For example, in granting preferential liquidity rights to a large investor, the adviser stands to benefit because its fees increase as fund assets under management increase. While the fund also may experience some benefits, including the ability to attract additional investors and to spread expenses over a broader investor and asset base and the ability to raise sufficient capital to implement the fund's investment strategy and complete investments that meet the fund's target investment size (particularly for illiquid funds), there are scenarios where the preferential liquidity terms harm the fund and other investors. For example, if an adviser allows a preferred investor to exit the fund early and sells liquid assets to accommodate the preferred investor's redemption, the fund may be left with a less liquid pool of assets, which can inhibit the fund's ability to carry out its investment strategy or promptly satisfy other investors' redemption requests. This can dilute remaining investors' interests in the fund and make it difficult for those investors to mitigate their investment losses in a down market cycle.[827] These concerns can also apply when an adviser provides favorable redemption rights to an investor in a similar pool of assets, such as another feeder fund investing in the same master fund. The Commission believes that the potential harms to other investors justify this restriction.

In a change from the proposal, and after considering comments, we are adopting two exceptions from this prohibition. First, an adviser is not prohibited from offering preferential redemption rights if the investor is required to redeem due to applicable laws, rules, regulations, or orders of any relevant foreign or U.S. Government, State, or political subdivision to which the investor, private fund, or any similar pool of assets is subject. Commenters suggested that, if we retain the rule, we should permit an exclusion from this rule with respect to investors that are required to obtain such liquidity terms because of regulations and laws (*i.e.,* institution-specific requirements).[828] Some commenters argued that this exception is necessary to prevent the fund or investors from suffering harm related to legal or regulatory issues[829] (*e.g.,* certain investors may require special redemption rights to comply with pay-to-play laws) and to ensure that certain investors, such as pension plans, can continue to invest in private funds.[830] We do not intend for this prohibition to result in the exclusion of certain investors from funds or in an investor violating other applicable laws. For example, under this exception, pension plan subject to State or local law may be required to redeem its interest under certain circumstances, such as a violation by the adviser of State pay-to-play, anti-boycott, or similar laws. Advisers that use this exception will still be subject to the disclosure obligations under rule 211(h)(2)–3(b). For example, with respect to a pension plan that receives preferential redemption rights under this exception, an adviser will need to disclose this preferential treatment pursuant to rule 211(h)(2)–3(b). Certain commenters suggested that we broaden the exception to include redemptions pursuant to an investor's policies or resolutions.[831] We are concerned, however, that excluding redemptions pursuant to these more informal arrangements could compromise the investor protection goals of the rule and would incentivize investors to adopt policies or resolutions to circumvent the rule. We also believe that any exception from this rule should be narrowly tailored to limit potential harms to other investors to those cases that are absolutely necessary. We believe that redemption terms required by more informal arrangements, such as policies or resolutions, would therefore not be permissible. Accordingly, the final rule does not provide an exception for more informal arrangements, such as policies and resolutions.

Second, an adviser is not prohibited from offering preferential redemption rights if the adviser has offered the same redemption ability to all other existing investors and will continue to offer such redemption ability to all future investors in the same private fund or any similar pool of assets. Several commenters supported giving investors a choice of various liquidity options and disclosing this in the fund's governing and offering documents.[832] We understand that advisers have many methods to provide different liquidity terms to private fund investors, including through side letters as well as by embedding these terms in the fund's governing documents.[833]

[822] *See* SBAI Comment Letter; NYC Bar Comment Letter II; RFG Comment Letter III; Ropes & Gray Comment Letter; PIFF Comment Letter.

[823] *See* Ropes & Gray Comment Letter.

[824] *See* PIFF Comment Letter; NYC Bar Comment Letter II; IAA Comment Letter II.

[825] *See, e.g.,* EXAMS Private Funds Risk Alert 2020, *supra* footnote 188.

[826] *See, e.g., id.* (Commission staff has observed advisers provide side letter terms to certain investors, including preferential liquidity terms).

[827] *See In the Matter of Deccan Value Investors LP, et al.,* Investment Advisers Act Release No. 6079 (Aug. 3, 2022) (settled action) (alleging that registered investment adviser mismanaged significant redemptions by two university clients due in part to the adviser's stated concern over the negative impact the redemptions could have on non-redeeming clients and investors).

[828] *See* NYC Comptroller Comment Letter; SIFMA–AMG Comment Letter I; OPERS Comment Letter; RFG Comment Letter III; AIC Comment Letter II.

[829] *See* Chamber of Commerce Comment Letter; RFG Comment Letter III; MFA Comment Letter I; Ropes & Gray Comment Letter; Dechert Comment Letter; PIFF Comment Letter; SIFMA–AMG Comment Letter I; Comment Letter of the Minnesota State Board of Investment (Apr. 25, 2022); OPERS Comment Letter; NYC Bar Comment Letter II; Meketa Comment Letter; SIFMA–AMG Comment Letter I.

[830] *See, e.g.,* Ropes & Gray Comment Letter; OPERS Comment Letter; RFG Comment Letter II.

[831] *See e.g.,* NY State Comptroller Comment Letter (stating that investor policies applied consistently across similar investments should be excepted); NYC Comptroller Comment Letter (stating that investor policies requiring different liquidity terms should be excepted).

[832] *See* AIMA/ACC Comment Letter; RFG Comment Letter III; NACUBO Comment Letter; MFA Comment Letter I; SBAI Comment Letter; SIFMA–AMG Comment Letter I; Segal Marco Comment Letter.

[833] This exception acknowledges that investors may prioritize one term over another (*e.g.,* an

Continued

While preferential liquidity terms provided via side letter are more explicitly targeted to particular investors, we believe that favorable liquidity terms provided through the fund's governing documents (*i.e.,* by a fund offering different share classes, some with more favorable liquidity terms than others) presents the same concerns that our final rule seeks to address. Overall, we believe that this exception balances our policy goals of protecting against potential fraud and deception and certain conflicts of interest, while preserving investor choice regarding liquidity and price. To qualify for the exception, an adviser must have offered the same redemption ability to *all* other existing investors and must continue to offer such redemption ability to all future investors *without qualification* (*e.g.,* no commitment size,[834] affiliation requirements, or other limitations). For example, an adviser offering a fund with three share classes, each with different liquidity options but that are otherwise subject to the same terms (Class A, Class B, and Class C), cannot restrict Class A to friends and family investors if the adviser reasonably expects such liquidity rights to have a material, negative effect on other investors.

Advisers are prohibited from acting directly or indirectly under the final rule.[835] For example, an adviser could not avail itself of the exception by offering Class A (annual redemption, 1% management fee, 15% performance fee) and Class B (quarterly redemption, 1.5% management fee, 20% performance fee) while requiring Class B investors also to invest in another fund managed by the adviser, to the extent the adviser reasonably expects such liquidity terms would have a material, negative effect on other investors. We would interpret such an incentive structure as failing to satisfy the requirement to offer investors the same redemption ability as required under the final rule because the obligation to invest in another fund managed by the adviser serves to indirectly prevent investors from selecting Class B. We similarly would interpret an arrangement where Class B investors (quarterly redemption, 1.5% management fee, 20% performance fee) would be required to agree to uncapped liability when the adviser has reason to believe that certain investors (*e.g.,* government entities) cannot agree to uncapped liability, while Class A investors would not be subject to such an obligation, as not satisfying the requirements of the exception.

2. Prohibited Preferential Transparency

We proposed to prohibit an adviser and its related persons from providing information regarding the portfolio holdings or exposures of the private fund or of a substantially similar pool of assets to any investor if the adviser reasonably expects that providing the information would have a material, negative effect on other investors in that private fund or in a substantially similar pool of assets.[836]

Some commenters supported the proposal,[837] and one commenter stated that all investors should receive basic information about portfolio holdings.[838] Others argued that the proposed rule could negatively impact investors to the extent it would prohibit them from receiving information required under applicable laws or regulations.[839] Certain commenters argued that the proposed rule could harm investors if they are prohibited from receiving certain information or material as members of the fund's limited partner advisory committee.[840] As with the proposed prohibition on preferential liquidity, some commenters recommended that we not move forward with this prohibition and instead allow preferential information rights, if they are disclosed to other investors.[841]

We have decided to adopt the prohibition on certain preferential transparency as proposed but with an exception that is discussed below. We continue to believe that selective disclosure of portfolio holdings or exposures can result in profits or avoidance of losses among those who were privy to the information beforehand at the expense of investors who did not benefit from such transparency. In addition, providing such information in a fund with redemption rights could enable an investor to trade in a way that ''front-runs'' or otherwise disadvantages the fund or other clients of the adviser. Granting preferential transparency if the adviser reasonably expects that providing the information would have a material, negative effect on other investors in that private fund or in a substantially similar pool of assets, for example through side letters, is contrary to the public interest and protection of investors because it preferences one investor at the expense of another. For example, if an adviser provides preferential information about a hedge fund's holdings to one investor as opposed to another investor, the investor with preferential information may use that information to redeem from the hedge fund during the next redemption cycle, even if both investors have the same redemption rights. In addition, an adviser can have a conflict of interest that may cause it to agree to provide preferential information rights to a certain investor in exchange for something of benefit to the adviser. For example, an adviser may agree to offer preferential terms to a large financial institution that agrees to provide services to the adviser. The rule is designed to neutralize the potential for private fund advisers to treat portfolio holdings information as a commodity to be used to gain or maintain favor with particular investors.[842]

Selective disclosure to certain parties is a fundamental concern often prohibited or restricted under other Federal securities laws. For example, the Commission adopted Regulation FD to address selective disclosure by certain issuers of material nonpublic information under the Exchange Act. The Commission stated that selective disclosure occurs when issuers release material nonpublic information about a company to selected persons, such as securities analysts or institutional investors, before disclosing the information to the general public.[843] This practice undermines the integrity of the securities markets—both public and private—and reduces investor confidence in the fairness of those markets.[844]

Many commenters stated that the proposed rule would have a chilling effect on ordinary course investor communications[845] and that it was unclear whether the proposed rule

investor may be willing to pay higher fees in exchange for better liquidity). Thus, we believe that this exception is responsive to commenters who stated that the Commission should provide an exception for scenarios in which an investor elects to receive less liquidity in exchange for other rights or terms.

[834] An adviser could not avail itself of this exception, for example, if it offered a share class that is only available to investors that meet a certain minimum commitment size.

[835] *See* rule 211(h)(2)–3.

[836] Proposed rule 211(h)(2)–3(a)(2).

[837] *See* Comment Letter of Pattern Recognition: A Research Collective (Apr. 25, 2022) (''Pattern Recognition Comment Letter''); Segal Marco Comment Letter.

[838] *See* Pattern Recognition Comment Letter.

[839] *See* Meketa Comment Letter; MFA Comment Letter I.

[840] *See* NYC Comptroller Comment Letter; NY State Comptroller Comment Letter; RFG Comment Letter II.

[841] *See* NYC Bar Comment Letter II; SBAI Comment Letter.

[842] *See* Selective Disclosure and Insider Trading, Securities Act Release No. 7881 (Aug. 15, 2000) [65 FR 51715 (Aug. 24, 2000)].

[843] *See id.*

[844] *See infra* section VI.D.4.

[845] *See* MFA Comment Letter I; Haynes & Boone Comment Letter; Dechert Comment Letter; RFG Comment Letter II; AIMA/ACC Comment Letter.

would apply only to formal communications (*e.g.,* side letters, other written communications) or whether informal communications (*e.g.,* oral statements,[846] such as phone conversations) would be included.[847] Because advisers might fear liability under the proposed rule, commenters stated that an outright prohibition on preferential transparency might prevent advisers from providing investors with important information desired by investors or, in some instances, required by investors because of the operation of a law, rule, regulation, or order.[848] Commenters also expressed concern regarding a lack of clarity under the ''material, negative effect'' standard.[849] We have considered these concerns in adopting the rule. While we understand commenter concerns that this prohibition could chill adviser/investor communications, the rule serves a compelling government interest in protecting all investors not just some investors, ensuring confidence in the fairness and integrity of our capital markets, and addressing conflicts of interest in private fund structures, which have been historically opaque. We also believe that the rule is closely drawn because it applies only in a narrow set of circumstances: when the adviser reasonably expects that providing information would have a material, negative effect on other investors in the private fund or similar pool of assets.[850] Any preferential information that does not meet this criterion would only be subject to the disclosure portions of this rule.[851]

In addition, any chilling effect is further reduced as, in a change from the proposal, we are adopting an exception to this prohibition for preferential information made broadly available by the adviser. Specifically, the rule states that an adviser is not prohibited from providing preferential information if the adviser offers such information to all existing investors in the private fund and any similar pool of assets at the same time or substantially the same time. Although the disclosure-based exception we are adopting is not identical to commenters' suggestions, we believe the final rule is responsive to suggestions that the rule should be disclosure based rather than prohibition based.[852]

As discussed above, we agree with commenters that it is important for investors to be able to continue to receive information and, without an exception, they may not be able to do so under the proposed rule. As a result, the exception requires that when an adviser discloses otherwise prohibited information to one investor, it must also provide such information to all investors. This is designed to help ensure that investors are treated fairly and that investors have equal access to the same information. We believe that this exception balances our policy goals while preserving the ability for investors to access information that is important to their investment decisions. To qualify for the exception, an adviser must offer the information to all other investors at the same time or substantially the same time. For example, an adviser could provide, to one current investor, ESG data related to a specific portfolio company that the private equity fund holds only if the adviser offers that same information to all other investors in the private equity fund and any similar pools of assets. To qualify for the exception, the adviser must offer to provide the information to other investors at the same time or substantially the same time.

As with the redemptions prohibition, some commenters requested that we provide an exception from this prohibition for preferential information that an investor must obtain as a requirement of State or other law.[853] We do not believe it is necessary to grant such an exception because advisers can now rely on the exception discussed above by offering to disclose information to all investors. This ensures that investors can still obtain necessary information, whether required by law or contract, without sacrificing the policy goals of the rule. We also believe that State laws generally require disclosure of information that would not have a material, negative effect on other investors, such as fee and expense transparency.[854]

The prohibition is narrowly drawn in that it applies only to preferential information that would have a material, negative effect on other investors in that private fund or in a similar pool of assets. Commenters suggested that the preferential treatment rule should apply only to open-end funds because the redemption ability in the open-end fund structure makes it more likely for preferential information rights to materially harm other investors.[855] We agree that is easier to trigger the material, negative effect provision in a scenario where certain investors receive preferential information *and* an ability to redeem their interests because those investors can exit the fund sooner than others, potentially harming remaining investors. As a result, the ability to redeem is an important part of determining whether providing information would have a material, negative effect on other investors and thus whether an adviser triggers the preferential information prohibition. We would generally not view preferential information rights provided to one or more investors in an illiquid private fund as having a material, negative effect on other investors. We do not believe, however, that a blanket exemption for all closed-end funds would be appropriate because, for example, even closed-end funds offer redemption rights in certain extraordinary circumstances. Whether preferential information provided to an investor in a closed-end fund violates the final rule requires a facts and circumstances analysis.

3. Similar Pool of Assets

We proposed to define the term ''substantially similar pool of assets'' as a pooled investment vehicle (other than an investment company registered under the Investment Company Act of 1940 or a company that elects to be regulated as such) with substantially similar investment policies, objectives, or strategies to those of the private fund managed by the adviser or its related persons.[856]

We are adopting the definition as proposed, but we are changing the defined term to ''similar pool of assets'' so that the defined term better reflects

[846] *See* RFG Comment Letter II.

[847] *See* MFA Comment Letter I; AIMA/ACC Comment Letter.

[848] *See* Dechert Comment Letter; RFG Comment Letter II.

[849] *See* Dechert Comment Letter; Haynes & Boone Comment Letter.

[850] We are clarifying that the final rule applies to all types of communications: formal and informal as well as written, visual, and oral.

[851] *See* final rule 211(h)(2)–3(b).

[852] *See* SBAI Comment Letter; Schulte Comment Letter.

[853] *See* NY State Comptroller Comment Letter; CalPERS Comment Letter; Predistribution Initiative Comment Letter II; Ropes & Gray Comment Letter; PIFF Comment Letter; NYC Comptroller Comment Letter; AIMA/ACC Comment Letter; NY State Comptroller Comment Letter; IAA Comment Letter II.

[854] *See, e.g.,* section 7514.7 of the California Government Code. This law requires California public investment funds to disclose certain information annually in a report presented at a meeting open to the public, such as the fees and expenses that the California public investment fund paid directly to the alternative investment vehicle; the California public investment fund's pro rata share of carried interest distributed to the fund manager or related parties; and the California public investment fund's pro rata share of aggregate fees and expenses paid by all of the portfolio companies held within the alternative investment vehicle to the fund manager or related parties.

[855] *See* NY State Comptroller Comment Letter; Top Tier Comment Letter.

[856] Proposed rule 211(h)(1)–1.

the broad scope of the definition.[857] This conforming change is appropriate because we believe that, depending on the facts and circumstances, the definition will likely capture vehicles outside of what the private funds industry would typically view as ''substantially similar pools of assets.'' For example, an adviser's healthcare-focused private fund may be considered a ''similar pool of assets'' to the adviser's technology-focused private fund under the definition. Thus, we believe the appropriate term to use is ''similar,'' rather than substantially similar pool of assets.

We are also excluding securitized asset funds from the definition of similar pool of assets. We believe that this change is appropriate because, as discussed above, we believe that certain distinguishing structural and operational features of SAFs have prevented or deterred SAF advisers from engaging in the type of conduct that the final rules seek to address, such as the granting of preferential treatment.

We believe the final definition provides the appropriate scope to address our concerns, which include an adviser providing more favorable terms to investors in another similar pool of assets to the detriment of private fund investors.[858] A comprehensive definition of ''similar pool of assets'' will help prevent advisers from attempting to structure around the preferential treatment prohibitions by, for example, creating parallel funds solely for investors with preferential terms.

Whether a pool of assets managed by the adviser is ''similar'' to the private fund requires a facts and circumstances analysis. A pool of assets with a materially different target return or sector focus, for example, would likely not have substantially similar investment policies, objectives, or strategies to those of the subject private fund, depending on the facts and circumstances.

The types of asset pools that would be included in this term would include a variety of pools, regardless of whether they are private funds. For example, this term would include limited liability companies, partnerships, and other organizational structures, regardless of the number of investors; feeders to the same master fund; and parallel fund structures and alternative investment vehicles. It would also include pooled vehicles with different base currencies and pooled vehicles with embedded leverage to the extent such pooled vehicles have substantially similar investment policies, objectives, or strategies as those of the subject private fund. In addition, an adviser would be required to consider whether its proprietary vehicles meet the definition of ''similar pool of assets.'' We believe this scope is appropriate, and we note our staff also has observed scenarios where an adviser establishes investment vehicles that invest side-by-side along with the private fund that have better liquidity terms than the terms provided to investors in the private fund.[859]

This definition is designed to capture most commonly used private fund structures (or similar arrangements) and prevent advisers from structuring around the prohibitions on preferential treatment. For example, in a master-feeder structure, some advisers create custom feeder funds for favored investors. Without a broad definition of similar pool of assets, the rule would not preclude such advisers from providing preferential treatment to investors in these custom feeder funds to the detriment of investors in standard commingled feeder funds within the master-feeder structure.

Many commenters argued that the proposed definition of ''substantially similar pool of assets'' was overbroad and suggested that we narrow the definition.[860] These commenters suggested that we limit the definition to, for example, funds that invest side by side, *pari passu,* with the main fund in substantially all investment opportunities (which would, among other things, make it easier for advisers to determine their compliance obligations under the rule and prevent investors from being subject to limitations on liquidity and information rights)[861] and that we exclude co-investment vehicles and separately managed accounts.[862] In contrast, one commenter suggested broadening the proposed definition beyond pooled vehicles to include separately managed accounts because separately managed accounts can pose similar risks to pooled vehicles.[863] This rule is designed to address the specific concerns that arise out of the lack of transparency and governance mechanisms prevalent in the private fund structure and protects underlying investors in those funds from being disadvantaged as a result of preferential treatment given to underlying investors in other similar pools because the adviser does not have a fiduciary duty to those underlying investors. It is not designed to protect against the adviser disadvantaging one client (a private fund) as a result of preferential treatment given to another client (a separately managed account client) because the fiduciary duty protects against such preferential treatment. Accordingly, there is no need to include separately managed accounts in the definition of ''similar pool of assets.'' There are, however, certain circumstances in which a fund of one or single investor fund can be a pooled investment vehicle and therefore can fall within the definition of ''similar pool of assets.''[864]

Certain advisers offer existing investors, related persons, or third parties the opportunity to co-invest alongside the private fund through one or more co-investment vehicles established or advised by the adviser or its related persons.[865] These co-investment vehicles may be set up for one or more specific investments. Co-investment vehicles have the effect of increasing the capital available for the adviser to complete a prospective investment. Commenters expressed concern that the rule would impede the co-investment process because the rule could be interpreted to prohibit selective disclosure of portfolio holding information to investors with co-investing rights and advisers would need to assess whether information provided to co-investors triggers the prohibition.[866] One commenter

[857] In the marketing rule, we defined the term ''related portfolio'' to mean ''a portfolio with substantially similar investment policies, objectives, *and* strategies. . .'' (emphasis added). In this final rule, the scope of similar pool of assets is broader because the term includes a pooled investment vehicle with ''substantially similar investment policies, objectives, *or* strategies. . .'' (emphasis added). We are removing the word ''substantially'' from the defined term in order to signal the broader scope. *See* rule 206(4)–1I(15) under the Advisers Act.

[858] *See, e.g.,* Proposing Release, *supra* footnote 3, at 168.

[859] *See* EXAMS Private Funds Risk Alert 2020, *supra* footnote 188.

[860] *See* SIFMA–AMG Comment Letter I; NYC Bar Comment Letter II; ILPA Comment Letter I; AIMA/ACC Comment Letter; PIFF Comment Letter; SFA Comment Letter II; Ropes & Gray Comment Letter; Haynes & Boone Comment Letter.

[861] *See* SIFMA–AMG Comment Letter I; NYC Bar Comment Letter II; ILPA Comment Letter I; AIMA/ACC Comment Letter.

[862] *See* AIMA/ACC Comment Letter.

[863] *See* Anonymous (Mar. 2, 2022) at 1.

[864] *See* Exemptions Adopting Release, *supra* footnote 9, at 78–79.

[865] In some cases, advisers use co-investment opportunities to attract new investors and retain existing investors. Advisers may offer these existing or prospective investors the opportunity to invest in co-investment vehicles with materially different fee and expense terms than the main fund (*e.g.,* no fees or no obligation to bear broken deal expenses). These co-investment opportunities may raise conflicts of interest, particularly when the opportunity to invest arises because of an existing investment and the fund itself would otherwise be the sole investor.

[866] *See* AIC Comment Letter II; Segal Marco Comment Letter (stating that the proposed rule

suggested excluding co-investment vehicles from the definition.[867] While we understand commenter concerns, we believe that we should adopt the definition as proposed because excluding co-investment vehicles that have substantially similar investment policies, objectives, or strategies would expose investors to similar risks that the rule is intended to address and potentially allow advisers to circumvent the rule. Co-investment vehicles operate in a similar fashion as other pooled investment vehicles that invest alongside the adviser's main fund, such as parallel funds, because they typically enter and exit the applicable investment(s) at substantially the same time and on substantially the same terms as the adviser's main fund. Providing investors in these vehicles with preferential information presents the same risks and circumvention concerns as other pooled investment vehicles captured by the definition. Thus, we do not believe that co-investment vehicles should be treated differently.

4. Other Preferential Treatment and Disclosure of Preferential Treatment

We proposed to prohibit other preferential terms unless the adviser provided certain written disclosures to prospective and current investors.[868] Specifically, we proposed to require an adviser to provide to prospective private fund investors, prior to the investor's investment in the fund, a written notice with specific information about any preferential treatment the adviser or its related persons provide to other investors in the same private fund.[869] We also proposed to require advisers to distribute an annual written notice to current investors in a private fund where such notice provides specific information about any preferential treatment the adviser or its related persons provide to other investors in the same private fund since the last written notice.[870]

We are adopting this aspect of the rule largely as proposed because we are concerned that an adviser's current sales practices do not provide all investors with sufficient detail regarding preferential terms granted to certain investors. Increased transparency will better inform investors about the breadth of preferential treatment, the potential for those terms to affect their investment in the private fund, and the potential costs (including compliance costs) associated with these preferential terms. This disclosure will help investors understand whether, and how, such terms present conflicts of interest or otherwise impact the adviser's compensation schemes with the private fund. The disclosure will also help prevent investors from being potentially defrauded or deceived by preferential treatment that negatively impacts their investment in the private fund.[871]

One commenter generally opposed the disclosure portion of the preferential treatment rule because advisers may seek to deny investors certain terms to avoid being required to disclose those concessions to all investors.[872] One commenter asserted that the disclosure obligation could compromise the anonymity of investors.[873] Other commenters suggested narrowing the scope of the proposed rule by requiring disclosure only of *material* preferential treatment.[874] In contrast, some commenters supported the disclosure requirements because they said they would assist the investor in the negotiation process.[875]

In response to commenter concerns, we are making three changes to the proposal. First, we are limiting the advance written notice requirement to ''any preferential treatment related to *any material economic terms*'' rather than requiring advance disclosure of all preferential treatment. Commenters stated that the advance notice requirement would impede the closing process because it would incentivize investors to wait until the last minute to invest in order to maximize the amount of information they receive about the terms other investors negotiated.[876] They asserted that, because of the dynamic nature of negotiations leading up to a closing (*i.e.,* advisers simultaneously negotiate with multiple investors), it would be impractical for an adviser to provide advance written notice to a prospective investor because doing so would result in a repeated cycle of disclosure, discussion, and potential renegotiation.[877] Several commenters argued that the most favored nations (''MFN'') clause process addresses the policy concerns raised by the proposed rule,[878] and they suggested that instead of applying the rule to funds that offer MFN rights to investors, especially closed-end funds, we should allow such funds to adopt a best-in-class MFN process.[879] In an MFN clause, an adviser or its related person generally agrees to provide an investor with contractual rights or benefits that are equal to or better than the rights or benefits provided to certain other investors, subject to certain exceptions. Closed-end fund investors are typically entitled to elect these rights or benefits *after the end of the private fund's fundraising period,* and open-end fund investors are typically entitled to elect these rights or benefits *after the closing of their investment.* As a result, adopting a best-in-class MFN process would not provide prospective investors with information that they can act upon when negotiating the terms of their investment because investors would not receive such information until after the closing of their investment. Some commenters supported limiting any advance disclosure requirement to certain key terms with more comprehensive disclosure to follow post investment.[880]

While we understand commenter views about the timing concerns associated with advance disclosure, we believe that it is crucial for prospective investors to have access to certain information before they invest. This is designed to prevent investors from being misled because it will provide them with transparency regarding how the terms may affect their investment, how the terms may affect the adviser's relationship with the private fund and

would require advisers to offer every co-investment opportunity to every investor, which could prevent private funds from maximizing value for investors).

[867] *See* AIMA/ACC Comment Letter.

[868] Proposed rule 211(h)(2)–3(b).

[869] Proposed rule 211(h)(2)–3(b)(1).

[870] Proposed rule 211(h)(2)–3(b)(2).

[871] As discussed above, investors can use this information to protect their interests, including through negotiations regarding new investments and renegotiations regarding existing investments, and to make more informed business decisions. We believe that disclosure of preferential treatment is necessary to guard against deceptive and/or fraudulent practices because it will increase investor access to information necessary to diligence the prospective investment and better understand whether, and how, such terms affect the private fund overall. For example, an investor could seek assurances that it will not bear more than its *pro rata* portion of expenses as a result of economic arrangements provided to other investors As another example, disclosure of significant governance rights provided to one investor, such as the ability to terminate the investment period of the fund or remove the adviser, will guard against other investors being misled about the terms of their investment and how preferential treatment provided to certain, but not all, investors impacts those terms.

[872] *See* OPERS Comment Letter.

[873] *See* IAA Comment Letter II.

[874] *See* BVCA Comment Letter; Invest Europe Comment Letter; GPEVCA Comment Letter.

[875] *See* RFG Comment Letter II; Healthy Markets Comment Letter I.

[876] *See* AIC Comment Letter I.

[877] *See* MFA Comment Letter I; PIFF Comment Letter; Chamber of Commerce Comment Letter; AIMA/ACC Comment Letter; Correlation Ventures Comment Letter; SIFMA–AMG Comment Letter I; ATR Comment Letter; Ropes & Gray Comment Letter.

[878] *See* NY State Comptroller Comment Letter.

[879] *See* ILPA Comment Letter I; BVCA Comment Letter; Invest Europe Comment Letter; GPEVCA Comment Letter.

[880] *See* Ropes & Gray Comment Letter; PIFF Comment Letter.

its investors, and whether the terms create any additional conflicts of interest.[881] To address commenter concerns about timing and impeding the closing process, the final rule will limit advance disclosure to those terms that a prospective investor would find most important and that would significantly impact its bargaining position (*i.e.,* material economic terms, including, but not limited to, the cost of investing, liquidity rights, fee breaks, and co-investment rights[882]). One commenter stated that the final rule should not apply to preferential terms an adviser offers to investors and instead should apply only to preferential terms actually provided.[883] We agree with this interpretation of the scope of the disclosure obligations under this aspect of the rule and believe this is clear from the rule text.[884]

Second, we are requiring advisers to disclose all other preferential treatment, in writing, to current investors on the following timeline: for illiquid funds, as soon as reasonably practicable following the end of the private fund's fundraising period, and for liquid funds, as soon as reasonably practicable following the investor's investment in the private fund.[885] This change is in response to commenter concerns that requiring advisers to disclose all preferential treatment would impede the closing process. As a result, we are allowing advisers to wait until after an investor has invested in the fund to disclose the remaining preferential terms (*i.e.,* all preferential terms that are not material economic terms). Although investors may not receive this information until after the closing of their investment, this information will nonetheless enable investors to protect their interests more effectively and make more informed investment decisions with a broader understanding of market terms, including with respect to negotiations of new investments with the adviser or renegotiations (or liquidations, if applicable) of existing investments. This change also addresses a commenter's suggestion that any final rule account for the different negotiating processes for open-end and closed-end funds.[886]

An example of preferential treatment that the final rule prohibits unless it is disclosed post investment and/or pursuant to the annual notice requirement is if an adviser to a private equity fund provides ''excuse rights'' (*i.e.,* the right to refrain from participating in a specific investment the private fund plans to make) to certain private fund investors.[887] We believe that post-investment and annual disclosure is important because it helps investors learn whether other investors are receiving a better or different deal and whether any such arrangements pose potential conflicts of interest, potential harms, or other disadvantages (*e.g.,* to the extent other investors are excused from participating in certain types of investments, such as alcohol-related investments, the participating investors may become over concentrated in such investments).

Third, we are revising the rule text to apply the disclosure obligations in final rule 211(h)(2)–3(b) to all preferential treatment, including any preferential treatment granted in accordance with final rule 211(h)(2)–3(a). Specifically, we are removing the reference to ''other'' from the first sentence in rule 211(h)(2)–3(b) to avoid the implication that the preferential treatment granted pursuant to the disclosure exceptions in final rule 211(h)(2)–3(a) would not be captured. This change is a necessary clarification because the granting of preferential treatment with respect to redemption rights or fund portfolio holdings or exposures information would have been prohibited under proposed rule 211(h)(2)–3(a) and, accordingly, there would have been nothing to disclose under proposed rule 211(h)(2)–3(b) with respect to these types of preferential treatment. Transparency into these terms will better inform investors regarding the breadth of preferential treatment, the potential for such terms to affect their investment in the private fund, and the potential costs associated with these preferential terms. Moreover, such disclosure may assist investors in determining whether the adviser offered the same redemption ability or information to all investors in the private fund, if applicable.

We are adopting the annual written notice requirement as proposed. One commenter supported the ability of an adviser to choose when to provide the annual disclosure as long as the adviser provides it on an annual basis.[888] Some commenters suggested that the final rule only require annual disclosure (instead of also requiring pre-investment disclosure).[889] We believe that the annual notice requirement will require advisers to reassess periodically the preferential terms they provide to investors in the same fund, and investors will benefit from receiving periodic updates on preferential terms provided to other investors in the same fund (*e.g.,* investors will benefit because they will be able to assess whether such preferential treatment presents new conflicts for the adviser). We also believe that providing this information annually will not overwhelm investors with disclosure.

We were not persuaded by commenters who urged us not to adopt this portion of the rule on the basis that advisers may use it to deny investors certain terms. Continuing to allow advisers to negotiate undisclosed side arrangements with certain investors that may impact other investors would be contrary to the public interest and the protection of investors because such arrangements can harm, mislead, or deceive other investors. It would also be inconsistent with promoting transparency into such arrangements. Moreover, even if advisers cease to offer certain provisions to investors, we believe the benefits associated with disclosure of preferential treatment justify such incremental burden.

Like the proposed rule, the final rule will require an adviser to describe specifically the preferential treatment to convey its relevance. One commenter argued that advisers should not be required to disclose the exact fees or other contractual terms that they negotiated and instead disclosure that some investors received preferential fees should be sufficient.[890] We do not believe that mere disclosure of the fact that other investors are paying lower

[881] For example, to the extent a private equity manager sought to limit or narrow the fund's overall investment strategy via a side letter provision with one investor, the other investors would likely be misled about the fund's actual investment strategy.

[882] Co-investment rights will generally qualify as a material, economic term to the extent they include materially different fee and expense terms from those of the main fund (*e.g.,* no fees or no obligation to bear broken deal expenses). Even if co-investment rights do not include different fee and expense terms, and for example, are offered to provide an investor with additional exposure to a particular investment or investment type, investors often negotiate for those rights and give up other terms in the bargaining process in order to secure access to co-investment opportunities. As a result, co-investment terms generally will be material given their impact on an investor's bargaining position.

[883] *See* AIMA/ACC Comment Letter.

[884] *See, e.g.,* final rule 211(h)(2)–3(b) (referring to preferential treatment ''the adviser or its related persons *provide.* . .'' (emphasis added).

[885] The disclosure requirements are not limited to an investor's initial investment in the fund. For example, if an existing investor increases its investment in the fund, the adviser is required to disclose all preferential treatment to such investor following such additional investment in accordance with the timelines set forth in the rule.

[886] *See* ILPA Comment Letter I.

[887] This example assumes that the relevant excuse rights are not material economic terms required to be disclosed pre-investment by final rule 211(h)(2)(3)–(b)(1).

[888] *See* AIMA/ACC Comment Letter.

[889] *See* RFG Comment Letter II; Ropes & Gray Comment Letter; PIFF Comment Letter.

[890] *See* SBAI Comment Letter.

fees is specific enough. For example, if an adviser provides an investor with lower fee terms in exchange for a significantly higher capital contribution than paid by others, an adviser must describe the lower fee terms, including the applicable rate (or range of rates if multiple investors pay such lower fees), in order to provide specific information as required by the rule. An adviser could comply with the disclosure requirements by providing copies of side letters (with identifying information regarding the other investors redacted).[891] Alternatively, an adviser could provide a written summary of the preferential terms provided to other investors in the same private fund, provided the summary specifically describes the preferential treatment. We believe information about fee arrangements such as those described in the example immediately above qualify as information about material economic terms that the adviser must disclose prior to the prospective investor's investment.

5. Delivery

As proposed, the timing of the final rule's delivery requirements differs depending on whether the recipient is a prospective or current investor in the private fund. For a prospective investor the notice needs to be provided, in writing, prior to the investor's investment in the fund. For a current investor, the adviser must ''distribute'' the notice as soon as reasonably practicable after the end of the fund's fundraising period (for illiquid funds) or as soon as reasonably practicable following the investor's investment in the fund (for liquid funds).[892] Also, for a current investor, the adviser must distribute an annual notice if any preferential treatment is provided to an investor since the last notice.[893] This includes preferential information provided to any transferees during such period. If an investor is a pooled investment vehicle that is in a control relationship with the adviser, the adviser must look through that pool in order to send the notice to investors in those pools.[894]

We are not adopting a requirement for advisers to distribute the various notices within a specified deadline (*e.g.,* five days after an investor's investment in the fund or five days after year end). Because notices for certain funds, especially funds that provide extensive or complex preferential treatment, may take more time to prepare, a one-size-fits-all approach is not appropriate for purposes of this rule.[895] We believe that the ''as soon as reasonably practicable'' is the appropriate standard because it emphasizes the need for the notices to be distributed to investors without delay to help ensure their timeliness while affording advisers a limited degree of flexibility. Whether a written notice is furnished ''as soon as reasonably practicable'' will depend on the facts and circumstances. While this standard imposes no specific time limit, we believe that it would generally be appropriate for advisers to distribute the notices within four weeks.

One commenter suggested that we require advisers to provide the preferential treatment disclosures only upon request to reduce the burden on advisers and require investors to consider what information is important to them.[896] We believe that requiring advisers to provide and distribute the disclosures under this rule is essential to placing investors in the best position to negotiate the terms of their investment (with regard to the advance disclosure) and, with regard to the post-investment and annual disclosures, in the best position to consider and negotiate future investment opportunities, including with the adviser providing the disclosures. We are concerned that, especially with the advance disclosure requirement, requiring investors to first request information that they believe is essential to their negotiation process would serve only to disadvantage these investors both from a time and information perspective. Requiring investors to request this information could change the relationship dynamics between the adviser and investors. For example, an adviser may decide not to allow an investor with significant information requests to invest in the adviser's future funds. Similarly, investors may hesitate to request information (even though the rules permit them to) for fear of burdening the adviser or potentially increasing the fees and expenses charged to the fund. We are not prescribing the method of delivery (*e.g.,* electronic, data room, via mail) for the written notices.[897]

6. Recordkeeping for Preferential Treatment

We proposed amending rule 204–2 under the Advisers Act to require advisers registered with the Commission to retain books and records to support their compliance with the proposed preferential treatment rule.[898] Some commenters supported this amendment to the recordkeeping rule and stated that the recordkeeping obligation would ensure compliance with the rule as well as support the completeness and accuracy of records.[899] Another commenter stated that advisers should not be required to retain records if the prospective investor does not ultimately invest in the fund since, in that case, the prospective investor would not have received any preferential treatment.[900] From a practical standpoint, advisers may find it more burdensome to sort out prospective investors who did *not* ultimately invest from prospects that *did* invest in the fund. This commenter also stated that requiring an adviser to retain records from a prospective investor that does not invest in the fund could conflict with other legal obligations an adviser has (*e.g.,* data protection rules in another jurisdiction).[901] We recognize that advisers and their related persons may have to navigate different or potentially competing obligations under other laws, including data protection laws and marketing laws applicable in other countries; however, we do not believe that such other obligations warrant removing this requirement. Advisers will need to determine whether, and how, they can engage prospective

[891] Advisers are not required to disclose the names or even types of investors provided preferential terms as part of this disclosure requirement. Thus, we do not believe commenters' concerns regarding investor confidentiality are supported.

[892] Final rule 211(h)(2)–3(b)(2).

[893] As a practical matter, a private fund that does not admit new investors or provide new terms to existing investors does not need to deliver an annual notice. However, an adviser that enters into a side letter after the closing date of the fund must disclose any preferential terms in the side letter to investors that are locked into the fund.

[894] *See supra* section II.B.3 (Preparation and Distribution of Quarterly Statements).

[895] We recognize that the quarterly statement rule includes specified distribution timelines. The primary reason for this is to help ensure that investors can monitor their investments with regular and consistent disclosures from the adviser. Moreover, this flexible standard acknowledges that there will likely be more variance in the time required to prepare these notices as compared to the quarterly statements.

[896] *See* AIMA/ACC Comment Letter.

[897] *See* AIMA/ACC Comment Letter (suggesting that the final rule allow advisers to make the written notices available via a data room, where appropriate). If delivery of the required disclosure is made electronically, it should be done in accordance with the Commission's guidance regarding electronic delivery. *See* Use of Electronic Media Release, *supra* footnote 435; *see also supra* section II.B.3 (discussing the distribution requirements).

[898] Proposed rule 211(h)(2)–3(b).

[899] *See* CFA Comment Letter I; Convergence Comment Letter.

[900] *See* AIMA/ACC Comment Letter.

[901] *See id.*

investors based on the facts and circumstances and applicable law.

Regardless of whether the investor actually receives any preferential treatment, this recordkeeping obligation is necessary to help ensure that advisers complied with the preferential treatment rule. Many advisers track which prospective investors have been contacted and what documents have been provided to them, whether through a virtual data room or otherwise. They also typically require placement agents or other third parties that are distributing fund documents on their behalf to retain an investor log, which typically includes prospective investors. Accordingly, we believe that the benefits justify the burdens associated with the rule.

We are adopting these amendments as proposed, and advisers are required to retain copies of all written notices sent to current and prospective investors in a private fund pursuant to the preferential treatment rule.[902] In addition, advisers are required to retain copies of a record of each addressee and the corresponding dates sent. In a change from the proposal, we are not requiring private fund advisers to make and retain records of the addresses or delivery methods used to disseminate any such written notices.[903] These requirements will facilitate our staff's ability to assess an adviser's compliance with the rule and will enhance an adviser's compliance efforts.

III. Discussion of Written Documentation of All Advisers' Annual Reviews of Compliance Programs

We are adopting the proposed amendments to the Advisers Act compliance rule to require all SEC-registered advisers to document the annual review of their compliance policies and procedures in writing, as proposed.[904] This requirement focuses attention on the importance of the annual compliance review process. In addition, we believe that the amendments will result in records of annual compliance reviews that allow our staff to determine whether an adviser has complied with the review requirement of the compliance rule.[905]

The amendment to the compliance rule requires advisers to review and document in writing, no less frequently than annually, the adequacy of their compliance policies and procedures and the effectiveness of their implementation. The annual review requirement was intended to require advisers to evaluate periodically whether their compliance policies and procedures continue to work as designed and whether changes are needed to assure their continued effectiveness.[906] As we stated in the Compliance Rule Adopting Release, "the annual review should consider any compliance matters that arose during the previous year, any changes in the business activities of the adviser or its affiliates, and any changes in the Advisers Act or applicable regulations that might suggest a need to revise the policies and procedures."

Based on staff experience, we understand that some investment advisers do not make and preserve written documentation of the annual review of their compliance policies and procedures. Our examination staff relies on documentation of the annual review to help the staff understand an adviser's compliance program, determine whether the adviser is complying with the rule, and identify potential weaknesses in the compliance program. Without documentation that the adviser conducted the review, including information about the substance of the review, our staff has had limited visibility into the adviser's compliance practices. The amendment to rule 206(4)–7 establishes a written documentation requirement applicable to all advisers subject to the compliance rule.[907]

Some commenters supported this rule,[908] while other commenters opposed it.[909] Commenters who supported the rule explained that written documentation of the annual review has been widely adopted as a standard practice by investment advisers and would not have a large impact.[910] The commenters that opposed it indicated that it may increase costs,[911] and deter an adviser from having compliance consultants or outside counsel.[912] A commenter that generally supported the rule cautioned that a prescriptive approach could lead to less tailored compliance reviews.[913]

Although we acknowledge commenters' concerns, we continue to believe that written documentation of the annual review is necessary for three key reasons. First, written documentation of the annual review may help advisers better assess whether they have considered any compliance matters that arose during the previous year, any changes in the adviser's or an affiliate's business activities during the year, and any changes to the Advisers Act or other rules and regulations that may suggest a need to revise an adviser's policies and procedures. Second, the availability of written documentation of the annual review should allow the Commission and the Commission staff to determine if the adviser is regularly reviewing the adequacy of the adviser's policies and procedures. Third, clients and investors conducting due diligence may request written documentation of the annual review to assess whether the adviser applies a structured framework and rigor to its compliance program.

We do not believe the amended rule will significantly increase costs for advisers. Since adopting the annual review requirement,[914] the Commission has observed that most advisers already document this review in writing. Some advisers may see benefits in the form of increased efficiency because of the written documentation of an annual review each year. Having written documentation year over year provides the adviser a starting point so that advisers, internal service providers (*e.g.,* internal auditors), external service providers (*e.g.,* compliance consultants), or outside counsel can be more targeted when conducting future annual reviews. And, in instances where an adviser hires external service providers or

[902] *See supra* footnote 452 (describing the record retention requirements under the books and records rule).

[903] *See* the discussion of recordkeeping requirements above in section II.B.6.

[904] Final amended rule 206(4)–7(b).

[905] *See* Compliance Programs of Investment Companies and Investment Advisers, Investment Advisers Act Release No. 2204 (Dec. 17, 2003) [38 FR 74714 (Dec. 24, 2003)] ("Compliance Rule Adopting Release"). When adopting the compliance rule, the Commission adopted amendments to the books and records rule requiring advisers to make and keep true a copy of the adviser's compliance policies and procedures and any records documenting an adviser's annual review of its compliance policies and procedures. The Commission noted that this recordkeeping requirement was designed to allow our examination staff to determine whether the adviser has complied with the compliance rule. *See also* final amended rule 204–2(a)(17)(i) and (ii).

[906] *See* Compliance Programs of Investment Companies and Investment Advisers, Investment Advisers Act Release No. 2107 (Feb. 5, 2003) [68 FR 7038 (Feb. 11, 2003)].

[907] The adviser is required to maintain the written documentation of its annual review in an easily accessible place for at least five years after the end of the fiscal year in which the review was conducted, the first two years in an appropriate office of the investment adviser. *See* rule 204–2(a)(17)(ii).

[908] CFA Comment Letter I; IAA Comment Letter II; Convergence Comment Letter; Comment Letter of National Regulatory Services, a ComplySci Company (Apr. 25, 2022) ("NRS Comment Letter").

[909] ATR Comment Letter; NYC Bar Comment Letter II; SBAI Comment Letter.

[910] *See generally* SBAI Comment Letter and IAA Comment Letter II.

[911] NYC Bar Comment Letter II.

[912] Curtis Comment Letter.

[913] SBAI Comment Letter.

[914] *See* Compliance Rule Adopting Release, *supra* footnote 905.

outside counsel to participate in the annual review, the adviser may take steps to defray any potential costs. For example, some advisers may choose to have their employees document a summary of results as explained to them by service providers or outside counsel, rather than request that the service provider or outside counsel produce a written summary.

Nor do we believe that the amended rule will deter an adviser from using service providers (*e.g.,* compliance consultants) or outside counsel. Since early 2004, advisers have had an obligation to review, at least annually, the adequacy and effectiveness of their policies and procedures.[915] Many advisers that already document the annual review in writing communicate with service providers or outside counsel, either throughout the entire annual review or for discrete issues. Nothing in this rule prohibits advisers from seeking the guidance of service providers or outside counsel during their annual review. Although this rule will now require that the adviser document the annual review in writing, it still provides advisers the flexibility to determine the scope of that review, including when, if at all, and how to communicate with service providers or outside counsel.

One commenter stated that the amendment would be unnecessarily burdensome and duplicative for asset managers that have multiple registered investment advisers operating under a common compliance program.[916] The commenter stated that, under the proposed amendment, advisers in an advisory complex would be producing multiple duplicative reports with little variation.[917] While the benefits of the produced reports may diminish with each marginal report produced with little variation, the costs will likely also decrease. We also do not believe that the marginal benefits of each report will be *de minimis.* For advisers in an advisory complex with many advisers, producing each report may help advisers assess whether they have considered any compliance matters that arose during the previous year, changes in business activities, or changes to the Advisers Act or other rules and regulations that may impact that particular adviser. Even if, in certain cases, consideration of such issues produces a similar report to a previous one, there may be broader benefits across the industry from standardizing the practice of advisers making such assessments throughout their entire advisory complex.[918]

The amended rule does not enumerate specific elements that advisers must include in the written documentation of their annual review. The written documentation requirement is intended to be flexible to allow advisers to continue to use the review procedures they have developed and found most effective. For example, some advisers may review the adequacy of their compliance policies and procedures (or a subset of those compliance policies and procedures) and the effectiveness of their implementation on a quarterly basis. In such a case, we believe that the written documentation of the annual review could comprise written quarterly reports. Some commenters suggested that we offer flexibility in the approach to the written annual review requirement.[919] We have previously stated our views regarding the areas that we expect an adviser's policies and procedures to address, at a minimum, if they are relevant to the adviser.[920] We understand that some advisers may choose to document the annual review of their written policies and procedures: (i) in a lengthy written report with supporting documentation; (ii) quarterly documentation, aggregated at year end; (iii) a presentation to the board or another governing body, such as a limited partner advisory committee (LPAC); (iv) a short memorandum summarizing the findings; and (v) informal documentation, such a compilation of notes throughout the year.[921] There are a number of other ways that an adviser may choose to document its annual review.[922] This rule does not prescribe a specific format of the written documentation, instead, allowing an adviser to determine what would be appropriate.

A commenter suggested that we should require advisers to provide the written documentation to the private fund's LPAC.[923] The commenter argued that this would provide evidence that the adviser has a systematic process in place to identify and address changes in the adviser's business model. While an adviser may choose to share the results of its annual review with the LPAC, or even investors in the fund, we are not requiring this. We do not believe that LPAC delivery is required to help ensure that advisers periodically evaluate whether their compliance policies and procedures continue to work as designed and whether changes are needed to assure their continued effectiveness.

The required written documentation of the annual review under the compliance rule is meant to be made available to the Commission and the Commission staff and therefore should promptly[924] be produced upon request.[925] Commission staff has observed improper claims of the attorney-client privilege, the work-product doctrine, or other similar protections over required records, including any records documenting the annual review under the compliance rule, based on reliance on attorneys working for the adviser in-house or the engagement of law firms and other service providers (*e.g.,* compliance consultants) through law firms.[926] Attempts to improperly shield from, or unnecessarily delay production of any non-privileged record is inconsistent with prompt production obligations and undermines Commission staff's ability to conduct examinations. Prompt access to all records is critical for protecting investors and to an effective and efficient examination program.

[915] *Id.*

[916] SIFMA–AMG Comment Letter I.

[917] *Id.*

[918] *See infra* section VI.D.7 (Benefits and Costs—Written Documentation of All Advisers' Annual Review of Compliance Programs).

[919] NSCP Comment Letter; AIMA/ACC Comment Letter; SIFMA–AMG Comment Letter I.

[920] Compliance Rule Adopting Release, *supra* footnote 905.

[921] *See generally* NSCP Comment Letter.

[922] *See generally* NSCP Comment Letter (describing a wide range of ''other responses'' for how advisers currently document their annual review in writing).

[923] Convergence Comment Letter.

[924] We have previously stated that ''[w]hile the ''promptly'' standard [for producing books and records] imposes no specific time limit, we expect that a fund or adviser would be permitted to delay furnishing electronically stored records for more than 24 hours only in unusual circumstances. At the same time, we believe that in many cases funds and advisers could, and therefore will be required to, furnish records immediately or within a few hours of request.'' Electronic Recordkeeping by Investment Companies and Investment Advisers, Investment Advisers Act Rel. No. 1945 (May 24, 2001).

[925] In connection with the written report required under rule 38a-1, the Compliance Rule Adopting Release stated that ''[a]ll reports required by our rules are meant to be made available to the Commission and the Commission staff and, thus, they are not subject to the attorney-client privilege, the work-product doctrine, or other similar protections.'' *See* Compliance Rule Adopting Release, *supra* footnote 905.

[926] Compliance Rule Adopting Release, *supra* footnote 905, at n.94. Staff also has observed delays in production of other non-privileged records. Delays undermine the staff's ability to conduct examinations and may be inconsistent with production obligations. *See* OCIE National Examination Program Risk Alert: Investment Adviser Compliance Programs (Nov. 19, 2020) (''EXAMS Investment Adviser Compliance Programs Risk Alert 2020''), *available at https://www.sec.gov/files/Risk%20Alert%20IA%20Compliance%20Programs_0.pdf* (the staff has observed instances of advisers failing to respond in a timely manner to requests for required books and records).

IV. Transition Period, Compliance Date, Legacy Status

For the audit rule and the quarterly statement rule, we are adopting an 18-month transition period for all private fund advisers. For the adviser-led secondaries rule, the preferential treatment rule, and the restricted activities rule, we are adopting staggered compliance dates that provide for the following transition periods: for advisers with $1.5 billion or more in private funds assets under management (''larger private fund advisers''), a 12-month transition period and for advisers with less than $1.5 billion in private funds assets (''smaller private fund advisers''), an 18-month transition period. Compliance with the amended Advisers Act compliance rule will be required 60 days after publication in the **Federal Register**.

We proposed a one-year transition period to provide time for advisers to come into compliance with these new and amended rules. Some commenters suggested adopting a longer transition period, such as 18 months,[927] two years,[928] or at least three years,[929] while other commenters have called for a swifter implementation.[930] Commenters also suggested an extended transition period for smaller or newer managers.[931] Although we considered a longer transition period for all private fund advisers, we have concerns that activity involving problematic sales practices, compensation schemes, and conflicts of interest would persist during any extended transition period to the detriment of investors.

Audit Rule and Quarterly Statement Rule

We believe that the audit rule and the quarterly statement rule warrant longer transition periods because they may require advisers to enter into new, or renegotiate existing, contracts with third-party service providers, such as accountants and administrators.

First, for the mandatory audit requirement, commenters suggested that the Commission extend, for at least one additional year, the transition period to allow private funds and their auditors enough time to properly assess auditor independence requirements.[932] Under the mandatory private fund adviser audit rule, there will not be an option for a surprise examination as there is under the current custody rule. That is, a private fund adviser will not be able to satisfy the requirements of the audit rule by undergoing a surprise examination that would comply with the custody rule. In light of these considerations, we believe that additional time of up to 18 months is appropriate to allow advisers time to either hire an audit firm that meets the SEC independence requirements or cause the auditor to cease providing any services that impair independence for purposes of the SEC independence requirements.

Second, under the quarterly statement requirement, commenters expressed concern that one year may not be enough time to come into compliance with a new rule as many advisers will need to find new reporting vendors or renegotiate agreements with existing vendors to implement the required rule changes [933] and create and update reporting templates.[934] Commenters also highlighted that advisers may need additional time to make the necessary adjustments to their operational and compliance systems.[935] Based on these comments, we have also decided to allow up to 18 months to comply with the quarterly statement requirement. We believe this transition period will provide an appropriate period of time that balances the needs of advisers to engage third parties and amend existing forms, with the needs of investors to receive this information.

Adviser-Led Secondaries, Preferential Treatment, and Restricted Activities Rules

Commenters requested an extended transition period for smaller or newer managers, stating that smaller or newer managers may require more time to modify practices to come into compliance.[936] We agree with these commenters that smaller private fund advisers will likely need additional time to modify existing practices, policies, and procedures to come into compliance. Accordingly, we are providing staggered compliance dates, with a longer transition period for smaller private fund advisers. The compliance date for larger private fund advisers will provide for a 12-month transition period, while the compliance date for smaller private fund advisers will provide for an 18-month transition period. This additional time will allow smaller private fund advisers, and their service providers, to adequately address the various new requirements under the rules and promote a smooth and efficient implementation of the rules. We believe that, by allowing a longer transition period for smaller advisers, the costs of compliance would be lessened by the sharing of industry knowledge from larger advisers that were required to comply at least six months earlier. For example, smaller advisers would be afforded more time to assess which parts of the implementation process can be performed in house versus those that must be outsourced and to identify, and negotiate with, appropriate service providers. Smaller private fund advisers will also likely receive the benefit of model forms and templates developed by larger private fund advisers and their service providers, which may reduce costs for smaller private fund advisers.

We are differentiating between larger private fund advisers and smaller private fund advisers based on private fund assets under management, calculated as of the last day of the adviser's most recently completed fiscal year. An adviser's private fund assets under management are the portion of such adviser's regulatory assets under management that are attributable to private funds it advises.[937] We chose to use the term ''private fund assets under management'' because many advisers are familiar with such term under Form PF. Investment advisers registered (or required to be registered) with the Commission with at least $150 million in private fund assets under management generally must file Form PF.[938] Accordingly, we believe that private fund assets under management is appropriate to use here because many advisers will already be familiar with how to calculate their private fund assets under management.

One commenter suggested differentiating between advisers based on specific parameters (*e.g.,* assets

[927] SIFMA–AMG Comment Letter I; Schulte Comment Letter; PIFF Comment Letter; CFA Comment Letter I; NSCP Comment Letter.

[928] MFA Comment Letter I; SBAI Comment Letter; AIC Comment Letter II.

[929] AIMA/ACC Comment Letter; Chamber of Commerce Comment Letter.

[930] Comment Letter of Los Angeles City Employees' Retirement System (Apr. 12, 2022) (''LACERS Comment Letter'').

[931] ILPA Comment Letter I. *See also* SEC Small Business Capital Formation Advisory Committee letter to Chair Gensler (Feb. 28, 2023) (expressing concern that the proposal could adversely impact small funds that attract sophisticated investors for small companies' growth).

[932] E&Y Comment Letter.

[933] Curtis Comment Letter; NRS Comment Letter; *see generally* NSCP Comment Letter.

[934] SBAI Comment Letter; REBNY Comment Letter; *see generally* AIC Comment Letter I.

[935] AIC Comment Letter I; *see also* Chamber of Commerce Comment Letter (advisers may need to build and implement compliance structures and systems to address new elements of the rules).

[936] ILPA Comment Letter I; CVCA Comment Letter.

[937] Regulatory assets under management are calculated in accordance with Part 1A, Instruction 5.b of Form ADV.

[938] *See* 17 CFR 275.204(b)–1.

under management).[939] Another commenter suggested using a combination of specific metrics, such as employee headcount and assets under management, to determine if a firm meets the threshold for being a larger private fund adviser.[940] We considered using metrics other than, or in addition to, private fund assets under management for purposes of this threshold, but we anticipate that they would be more likely to lead to adverse incentives or otherwise be less reliable metrics. For instance, if we were to define larger private fund advisers based on number of employees, advisers may be incentivized to outsource operations and minimize compliance personnel. Also, unlike private fund assets under management, employee headcount attributable to an adviser's private funds is generally not tracked or reported to the Commission.[941] We believe that private fund assets under management is the appropriate metric because it is less likely to create adverse incentives and is more likely to be tracked and reported by private fund advisers than other metrics.

We believe that $1.5 billion in private fund assets under management is the appropriate threshold for a tiered compliance date for smaller private fund advisers.[942] The threshold is designed so that the group of larger private fund advisers will be relatively small in number but represent a substantial portion of the assets of the private funds industry. For example, we estimate that approximately 1,478 SEC registered investment advisers each managing at least $1.5 billion in private fund assets represent approximately 75% of private fund assets under management advised by registered private fund advisers and exempt reporting advisers.[943] Similarly, we estimate that approximately 491 exempt reporting advisers each managing at least $1.5 billion in private fund assets represent approximately 16% of private fund assets under management advised by exempt reporting advisers and registered private fund advisers.[944] We considered selecting a different threshold, such as $2 billion in private fund assets under management. However, we believe that $1.5 billion is appropriate because, as discussed above, it captures a relatively small number of advisers but represents a substantial portion of the assets under management advised by registered private fund advisers and exempt reporting advisers. We do not believe a $2 billion threshold would capture a significant enough portion of the assets in the private fund adviser industry.

We also chose the $1.5 billion threshold because we believe advisers with $1.5 billion or more in private fund assets generally have larger back offices to assist with the adoption and implementation of the new rules. Larger advisers are more likely to have launched more than one private fund and thus may have more experience in complying with Commission rules and potentially have been registered with us for a longer period of time. Accordingly, we believe that the $1.5 billion threshold strikes an appropriate balance between ensuring that a significant portion of private fund advisers implements the various rules reasonably quickly, while seeking to minimize the initial burdens imposed on certain private fund advisers.

Amended Advisers Act Compliance Rule

The written documentation of an adviser's annual review impacts all advisers, whether they advise private funds or not. This requirement to document in writing, at least annually, the adviser's annual review of the adequacy and effectiveness of its policies and procedures is an important part of an effective compliance program. Because of this importance, we have decided to require compliance with this rule 60 days after publication in the **Federal Register**. We also believe that documenting an existing practice in writing does not warrant a longer transition period because the additional burden should be relatively low for two important reasons. First, most advisers are already documenting their annual review in writing, so these advisers would have to make limited, if any, changes to existing practices.[945] Second, we did not prescribe a specific format for the written documentation, allowing advisers flexibility to record the results of the annual review in a manner that best fits their business and to use the review procedures that they have found most effective.[946] Thus, whenever the adviser commences its review within the next 12 months after the compliance date, the review must be documented in writing.[947]

In summary, the following tables set forth the compliance dates:

Rule	Larger private fund advisers	Smaller private fund advisers
211(h)(1)–2	18 months after date of publication in the FEDERAL REGISTER	18 months after date of publication in the FEDERAL REGISTER.
206(4)–10	18 months after date of publication in the FEDERAL REGISTER	18 months after date of publication in the FEDERAL REGISTER.
211(h)(2)–1	12 months after date of publication in the FEDERAL REGISTER	18 months after date of publication in the FEDERAL REGISTER.
211(h)(2)–2	12 months after date of publication in the FEDERAL REGISTER	18 months after date of publication in the FEDERAL REGISTER.
211(h)(2)–3	12 months after date of publication in the FEDERAL REGISTER	18 months after date of publication in the FEDERAL REGISTER.

[939] ILPA Comment Letter I.

[940] Predistribution Initiative Comment Letter II.

[941] We note that Form ADV, Part 1, Item 5 requires an adviser to disclose certain information regarding its employees, including the number of full- and part-time employees.

[942] Form PF also uses a $1.5 billion threshold. Specifically, a private fund adviser must complete section 2 of Form PF if it had at least $1.5 billion in hedge fund assets under management as of the last day of any month in the fiscal quarter immediately preceding the adviser's most recently completed fiscal quarter. Section 2a requires a large hedge fund adviser to report certain aggregate information about any hedge fund it advises and section 2b requires a large hedge fund adviser to report certain additional information about any hedge fund it advises that has a net asset value of at least $500 million as of the last day of any month in the fiscal quarter immediately preceding the adviser's most recently completed fiscal quarter.

[943] *See* Form ADV data (as of Dec. 2022). This $1.5 billion in private fund assets threshold does not include SAF advisers with respect to SAFs they advise.

[944] *Id.* Aggregate totals may include duplicative data to the extent a private fund is reported on Form ADV by both a registered investment adviser and an exempt reporting adviser (*e.g.,* in the case of a sub-advisory or co-advisory relationship).

[945] *See* SBAI Comment Letter (the written annual review "is already common practice in the industry and would not have a large impact"); *see also* IAA Comment Letter II ("a written annual review has been a widely adopted best practice for investment advisers, including private fund advisers, for years"); *see also* NRS Comment Letter ("most SEC registered investment advisers regularly document their annual reviews, though the format, scope, and detail provided in this documentation varies widely from firm to firm"); see *generally* NSCP Comment Letter (noting that, in a survey of members, 213 out of 214 members responded that they already document the annual review in writing).

[946] *See supra* section III.

[947] For an adviser that completed its annual review immediately before the Commission voted to adopt this rule, this could mean that the adviser documents the annual review, in writing, for the first time up to 14 months after the Commission's vote, which should allow an adviser more than enough time to determine how to document the annual review. To the extent an adviser has a review year that is partially complete by the compliance date and the adviser has already reviewed the adequacy of its policies and procedures in accordance with rule 206(4)–7 for such period prior to the compliance date, the new documentation requirement will not apply retroactively to such period.

Rule	All investment advisers
206(4)–7(b).	60 days after publication in the FEDERAL REGISTER.

Legacy Status

Commenters requested the Commission not to apply the final rules to existing funds and their contractual agreements (*i.e.,* provide ''legacy status'' for such funds and agreements). Several commenters suggested providing legacy status for all existing funds,[948] while some commenters recommended legacy status for all funds currently in compliance [949] and other commenters recommended permitting legacy status for 10 years.[950]

After considering these comments, we are providing legacy status under the prohibitions aspect of the preferential treatment rule, which prohibits advisers from providing certain preferential redemption rights and information about portfolio holdings. We are also providing legacy status for the aspects of the restricted activities rule that require investor consent, which restrict an adviser from borrowing from a private fund and from charging for certain investigation fees and expenses. However, such legacy status does not permit advisers to charge for fees or expenses related to an investigation that results or has resulted in a court or governmental authority imposing a sanction for a violation of the Act or the rules promulgated thereunder.[951]

The legacy status provisions apply to governing agreements, as specified below, that were entered into prior to the compliance date if the rule would require the parties to amend such an agreement.[952] To prevent advisers from abusing this provision, legacy status applies only to such agreements with respect to private funds that had commenced operations as of the compliance date. The commencement of operations includes any *bona fide* activity directed towards operating a private fund, including investment, fundraising, or operational activity. Examples of activity that could indicate a private fund has commenced operations include issuing capital calls, setting up a subscription facility for the fund, holding an initial fund closing and conducting due diligence on potential fund investments, or making an investment on behalf of the fund.

Some commenters suggested that we also apply legacy status to the disclosure portions of the preferential treatment rule so that the rule would only apply to new agreements (*e.g.,* side letters) entered into after the effective/compliance date.[953] These commenters noted that side letters are negotiated on a confidential basis and requiring disclosure of such bespoke terms would violate existing agreements.[954] Also, they argued that applying the rule to existing side letters would result in repapering costs to advisers and investors.[955] We are not applying legacy status to the disclosure portions of the preferential treatment rule because we believe that transparency of these terms is important and will not harm investors in the private fund. As a result, information in side letters that existed before the compliance date will be disclosed to other investors that invest in the fund post compliance date. Advisers are not required to disclose the identity of the specific investor that received a preferential term and can choose to anonymize that information. Commenters also opposed any application of the rule that would require retroactive changes to existing side letters, and we believe requiring the disclosure of side letters that were entered into before the compliance date, rather than the outright prohibition of preferential terms under existing side letters, is the best path forward to avoid the costs associated with rewriting and renegotiating existing agreements.[956] Similarly, we are not applying legacy status to the aspects of the restricted activities rule with disclosure-based exceptions because transparency into these practices is important and will not harm investors in the private fund.

This legacy treatment is designed to address commenters' concerns that the rules would require advisers and investors to renegotiate contractual agreements at a significant cost to the industry,[957] including for investors that may not have internal counsel to renegotiate contracts with advisers. Moreover, requiring advisers and investors to modify fund terms or alter their rights in order to comply with the rules would likely require the private funds industry to devote substantial time to such process (rather than focusing on the investment process) and yield unintended consequences for the industry.

The legacy provisions apply with respect to contractual agreements that (i) govern the fund, which include, but are not limited to, the private fund's operating or organizational agreements (*e.g.,* the limited partnership agreement, the limited liability company agreement, articles of association, or by-laws), the subscription agreements, and side letters and (ii) govern the borrowing, loan, or extension of credit entered into by the fund, which include, but are not limited to, the foregoing agreements from clause (i), if applicable, as well as promissory notes and credit agreements. As discussed above, amendments to governing documents warrant legacy treatment because of how disruptive and costly that process can be. We view the following as examples of amendments to such governing agreements: (i) changing or removing redemption terms for one or more investors where such terms are specified in the governing agreement; and (ii) removing terms from a side letter that granted an investor redemption rights or periodic reporting about the fund's holdings or exposures.[958] In contrast, disclosure of information (*e.g.,* under the disclosure portion of the preferential treatment rule and the restricted activities rule) is not as burdensome or disruptive and therefore does not warrant legacy treatment.

The legacy provisions apply only with respect to advisers' existing agreements with parties as of the compliance

[948] *See, e.g.,* SIFMA–AMG Comment Letter I; NSCP Comment Letter; Chamber of Commerce Comment Letter; Segal Marco Comment Letter; Schulte Comment Letter; BVCA Comment Letter; Invest Europe Comment Letter; PIFF Comment Letter; MFA Comment Letter I; AIMA/ACC Comment Letter; SBAI Comment Letter; GPEVCA Comment Letter; Top Tier Comment Letter; George T. Lee Comment Letter; CCMR Comment Letter I; Andreessen Comment Letter; Ropes & Gray Comment Letter; NYC Bar Comment Letter II; Pathway Comment Letter; Cartwright et al. Comment Letter; Canada Pension Comment Letter.

[949] *See, e.g.,* Comment Letter of Michelle Katauskas (Apr. 19, 2022); CVCA Comment Letter.

[950] *See, e.g.,* Cartwright et al. Comment Letter.

[951] *See* final rule 211(h)(2)–1(b). For the avoidance of doubt, and for the reasons specified in section II.E.2.a) above, we have specified that the legacy status provision does not permit advisers to charge for fees and expenses related to an investigation that results or has resulted in a court or governmental authority imposing a sanction for a violation of the Act or the rules promulgated thereunder.

[952] *See* final rules 211(h)(2)–1(b) and 211(h)(2)–3(a).

[953] *See, e.g.,* SBAI Comment Letter; Comment Letter of CompliDynamics APC (Apr. 24, 2022); Dechert Comment Letter; NYC Comptroller Comment Letter; Ropes & Gray Comment Letter.

[954] *See, e.g.,* SBAI Comment Letter; Dechert Comment Letter (stating that ''[t]hese arrangements were reached with the general expectation of confidentiality'').

[955] *See, e.g.,* NYC Comptroller Comment Letter; SBAI Comment Letter.

[956] *See, e.g.,* Canada Pension Comment Letter; Pathway Comment Letter.

[957] MFA Comment Letter I; PIFF Comment Letter; AIMA/ACC Comment Letter; SIFMA–AMG Comment Letter I.

[958] We would also interpret the legacy status provision for the borrowing restriction to apply to existing borrowings from a private fund that has commenced operations as of the compliance date and that were entered into in writing prior to the compliance date. Thus, an adviser would not be required to seek consent for such existing borrowings for purposes of the final rule.

date.[959] As a result, an adviser may not add parties to the side letter after the compliance date in order to do indirectly what it is prohibited from doing directly.[960] However, we would not view an adviser to a fund who admits new investors to an existing fund as violating the legacy provisions to the extent the applicable terms are set forth in the fund's limited partnership (or similar) agreement and applicable to all investors.

We are not providing legacy status under the other final rules because we do not believe that the requirements of those rules will typically require advisers and investors to amend binding contractual agreements. Also, the quarterly statement rule, the audit rule, the disclosure aspects of the restricted activities rule, and the adviser-led secondaries rule do not flatly prohibit activities, except for the charging of fees and expenses related to sanctions for violations of the Act. Rather, these rules generally require advisers to provide certain information to or obtain consent from investors.

V. Other Matters

Pursuant to the Congressional Review Act,[961] the Office of Information and Regulatory Affairs has designated this rule a ''major rule'' as defined by 5 U.S.C. 804(2). If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

VI. Economic Analysis

A. Introduction

We are mindful of the costs imposed by, and the benefits obtained from, the final rules. Whenever we engage in rulemaking and are required to consider or determine whether an action is necessary or appropriate in the public interest, section 202(c) of the Advisers Act requires the Commission to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. The following analysis considers, in detail, the potential economic effects that may result from these final rules, including the benefits and costs to market participants as well as the implications of the final rules for efficiency, competition, and capital formation.

Where possible, the Commission quantifies the likely economic effects of its final amendments and rules. However, the Commission is unable to quantify certain economic effects because it lacks the information necessary to provide estimates or ranges of costs. Further, in some cases, quantification would require numerous assumptions to forecast how investment advisers and other affected parties would respond to the amendments and rules, and how those responses would in turn affect the broader markets in which they operate. In addition, many factors determining the economic effects of the amendments and rules would be firm-specific and thus inherently difficult to quantify, such that, even if it were possible to calculate a range of potential quantitative estimates, that range would be so wide as to not be informative about the magnitude of the benefits or costs associated with the rules and amendments. Many parts of the discussion below are, therefore, qualitative in nature. As described more fully below, the Commission is providing a qualitative assessment and, where feasible, a quantified estimate of the economic effects.

B. Broad Economic Considerations

As discussed above, private fund assets under management have steadily increased over the past decade.[962] Additionally, private funds and their advisers play an increasingly important role in the lives of millions of Americans planning for retirement.[963] While private funds typically issue their securities only to certain qualified investors, such as institutions and high net worth individuals, individuals have indirect exposure to private funds through those individuals' participation in public and private pension plans, endowments, foundations, and certain other retirement plans, which all invest directly in private funds.[964]

Many commenters argued in response to the Proposing Release that the private fund industry is competitive and not in need of further regulation, and that private incentives and negotiations already yield competitive outcomes.[965] Other commenters stated that the Proposing Release did not demonstrate or provide evidence of a market failure to provide a rationale for the proposed rules, or did not provide sufficient quantifiable justification of the benefits of the rule relative to the costs.[966] These comments also generally stated that financial regulation in the absence of such market failures results in negative unintended consequences, such as reduced capital formation, higher prices, or lower overall economic activity.[967] Commenters stated that new regulations, if any, should prioritize or be limited to ensuring full and fair disclosure.[968]

One commenter representing a fund adviser group stated that the development of the potentially harmful practices at issue in the proposal is evidence of market efficiency, as it shows the development of differentiated investor terms that are responsive to

[959] We anticipate that the applicable parties to fund governing documents generally would be the general partner/adviser and investors; however, we used a broader term because some investors may authorize other persons to sign documents on their behalf, such as nominees. Similarly, in the context of certain non-U.S. funds, the parties to the governing agreements may be a board of directors or certain other persons, acting on the fund's or the adviser's behalf.

[960] *See* section 208(d) of the Advisers Act.

[961] 5 U.S.C. 801 *et seq.*

[962] *See supra* section I; *see also infra* section VI.C.1.

[963] *Id.*

[964] *Id.*

[965] *See, e.g.,* MFA Comment Letter I, Appendix A (''The Commission fails to consider that sophisticated investors invest in private funds and does not establish that sophisticated investors need the purported protections outlined in the Proposal.''); AIC Comment Letter I, Appendix 1 (''Private equity is a competitive industry with thousands of advisory firms on one side and sophisticated investors on the other side. Certain characteristics of the private equity industry, which the Commission is concerned about, emerge as a result of negotiations between sophisticated parties, and the literature provides economic reasons for these patterns in the data.''); AIC Comment Letter I, Appendix 2 (''If investment advisers all have market power and private funds are in short supply, LPs will have little bargaining power if they wish to be included in a particular fund. By contrast, if the IAs compete to attract investable resources, the supply of private funds should be substantial and LPs should be able to negotiate contractual terms that reflect their preferences and trade-offs. In particular, if the SEC has identified practices that are generally viewed negatively by LPs, an adviser that tried to impose these practices will find it more difficult to attract investments than one who offers some flexibility. There are many IAs offering private funds but, unfortunately, the Proposal and economic analysis provide no evidence about their market power. Yet this assessment should have a first-order impact on appropriate regulatory changes.''); Comment Letter of Professor William Clayton (Apr. 21, 2022) (''Clayton Comment Letter I'') (''The Proposal also includes various explanations for why bargaining in private funds might be leading to unsatisfying outcomes. Interestingly, these claims are not presented as part of a clear and unified thesis for why suboptimal bargaining happens in this industry. Instead, the staff's discussion of bargaining problems is scattered throughout the Proposal, and one might miss the descriptions of these bargaining problems if one is not looking carefully for them.'').

[966] *See, e.g.,* ATR Comment Letter; Comment Letter of Harvey Pitt (Apr. 18, 2022) (''Harvey Pitt Comment Letter''); SBAI Comment Letter; LSTA Comment Letter, Exhibit C; Cartwright et al. Comment Letter.

[967] *See, e.g.,* AIC Comment Letter I, Appendix 1; Segal Marco Comment Letter; SBAI Comment Letter.

[968] *See, e.g.,* Clayton Comment Letter I; MFA Comment Letter I; Dechert Comment Letter.

unique investor needs.[969] Commenters representing advisers also stated that the growth of private funds provides evidence that the market is not in need of further regulation,[970] and that the number of private fund advisers and low concentration of assets under management indicate the private equity market is competitive.[971] One investor comment letter also stated that private markets have ''thrived,'' stating that investors are well-compensated for the risks they face.[972]

We view these commenters' statements as contributing to three principal arguments that will be analyzed in this section.[973] First, commenters' statements contribute to an argument that the size and sophistication of private fund investors indicates they are able to negotiate with their advisers for themselves.[974] Second, commenters' statements contribute to an argument that if any potential private fund investor were arguably unable to sufficiently negotiate for its interests in a private fund, the investor could instead invest in publicly-traded securities along with a range of other available investment options.[975] This would indicate that private fund investors allocating to private fund investments must have sufficient information to be responsibly making their current allocations.[976] Third, as a closely related matter, commenters' statements contribute to an argument that new regulations, if any, should prioritize enhancing disclosures to help ensure private fund investors have sufficient information.[977]

Separately, one commenter stated that the proposal failed to meet the Office of Management and Budget's guidelines for performing a regulatory impact analysis as set out under certain executive orders and laws.[978] The Commission was not required to perform a regulatory impact analysis but complied with the Regulatory Flexibility Act and the Paperwork Reduction Act and included a robust economic analysis in the Proposing Release.[979]

Conversely, several investor commenters provided insight into the specific private fund market structures and resulting market failures that motivate regulation of private fund advisers and inform the specific types of regulations that would be appropriate. Specifically, investor commentary suggests that investors face difficulties in negotiating reforms because of the bargaining power held by fund advisers and because of the bargaining power held by larger investors who are able to secure preferential terms that carry a risk of having a material, negative effect on other investors.

Analysis of industry comments demonstrates that fund advisers have multiple sources of bargaining power, which we discuss in turn, and we also discuss the bargaining power held by certain investors that may harm other investors with less bargaining power.[980] We specifically have analyzed all three categories of the broad arguments above. That is, we have analyzed below market failures that can prevent private fund investors from efficiently negotiating for themselves with private fund advisers. Second, we have analyzed below market failures that can prevent private fund investors from being able to exit their private fund adviser negotiations, including market failures that prevent private fund investors from exiting private fund allocations entirely in favor of publicly traded securities or other investment options. Third, we have analyzed the extent to which market failures could have been addressed by disclosure and, in some cases, consent requirements alone. To the extent that these market failures negatively affect the efficiency with which investors search for and match with advisers, the alignment of investor and adviser interests, investor confidence in private fund markets, or competition between advisers, then the final rules may improve efficiency, competition, and capital formation in addition to benefiting investors.[981] For example, an academic study found that the passing of regulation requiring advisers to hedge funds to register with the SEC reduced misreporting of results to hedge fund investors, misreporting increased on the overturn of that legislation, and that the passing of the Dodd-Frank Act (which reinstated certain regulations for hedge funds) resulted in higher inflows of capital to hedge funds, indicating that hedge fund investors view regulatory oversight as protecting their interests.[982]

This analysis yields six key conclusions. First, investors and advisers may have asymmetric abilities to gather information, as fund advisers often have greater information as to their negotiation options available to them than do many investors. Second, it may be difficult solely as a matter of coordination for private fund advisers to adopt a common, standardized set of detailed disclosures and possibly further consent requirements that achieve sufficient transparency. The remaining sources of asymmetric bargaining power between investors and advisers and among investors necessitate reforms beyond disclosures and consent requirements. Third, investors have worse outside options to a given negotiation than the adviser, including cases where investors are limited in their ability to exit a negotiation with a private fund adviser in favor of turning to public markets or other investment options. Fourth, these descriptions of bargaining difficulties for investors are consistent with a view

[969] AIMA/ACC Comment Letter.

[970] *See, e.g.,* AIMA/ACC Comment Letter; AIC Comment Letter I, Appendix 1; MFA Comment Letter I, Appendix A.

[971] Comment Letter of Committee on Capital Market Regulation (May 25, 2023) (''CCMR Comment Letter IV''); CCMR, A Competitive Analysis of the U.S. Private Equity Fund Market (Apr. 2023), *available at https://capmktsreg.org/wp-content/uploads/2023/04/CCMR-Private-Equity-Funds-Competition-Analysis-04.11.20231.pdf.*

[972] OPERS Comment Letter.

[973] We discuss other commenter concerns, such as commenter concerns on specific economic aspects of individual rules, throughout the remainder of section VI.

[974] *See, e.g.,* Harvey Pitt Comment Letter; AIC Comment Letter I, Appendix 2; OPERS Comment Letter.

[975] *See, e.g.,* AIC Comment Letter I; AIC Comment Letter I, Appendix 1; MFA Comment Letter I; CCMR Comment Letter IV.

[976] *Id.*

[977] *See, e.g.,* Clayton Comment Letter I; MFA Comment Letter I; Dechert Comment Letter.

[978] *See* LSTA Comment Letter, Exhibit C.

[979] The Commission is subject to the Paperwork Reduction Act of 1995 (''PRA''), the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA''), and the Regulatory Flexibility Act (''RFA''). *See also* Staff's ''Current Guidance on Economic Analysis in SEC Rulemaking'' (March 16, 2012), available at *https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf* (''Staff's Current Guidance on Economic Analysis in SEC Rulemaking''). The commenter also referred to the Unfunded Mandate Reform Act of 1995, but that Act does not apply to rules issued by independent regulatory agencies. See 2 U.S.C. 1501 et seq, stating ''The term 'agency' has the same meaning as defined in section 551(1) of title 5, United States Code, but does not include independent regulatory agencies.'' *See also* Cong. Research Serv., Unfunded Mandates Reform Act: History, Impact, and Issues (July 17, 2020), *available at https://crsreports.congress.gov/product/pdf/R/R40957/108* (noting ''[UMRA] does not apply to duties stemming from participation in voluntary federal programs [or] rules issued by independent regulatory agencies''). *See also infra* section VIII.

[980] The Proposing Release also considered whether conflicts of interest associated with specific contractual terms themselves constituted a market failure preventing private reform. Proposing Release, *supra* footnote 3, at 214–215. However, commenters argued that conflicts of interest arising from specific contractual terms after the investor enters into a relationship cannot constitute a market failure, and the analysis must instead consider why investors accept contractual terms associated with conflicts of interest in the first place. *See, e.g.,* Clayton Comment Letter I.

[981] *See infra* section VI.E. *See also, e.g.,* Consumer Federation of America Comment Letter.

[982] Stephen G. Dimmock & William Christopher Gerken, *Regulatory Oversight and Return Misreporting by Hedge Funds,* 20 Rev. Fin., Euro. Fin. Assoc. 795–821 (2016), *available at https://ssrn.com/abstract=2260058.*

that smaller investors who lack bargaining power also face a collective action problem. Fifth, even if investors could coordinate, there is substantial variation across investors in terms of their ability to bargain with private fund advisers, and larger investors with more bargaining power may benefit from using their bargaining power to extract terms that may risk materially, negatively affecting other investors. Lastly, there may be additional internal principal-agent problems at private fund investors, between investment committees and their own beneficiaries, in which investment committees have limited incentives to intensely negotiate for reforms that are in the interests of their beneficiaries. We discuss each of these issues in turn in the remainder of this section.

First, investors and advisers may have asymmetric abilities to gather information, as fund advisers often have greater information as to their negotiation options available to them than do many investors.[983] We understand many investors lack the resources to negotiate and conduct due diligence with a large number of fund advisers simultaneously. As one commenter states, each investor negotiates the private fund terms on a separate basis with the fund adviser.[984] This problem is exacerbated by the fact that many investors' internal diversification requirements and objectives and underwriting standards generally leave them with a smaller pool of advisers with whom they can negotiate.[985] One commenter and industry report further stated that "[c]onversations with industry parties (including several advisers and consultants) and directly with [investors] suggest that there may only be a 'handful' or 'a dozen' eligible funds for a given investment" when taking into account the investor's limitations on the size of the investor's potential investments, and diversification across vintage years, size, sector, strategy, and geography.[986] Having a smaller pool of advisers with whom investors can negotiate reduces their access to information on what terms are consistent with the market.

Meanwhile, and by contrast, many fund advisers can negotiate with comparatively more investors simultaneously. In particular, although advisers face restrictions around their ability to admit certain investors such as benefit plans subject to ERISA,[987] advisers are typically less restricted in their ability to market to and accept investments from a wide variety of investors as compared to investor ability to negotiate and invest with a wide variety of advisers. This increases the adviser's information as to what terms may be accepted by different investors.

The ILPA comment letter and industry report also states that many investor negotiations are with advisers that are represented by the same law firms. As a result, advisers represented by those law firms gain bargaining power from being able to gather information about negotiations between other investors and other advisers represented by the same law firm.[988] For example, in private equity, the leading five global law firms represented advisers to private funds that raised over $380 billion in capital from October 2021 to September 2022 from global investors, and the leading 10 represented advisers who raised almost $500 billion in capital.[989] A single law firm represented advisers to private funds that accounted for $171 billion of that capital.[990] In the first half of 2022, total capital raised by private equity funds globally accounted for $337 billion.[991] Comparing this to the amounts raised by private funds represented by leading law firms indicates the leading 10 law firms represented funds that likely accounted for approximately 75% of global private equity capital raised in 2022, and one law firm alone represented funds that likely accounted for approximately 25% of global private equity capital raised in 2022.[992]

However, investor consultants can also provide services such as negotiating for fee reductions, providing analytics on a specific fund or investor portfolio performance, or valuation reporting, among others.[993] These investor consultants may partially or fully offset the information asymmetry and resulting bargaining power that advisers receive from industry consolidation of law firms. We have considered that the ILPA comment letter and report does not discuss how enhanced information for advisers from adviser law firm concentration may be mitigated by investors relying on investment consultants, who provide advice to investors with large amounts of assets and may provide preliminary screens of

[983] Comment Letter of Prof. William Clayton (Dec. 22, 2022) ("Clayton Comment Letter II") (citing "Insufficient information on 'what's market' in fund terms" as a reason LPs are accepting poor legal terms in LPAs). This evidence has been corroborated in industry literature and by another commenter. *See* Comment Letter of Institutional Limited Partners Association (Mar. 9, 2023) ("ILPA Comment Letter II"); ILPA, The Future of Private Equity Regulation, Insight Into the Limited Partner Experience & the SEC's Proposed Private Fund Advisers Rule (2023), *available at https://ilpa.org/wp-content/uploads/2023/03/ILPA-SEC-Private-Fund-Advisers-Analysis.pdf*; ILPA, Private Fund Advisers Data Packet, Companion Data Packet to the Future of Private Equity Regulation Analysis (2023), *available at https://ilpa.org/wp-content/uploads/2023/03/ILPA-Private-Fund-Advisers-Data-Packet-March-2023-Final.pdf*; William W. Clayton, *High-End Bargaining Problems,* 75 Vand. L. Rev. 703 (2022), *available at https://vanderbiltlawreview.org/lawreview/wp-content/uploads/sites/278/2022/04/1-Clayton-Paginated-v3.pdf*; Leo E. Strine, Jr. & J. Travis Laster, *The Siren Song of Unlimited Contractual Freedom, in* Research Handbook on Partnerships, LLCs and Alternative Forms of Business Organizations (Robert W. Hillman and Mark J. Loewenstein eds., 2015) ("Based on the cases we have decided and our reading of many other cases decided by our judicial colleagues, we do not discern evidence of arms-length bargaining between sponsors and investors in the governing instruments of alternative entities. Furthermore, it seems that when investors try to evaluate contract terms, the expansive contractual freedom authorized by the alternative entity statutes hampers rather than helps. A lack of standardization prevails in the alternative entity arena, imposing material transaction costs on investors with corresponding effects for the cost of capital borne by sponsors, without generating offsetting benefits. Because contractual drafting is a difficult task, it is also not clear that even alternative entity managers are always well served by situational deviations from predictable defaults.").

[984] *See* NY State Comptroller Comment Letter.

[985] *Id.; see also, e.g., Pension Funds, What is a Pension Fund?,* CFA Institute (2023), *available at https://www.cfainstitute.org/en/advocacy/issues/pension-funds#sort=%40pubbrowsedate%20descending.*

[986] ILPA Comment Letter II; The Future of Private Equity Regulation, *supra* footnote 983, at 30. While commenters also discussed limitations based on institutional track records, we do not consider those to be as relevant of restrictions contributing to market failures, because competitive forces operating correctly will also result in advisers with stronger institutional track record having greater bargaining power.

[987] For example, an employee benefit plan or pension plan subject to ERISA may be required to redeem its interest under certain circumstances to prevent the fund's assets from becoming plan assets of the investor, and such requirements for those investors may limit an adviser's ability to admit those plans as an investor. *See, e.g.,* NEBF Comment Letter.

[988] ILPA Comment Letter II; The Future of Private Equity Regulation, *supra* footnote 983, at 4.

[989] Carmela Mendoza, *PEI Fund Formation League Table Reveals Industry's Top Law Firms,* Priv. Equity Int'l (Feb. 15, 2023), *available at https://www.privateequityinternational.com/pei-fund-formation-league-table-reveals-industrys-top-law-firms/.*

[990] *Id.*

[991] Carmela Mendoza, *Fundraising Sees $122 Billion Drop in the First Half of 2022,* Priv. Equity Int'l (July 28, 2022), *available at https://www.privateequityinternational.com/fundraising-sees-122bn-drop-in-the-first-half-of-2022.*

[992] *Id.* These figures are global, and so comparable figures for the U.S. market that will be subject to the final rules may differ from those presented here. We are not aware of data on comparable figures for the U.S. market that will be subject to the final rules. However, North American private equity funds accounted for more than 40% of all private equity capital raised in the first half of 2022, which limits how much the law firm concentration of private fund capital raises may differ for U.S. markets in comparison to global markets. *Id.*

[993] *See, e.g., Services,* Albourne, *available at https://www-us.albourne.com/albourne/services.*

advisers or databases of information on advisers.[994] For example, in principle and given sufficient bargaining power by investor consultants, investor consultant screens of advisers could filter advisers based on offerings of investor-friendly contractual terms and quickly provide investors with complete information as to the landscape of those investor-friendly contractual terms, thereby inducing advisers to offer more investor-friendly terms over time.

However, there are two reasons we believe the involvement of investor consultants may not sufficiently offset all information asymmetries and resulting bargaining asymmetries. First, one survey result indicates that these consultants may not entirely offset all such information asymmetries, as the survey reports that 73% of private equity investor respondents disagree or strongly disagree with the statement that the private equity industry is unconcentrated, such that investors have flexibility to switch advisers.[995] Almost all respondents reported that the starting point of contractual LPA terms and the final negotiated LPA terms have become more adviser-friendly over the last three years.[996] Because at least one commenter has stated that such survey results may not be reliable, based on a statement that investors bargaining with advisers may rationally seek the assistance of outside parties such as industry researchers to alter negotiation outcomes even absent any market failure,[997] we have further considered non-survey evidence. Second, while there is not comprehensive data comparing industry concentration of investor consultants to industry concentration of adviser law firms, one industry report shows that the investor consultant industry may be substantially less concentrated than the adviser law firm industry, as the report shows 231 public pension plans reported commitments of $190.8 billion to private funds in 2021, and the top five consultants advised $23.5 billion.[998] Similarly, for private equity in 2022, a report shows 155 public pension plans reported commitments of $88.4 billion to private equity funds, the top consultant advised $7.2 billion (8.2%), top five consultants advised $18.2 billion (20.6%) and the top 10 consultants advised $21.7 billion (24.5%).[999] While these data points may have some differences in focus from the industry report on adviser law firm concentration above (for example, this concentration measure pertains to the United States, while the report above considers global concentration), the concentration measures of the two industries in these reports differ so substantially that we believe they are informative of potential overall differences in market power between adviser law firms and investor consultants.

The second factor that may give advisers bargaining power is that it may be difficult solely as a matter of coordination for private fund advisers to adopt a common, standardized set of detailed disclosures and consent practices that achieve sufficient transparency, because investors and advisers compete and negotiate independently of each other on many dimensions, including performance statistics, management fees, fund expenses, performance-based compensation, and more.[1000] For example, recent industry literature has documented ongoing challenges in achieving standardization of disclosures around the impact of subscription lines of credit on performance.[1001]

While asymmetric information and difficulties in coordinating standardized disclosures and consent practices provide an economic rationale for new regulations for practices of private fund advisers to the extent that those issues result in investor harm or negatively affect efficiency, competition, or capital formation, they do not offer a complete picture as to the necessary degree of regulation. As one commenter states, many imbalances in bargaining power can be resolved through enhanced disclosure alone, and do not necessitate either prohibiting any activities or making any non-disclosure activities mandatory.[1002] We agree that policy decisions can benefit from taking into account the causes of bargaining failures or other market frictions.[1003]

While this commenter did not discuss consent requirements,[1004] commenters generally contemplated consent requirements as potential policy choices for certain aspects of the final rules.[1005] We have therefore also considered consent requirements, in addition to disclosure requirements, as potential policy solutions to the bargaining imbalances described in this release.[1006] In particular, consent requirements may be effective policy solutions in cases where investors and advisers have asymmetric information, but the nature and degree of asymmetric information is uncertain or may change over time, such that disclosure requirements may be difficult to tailor in a way that resolves the asymmetry of information on their own without further consent practices. For example, commenters stated that several of the proposed prohibited activities, such as advisers borrowing from their funds, may be beneficial to the fund and its investors,[1007] while the Proposing Release contemplated ways in which these activities may harm the fund and its investors.[1008] Whether the activity benefits the fund and its investors, or the adviser at the expense of the fund and its investors, can

[994] *See, e.g., Asset Managers' Latest Big Investment: Consultant Relations,* Chief Investment Officer (July 8, 2016), *available at https://www.ai-cio.com/news/asset-managers-latest-big-investment-consultant-relations/*.

[995] ILPA Comment Letter II; The Future of Private Equity Regulation, *supra* footnote 983. If the industry were unconcentrated and investors were free to flexibly switch advisers, economic theory would predict that competition between advisers would absolve asymmetries of bargaining power, as advisers would have to offer investors more attractive terms, such as more transparency and disclosure rights, in order to secure investor business.

[996] ILPA Comment Letter II; The Future of Private Equity Regulation, *supra* footnote 983.

[997] *See, e.g.,* Harvey Pitt Comment Letter.

[998] Andrés Ramos, Content Marketing Specialist, Nasdaq Private Fund Solutions, *Understanding the Consultant Landscape in the Private Markets, available at https://privatemarkets.evestment.com/blog/understanding-the-consultant-landscape-in-the-private-markets/*; NASDAQ, Private Fund Trends Report 2021–2022, *available at https://www.nasdaq.com/solutions/asset-owners/insights/private-fund-trends*.

[999] Private Fund Trends Report 2022–2023, *supra* footnote 998.

[1000] Academic literature discussed in the comment file debates whether privately organized standardized disclosures are more or less efficient than regulated or mandated disclosures. *See, e.g.,* Memo Re: Aug. 18, 2022, Meeting with Prof. William Clayton; *see also, e.g.,* Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors,* 70 Va. L. Rev. 669 (1984). Certain investors and industry groups have encouraged advisers to adopt uniform reporting templates to promote transparency and alignment of interests between advisers and investors. *See, e.g., Reporting Template,* ILPA, *available at https://ilpa.org/reporting-template/*. Despite these efforts, many advisers still do not provide adequate disclosure to investors. In 2021, 59% of LPs in a survey reported receiving the template more than half the time, indicating that LPs must continue to use their negotiating resources to receive the template. *See infra* section VI.C.3; *see also* ILPA Comment Letter II; The Future of Private Equity Regulation, *supra* footnote 983, at 17; ILPA Private Fund Advisers Data Packet, *supra* footnote 983.

[1001] *See infra* section VI.C.3; *see also* ILPA, Enhancing Transparency Around Subscription Lines of Credit, Recommended Disclosures Regarding Exposure, Capital Calls and Performance Impacts (June 2020), *available at https://ilpa.org/wp-content/uploads/2020/06/ILPA-Guidance-on-Disclosures-Related-to-Subscription-Lines-of-Credit_2020_FINAL.pdf*.

[1002] Clayton Comment Letter II.

[1003] *Id.*

[1004] *Id.*

[1005] *See, e.g.,* BVCA Comment Letter; MFA Comment Letter I; AIMA/ACC Comment Letter.

[1006] *See infra* sections VI.D, VI.F.

[1007] *See, e.g.,* SBAI Comment Letter; CFA Comment Letter I; AIC Comment Letter I.

[1008] Proposing Release, *supra* footnote 3, at 232.

depend on the terms and price of the advisers' activity, the reasons for the adviser undertaking the activity, or both. In these cases, it may be difficult for investors, with disclosure alone, to analyze the implications of the advisers' activity, and it may be difficult for disclosure requirements alone to capture the asymmetric information possessed by the adviser that would benefit the investor. We believe these cases motivate consent requirements in addition to disclosure requirements in certain cases.

We believe that many of the bargaining imbalances described in the Proposing Release and in this release may be improved through enhanced disclosure and, in some cases, consent requirements, and have tailored many of the final rules accordingly. This includes revising several proposed rules that would have prohibited certain activities outright to instead provide for certain exceptions in the final rules where the adviser makes an appropriate enhanced disclosure and, in some cases, obtains investor consent. We believe these revisions substantially preserve economic benefits, including positive effects on the process by which investors search for and match with advisers, the alignment of investor and adviser interests, investor confidence in private fund markets, and competition between advisers. Because consent requirements for certain restricted activities also directly enhance the bargaining power of investors, by providing investors an opportunity to offer consent only upon receiving certain concessions, the inclusion of certain consent requirements also enhances investor ability to secure additional information from advisers. These positive effects may improve efficiency, competition, and capital formation in addition to benefiting investors,[1009] while reducing the risks of the negative unintended consequences identified by commenters.[1010]

However, we believe that certain targeted further reforms, namely the prohibition of certain preferential terms that the adviser reasonably expects would have a material, negative effect on other investors and the mandatory audits, are necessitated by several additional sources of asymmetric bargaining power between investors and advisers and among investors. We believe those imbalances are not fully resolved by enhanced disclosure and would also not be fully resolved by requiring investor consent, and that those imbalances may further negatively affect the efficiency with which investors search for and match with advisers, the alignment of investor and adviser interests, investor confidence in private fund markets, and competition between advisers.

As a third source of bargaining power imbalances between investors and advisers, investors have worse outside options to a given negotiation than the adviser. As discussed above, many investors face complex internal administrative and regulatory requirements that govern their negotiations with advisers.[1011] This means that investors in private funds often face high upfront costs of identifying advisers who meet their administrative and regulatory requirements, with due diligence costs such as fees for investment consultants.[1012] The result is that, once a relationship with such an adviser is established, the cost of leaving that adviser to search for another adviser can be high, because many of these upfront costs of administrative and regulatory due diligence must be repeated. Investors may also have predetermined investment allocations to private funds, as stated by one commenter.[1013] For an investment committee of an investor with a predetermined investment allocation to private funds, they may have no outside option to a given negotiation at all, as they are required to allocate a set amount of funds to a private investment. Advisers may also benefit in the negotiation from knowing that an investment committee with a predetermined investment allocation to private funds must select an adviser within a certain time frame, and therefore may have limited ability to walk away from the negotiation and find a new adviser. This is consistent with one recent survey of attorneys representing private equity investors, in which over 40% of respondents reported that the investors were ''unable'' or unwilling to walk away from bad terms.[1014]

As a related matter, even outside these predetermined allocations, many public pension plans have turned to private funds in an attempt to address underfunding problems.[1015] The academic and industry literature has documented that U.S. public pension plans face a stark funding gap, in which states on average had less than 70% of the assets needed to fund their pension liabilities, with that figure for some states reaching as low as 34%.[1016] This further limits the ability of public pension plans, an important category of private fund investor, to exit a private fund negotiation and, for example, invest in public markets instead.

These issues indicate that many investors therefore have strong incentives to compromise to pursue repeat business with the same fund adviser,[1017] and that many investors negotiating with fund advisers simply do not have the outside option of turning to public markets. In the survey described above,[1018] nearly 60% of

[1009] *See infra* section VI.E.

[1010] *See, e.g.,* AIC Comment Letter I, Appendix 1.

[1011] *See supra* footnote 983–986 and accompanying text.

[1012] *See supra* footnote 993 and accompanying text.

[1013] *See, e.g., CalPERS Investment Fund Values,* CalPERS (Nov. 18, 2022), *available at https://www.calpers.ca.gov/page/investments/about-investment-office/investment-organization/investment-fund-values* (showing $48.8 billion or 11.5% asset allocation towards private equity); Oklahoma Municipal Retirement Fund, Audit Reports (2022), *available at https://www.okmrf.org/financial/#investments* (showing an allocation of approximately $50 million out of total investments of $600 million allocated to hedge fund investments); Healthy Markets Comment Letter I (''Many institutional private fund investors, such as public pension funds, have predetermined investment allocations to alternative investment strategies. As allocations to private fund investments have generally risen in recent years, investors have faced increased competition to participate in investment vehicles offered by leading advisers or specific attractive opportunities. In fact, as this competition for the opportunity to invest has increased, many institutional investors have been compelled to lower their demands upon private fund advisers, including accepting even egregious, anti-investor contractual provisions, such as purported waivers of liability.'').

[1014] Clayton Comment Letter II.

[1015] This is driven in part by private markets outperforming public benchmarks. Some commenters discussed the relative performance of private markets and public benchmarks. *See, e.g.,* CCMR Comment Letter IV.

[1016] *See, e.g.,* Professor Clayton Public Investors Article, *supra* footnote 12; Sarah Krouse, *The Pension Hole for U.S. Cities and States Is the Size of Germany's Economy,* Wall St. J. (July 30, 2018), *available at https://www.wsj.com/articles/the-pension-hole-for-u-s-cities-and-states-is-the-size-of-japans-economy-1532972501* (retrieved from Factiva database); Pew Charitable Trusts, The State Pension Funding Gap: 2017, Issue Brief (June 27, 2019), *available at https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/06/the-state-pension-funding-gap-2017.*

[1017] The asymmetries of information also contribute to investors having poor outside options to their negotiations: Because investors have less information as to what terms are market than do their private fund advisers, they face a more uncertain outcome as to what terms they might receive with their next adviser if they leave their current adviser. For risk-averse investors, this uncertainty incentivizes investors to accept terms in their current negotiation that they otherwise might not. *See, e.g.,* Clayton Comment Letter II; ILPA Comment Letter II; The Future of Private Equity Regulation, *supra* footnote 983; ILPA Private Fund Advisers Data Packet, *supra* footnote 983.

[1018] Clayton Comment Letter II. This evidence has been corroborated in industry literature and by another commenter. *See* ILPA Comment Letter II; The Future of Private Equity Regulation, *supra* footnote 983; ILPA Private Fund Advisers Data Packet, *supra* footnote 983.

respondents reported ''fear of losing allocation'' as an explanation for why investors have accepted poor legal terms in LPAs.[1019] These asymmetries in bargaining power may be exacerbated for smaller investors: Nearly 50% of respondents reported having too small of a commitment size as an explanation for why investors have accepted poor legal terms.[1020]

Investors may have fewer outside options as to who their next negotiating partner will be if they leave their current private fund or other funds with the same adviser, for example because of the consolidation of law firms representing advisers.[1021] As a result, investors considering leaving a negotiation have a high probability of having to pay high fixed costs to find a new negotiating partner, only to end up negotiating with the same law firm again. As noted above, while many advisers benefit from the reliability and security of repeat investors, and face certain regulatory burdens such as restrictions around ERISA funds they are typically otherwise less restricted in their ability to market to and accept investments from a wide variety of investors.[1022] We believe these imbalances in bargaining power may be a factor in the cases of disadvantaged investors accepting fund terms in which the fund will not be audited or in which other investors will receive preferential treatment that may have a material, negative effect on other investors in the fund, and these imbalances are not resolved by disclosure.

Fourth, these descriptions of bargaining difficulties for investors are consistent with a view that smaller investors who lack bargaining power also face a collective action problem. Investors are unable to negotiate with each other because advisers often impose non-disclosure agreements or other confidentiality provisions that restrict each investor from being able to learn from the adviser who the other investors are, and as a result investors are hindered from collectively negotiating. To the extent that advisers have differential pricing power over different kinds of investors, they are incentivized to offer terms to some investors that extract surplus from investors with the least bargaining power and transfer it to the investors with the most bargaining power. The non-disclosure agreements and other confidentiality restrictions currently benefit larger investors who have sufficient bargaining power to negotiate unilaterally but may prevent smaller investors from engaging in collective action.

Specifically, contract terms that offer preferential treatment to advantaged investors may impose a negative externality on disadvantaged investors. If the disadvantaged investors could collectively bargain with the advantaged investors and the adviser, all parties could potentially agree to terms in which the disadvantaged investors would pay greater fees, the advantaged investors would pay reduced fees (or even received some fixed payout), and the preferential terms would be removed from the contract. As one commenter states, ''[p]rivately negotiating various side letters[,] however[,] has instead pitted LPs against one another rather than collectively trying to negotiate for a standard set of disclosures and investment terms from the GPs.'' [1023]

For example, when advisers offer preferential redemption terms to only certain advantaged investors that materially negatively affect other investors, those advantaged investors experience a reduction in the risk of their payouts from the private fund, and the disadvantaged investors who do not receive preferential redemption terms face an increase in the risk of their payouts from the private fund. Depending on the relative risk preferences of the two sets of investors, there may exist some payout from the disadvantaged investors to the advantaged investors in exchange for the removal of the preferential redemption terms that could leave all parties better off. Because contracts are individually negotiated between single investors and the adviser and because advisers are typically not permitted to reveal identities of other investors, which prevents investors from communicating with each other, there is no scope for a private resolution to this collective action problem.

Fifth, even if investors could coordinate, there is substantial variation across investors in the private fund space in terms of their ability to bargain, and larger investors with more bargaining power may benefit from using their bargaining power to extract terms that may risk materially, negatively affecting other investors. Not all private fund investors are large negotiators with the resources to bargain effectively, and the largest investors who negotiate the most intensely may not want to coordinate or collectively negotiate with smaller advisers or may benefit from negotiating separately from smaller advisers.

Specifically, as we discuss in detail further below, the ability for certain preferred investors with sufficient bargaining power to secure preferential terms that would have a material, negative effect on other investors leaves the preferred investors in a scenario where they can opportunistically ''hold-up'' other investors, exploiting their preferred terms.[1024] As a specific example of how this might occur, an adviser with repeat business from a large investor with early redemption rights and smaller investors with no early redemption rights may have adverse incentives to take on extra risk, as the adviser's preferred investor could exercise its early redemption rights to avoid the bulk of losses in the event an investment begins to fail. The result is that the larger investors, who can secure preferential redemption terms, benefit from having smaller investors in their funds who must negotiate independently and do not have the same bargaining resources as the larger investors.[1025] This is because preferential redemption rights gain value from the presence of other investors who can be ''held up,'' with investors sharing returns equally when investments succeed but disproportionately allocating losses to the smaller investors when an investment begins to fail.

Those private fund investors who are smaller than the largest investors, and therefore may be less able to bargain than the largest investors, may not be able to appreciate, even with disclosure, and also may not be able to appreciate after providing investor consent, the full ramifications of these bargaining outcomes or the contractual terms that they agree to in the case of preferential treatment that the adviser reasonably expects to have a material, negative effect on the investors who do not receive it. As stated above, in one recent survey of private equity investors, nearly 50% of respondents reported that they accept poor legal terms because the commitment size of their institution is too small,[1026] indicating potential unlevel playing fields for smaller investors who are the most likely to be the investors lacking bargaining power.

[1019] *Id.*

[1020] *Id.*

[1021] One commenter also stated that law firms that serve as external counsel to private equity managers have incentives to push back on investor-friendly terms. *See* Clayton Comment Letter II.

[1022] *See supra* footnote 987 and accompanying text.

[1023] Comment Letter of Americans for Financial Reform Education Fund, et al. (May 8, 2023) (''AFREF Comment Letter IV'').

[1024] *See infra* section VI.D.4.

[1025] Similar outcomes can arise in the case of preferential information. *See infra* section VI.D.4.

[1026] Clayton Comment Letter II.

One commenter stated that smaller investors receive less timely and complete information than other investors, indicating only certain investors receive preferential information.[1027] That commenter also stated that preferential fund terms primarily benefit larger, more advantaged investors.[1028]

This asymmetry in bargaining power across investors, and the lack of incentive to coordinate across investors with different levels of bargaining power, provides a specific economic rationale for the prohibition of certain preferential terms that would have a material, negative effect on other investors. Several commenters' letters supported this economic rationale, commenting on these types of asymmetries across investors for all categories of private funds.[1029] Because the preferential terms that are prohibited in the final rule are only those that the adviser reasonably expects to have a material, negative effect on other investors, we believe the rule is focused on the case where an investor's ability to extract such terms is itself evidence of substantial bargaining power on the part of the investor. This economic rationale is bolstered by the variation in commenter response to the proposal to prohibit certain preferential terms, with certain investors themselves opposing the prohibition and others supporting it.[1030]

These specific problems may be difficult, or unable, to be addressed via enhanced disclosures and consent requirements alone. For example, investors facing a collective action problem today, in which they are unable to coordinate their negotiations, would still be unable to coordinate their negotiations even if consent was sought from each investor for a particular adviser practice. As another example, in cases where certain preferred investors with sufficient bargaining power secure preferential terms over disadvantaged investors, majority consent by investor interest requirements may have minimal ability to protect the disadvantaged investors, as we would expect the larger, preferred investors to outvote the disadvantaged investors.

While there are cases where the prohibited preferential treatment terms can result in investor harm outside the context of redemptions, and we discuss all such cases below,[1031] the leading cases are focused on redemption rights, which may on average be more relevant for hedge funds and other liquid funds than for illiquid funds or other funds that offer more limited redemption or withdrawal rights. Therefore, with respect to the final rules prohibiting certain preferential treatment, we again believe the policy decision has benefited from taking into account the causes of bargaining failures or other market frictions.[1032]

As a final matter, one commenter points to additional internal principal-agent problems at private fund investors, between investment committees and their own beneficiaries, in which investment committees have limited incentives to intensely negotiate for reforms that are in the interests of their beneficiaries, but not necessarily further the interests of the investment committee.[1033] Conversely, investment committees may have incentives to maintain existing structures that are to their benefit, but are not in the interest of fund beneficiaries.[1034] For example, academic literature has theorized that staff members of institutional investors may have incentives to structure contracts in opaque ways to advance their own career interests, that staff at institutional investors may have incentives to demand overstated reported returns from fund advisers, or that institutional investor committees may have incentives to overinvest in private equity funds making investments in their local markets.[1035] Other literature has analyzed public pension plan investments in private funds more broadly and raised concerns as to whether public pension plan trustees and officials adequately protect the interests of their beneficiaries when negotiating.[1036]

In light of these enhanced considerations from the comment file, we can more closely evaluate statements by commenters presenting arguments that no further regulation is needed. In particular, and as briefly noted above, one commenter and industry report stated that, because the private equity industry has a large number of advisers and funds with low concentrations of assets under management and capital raised, the industry must already be competitive.[1037] While that commenter and report did not discuss hedge funds, that commenter and report stated that, for example, the capital raised by new funds established by the five largest PE fund advisers has not exceeded 15% of total capital raised by new PE funds from 2013–2021.[1038] The commenter and report conclude that, because the private equity industry is already highly competitive, further regulation would reduce competition in that market.[1039]

However, we believe this analysis may not fully take into account the imbalances and inefficiencies in the bargaining process discussed above. For example, this analysis does not take into account investor limitations on size of the investors' potential investments institutional track record, and diversification across vintage years, size, sector, strategy, and geography, and therefore overstates the number of advisers and funds available to any given investor.[1040] As another example, even though adviser law firm concentration may be offset by investor consultant concentration, an analysis of private equity industry concentration solely by counts of the number of private equity funds and advisers, and the distribution by assets under management, fails to take into account the effects of either adviser law firms or investor consultants.[1041] As a third example, the analysis does not take into consideration the fact that investors can have predetermined investment allocations to private funds that must be satisfied within a certain time frame, limiting their ability to freely exit negotiations.[1042] While these efficiencies and imbalances may be mitigated by having a marketplace with a large number of advisers, it may be

[1027] Healthy Markets Comment Letter I.

[1028] *Id.*

[1029] *See, e.g.,* AFREF Comment Letter IV; LACERS Comment Letter; NEBF Comment Letter; OFT Comment Letter.

[1030] *See, e.g.,* Carta Comment Letter; Meketa Comment Letter; Lockstep Ventures Comment Letter; LACERS Comment Letter; AFREF Comment Letter IV; NY State Comptroller Comment Letter; Weiss Comment Letter; AIC Comment Letter I, Appendix 2; MFA Comment Letter II.

[1031] *See infra* section VI.D.4.

[1032] *See supra* section VI.B.

[1033] *See* Clayton Comment Letter II; *see also, e.g.,* Yael V. Hochberg & Joshua D. Rauh, *Local Overweighting and Underperformance: Evidence from Limited Partner Private Equity Investments,* 26 Rev. Fin. Stds. 403 (2013); Blake Jackson, David C. Ling & Andy Naranjo, *Catering and Return Manipulation in Private Equity* (Oct. 11, 2022), *available at https://ssrn.com/abstract=4244467* (retrieved from SSRN Elsevier database).

[1034] *Id.*

[1035] *Id.*

[1036] Clayton Comment Letter II; *see also, e.g.,* Professor Clayton Public Investors Article, *supra* footnote 12.

[1037] CCMR Comment Letter IV; A Competitive Analysis of the U.S. Private Equity Fund Market, *supra* footnote 971. This commenter's analysis is limited to the private equity market. Other commenters also stated that there are a large number of private fund advisers in the industry more generally, without analyzing the concentration of capital raised or assets under management. *See supra* footnote 970 and accompanying text; *see also, e.g.,* AIMA/ACC Comment Letter; AIC Comment Letter I, Appendix 1; MFA Comment Letter I, Appendix A.

[1038] *Id.*

[1039] *Id.*

[1040] *See supra* footnote 986.

[1041] *See supra* footnotes 988 and accompanying text.

[1042] *See supra* footnotes 1013–1014 and accompanying text.

difficult for competitive forces solely driven by low industry concentration to fully resolve these issues with the bargaining process itself.

The commenter and report also argue that the presence of price competition in the market for private equity is evidence that the market is competitive and not in need of further regulation.[1043] However, the analysis considers only price competition and ignores competition over non-price contractual terms. An analysis of price competition overlooks the staff observations on harmful practices and non-price contractual terms contemplated in the Proposing Release and in this release, such as private fund advisers offering preferential redemption terms to only certain investors. Competition between advisers over whether they offer preferential redemption terms, or other non-price contractual terms, cannot be reliably measured in an analysis solely focused on price competition across advisers. As another commenter notes, academic literature has documented that among private fund advisers, there is substantial negotiation over non-price contractual terms.[1044] In particular, in a recent industry survey of ILPA members, almost all respondents reported that the starting point of contractual LPA terms and the final negotiated LPA terms have become more adviser-friendly over the last three years.[1045] As a final matter, price competition may vary in its intensity between different types of private funds in a way not accounted for by the CCMR comment letter and report. In a recent study on the performance of hedge fund fees, the authors find that hedge fund compensation structures have resulted in investors collecting only 36% of the returns earned on their invested capital (over the risk-free rate).[1046]

For these reasons, we believe certain particularly harmful practices can warrant stricter regulation, such as mandating protective actions like audits or prohibiting particularly problematic or harmful practices.[1047] For smaller investors with less bargaining power who may be more vulnerable, advisers may have conflicts of interest between the fund's interests and their own interests (or ''conflicting arrangements''). These conflicts reduce advisers' incentives to act in the best interests of the fund. For example, an adviser attempting to raise capital for a successor fund has an incentive to inflate valuations and performance measurements of the current fund.

Many commenters argued that private fund investors are sophisticated negotiators, and that the Commission should not insert itself into commercial negotiations between sophisticated parties.[1048] Other commenters highlighted specific proposed prohibited activities such as the prohibition on reducing adviser clawbacks for taxes paid and the prohibition on borrowing, and stated that the prohibited activities represent outcomes of sophisticated negotiations.[1049] Commenters also cited the overall burden of the rule, and expressed concern that the rule would negatively impact private fund competition and capital formation.[1050] Some of these commenters specifically expressed a concern that the impact on competition would occur because the compliance costs of the rule would cause smaller advisers to exit.[1051]

While we acknowledge commenters' concerns, we remain convinced by the evidence of market failures in the private fund adviser industry. We believe, as discussed further below, that these commenters fail to acknowledge that (i) the substantial growth of private funds has included interest and participation by smaller investors who may lack bargaining resources, and be more vulnerable than the largest investors,[1052] and (ii) many attorneys representing investors report in survey evidence that investors accept poor legal terms in negotiations because the commitment size of their institution is too small, or they have a fear of losing their allocation, or they are unable or unwilling to walk away from bad terms.[1053] Some commenters stated that the proposed prohibitions on certain preferential treatment would cause advisers to be less inclined to accept smaller investors,[1054] and while we agree that this could occur and some investors may face additional difficulties securing an investment in a private fund, we also believe this observation concedes the existence of smaller investors, who are more likely to lack bargaining resources.[1055] Another commenter, even though they did not describe specific structural elements of the private fund marketplace that result in market failures, broadly supported the view that the bargaining process in private fund negotiations is not even and requires further regulation.[1056]

We have revised the final rules accordingly to take into consideration the specific causes of bargaining failure. In doing so, we also believe we have not overly prescribed market practices. We also believe we have addressed commenters' concerns that overly prescriptive market practices should not be imposed based solely on self-reported survey evidence from investors, who may be incentivized to seek the assistance of industry researchers or the Commission to improve their negotiation outcomes, even absent any market failure.[1057] We have addressed this issue both by revising the final rules relative to the proposal, such as by revising the restricted activities rule to provide for certain exceptions where required disclosures are made and, in some cases, where investor consent is obtained, and by considering a wider

[1043] CCMR Comment Letter IV; A Competitive Analysis of the U.S. Private Equity Fund Market, *supra* footnote 971.

[1044] Clayton Comment Letter II; Paul Gompers & Josh Lerner, The Venture Capital Cycle, at 31–32, 45–47 (The MIT Press, 2002).

[1045] The Future of Private Equity Regulation, *supra* footnote 983; ILPA Private Fund Advisers Data Packet, *supra* footnote 983.

[1046] Itzhak Ben-David, Justin Birru & Andrea Rossi, *The Performance of Hedge Fund Performance Fees,* Fisher College of Bus. Working Paper No. 2020–03–014, Charles A. Dice Working Paper No. 2020–14, (June 24, 2020), *available at https://ssrn.com/abstract=3630723* (retrieved from SSRN Elsevier database).

[1047] That is, these additional bargaining power asymmetries are unlikely to be resolved by disclosure alone. Moreover, because the preferential treatment rule specifically considers the case where the adviser benefits larger investors at the expense of smaller investors, and because smaller investors generally have more limited ability to identify outside options to their current adviser, these market failures also are unlikely to be resolved by consent requirements. *See infra* section VI.D.4.

[1048] *See, e.g.,* PIFF Comment Letter; IAA Comment Letter; AIMA/ACC Comment Letter; BVCA Comment Letter; Comment Letter of Bill Huizenga and French Hill (Apr. 25, 2022); MFA Comment Letter I; Grundfest Comment Letter.

[1049] *See, e.g.,* Grundfest Comment Letter; AIC Comment Letter I; Ropes & Gray Comment Letter; SBAI Comment Letter; AIMA/ACC Comment Letter.

[1050] *See, e.g.,* Carta Comment Letter; Meketa Comment Letter; Lockstep Ventures Comment Letter; NY State Comptroller Comment Letter; AIC Comment Letter I, Appendix 1; AIC Comment Letter I, Appendix 2; MFA Comment Letter I, Appendix A.

[1051] *See, e.g.,* AIC Comment Letter I, Appendix 1; AIC Comment Letter I, Appendix 2; MFA Comment Letter I, Appendix A; NAIC Comment Letter. These commenters also expressed concerns that the loss of smaller advisers would result in reduced diversity of investment advisers, based on an assertion that most women- and minority-owned advisers are smaller and are smaller and associated with first time funds. To the extent compliance costs cause smaller advisers to exit, reduced diversity of investment advisers may be a negative effect of the rule. We discuss these effects further in section VI.E.2.

[1052] *See infra* section VI.C.1.

[1053] Clayton Comment Letter II; ILPA Comment Letter II; The Future of Private Equity Regulation, *supra* footnote 983; ILPA Private Fund Advisers Data Packet, *supra* footnote 983.

[1054] *See, e.g.,* Ropes & Gray Comment Letter.

[1055] *See infra* sections VI.C.1, VI.D.4.

[1056] ICCR Comment Letter.

[1057] *See, e.g.,* Harvey Pitt Comment Letter.

variety of evidence than self-reported survey evidence from investors.[1058]

In particular, we disagree with commenters who believe the Commission conceptualizes all investors as alike, or who interpret the Commission's goal as creating a one-size-fits-all solution for all private fund advisers.[1059] The variation in responses to surveys of investor groups,[1060] the variation identified by commenters in reporting preferences of investors,[1061] the variation identified by commenters in the degree to which different investors receive preferential treatment,[1062] the variation identified by commenters in terms of the different types of structures of private funds and how those structures meet investor needs,[1063] and all other instances of variation across fund outcomes are all substantial evidence of the variation in private fund investors. Moreover, the economic rationale for the prohibition on certain preferential terms that the adviser reasonably expects would have a material, negative effect on other investors relies substantially on a view that certain investors are larger, with more bargaining resources, and able to secure terms that leave them in an advantaged position relative to other investors. As stated above, this economic rationale is bolstered by the variation in commenter response to the proposal to prohibit certain preferential terms, with certain investors themselves opposing the prohibition and others supporting it.[1064]

We also believe we have preserved the ability for advisers and investors to flexibly negotiate fund terms, including via certain changes that are in response to commenters. For example, advisers and investors may still negotiate to identify any performance metrics that they believe will be beneficial to investors, so long as the minimum requirements of the quarterly statement rule are met.[1065] Advisers and investors may also still negotiate for preferential terms for certain investors, as long as those terms are properly disclosed and are not redemption rights or information that would likely have a material negative effect on other investors.[1066] Different investors with different risk preferences or different needs may also accept different redemption rights or information rights, as long as those rights and information are offered to all existing and future investors.[1067] Investors and advisers may further negotiate whether the adviser will engage in the restricted activities under the rule, subject to certain disclosure and, in some cases, consent requirements.[1068] Investor and adviser negotiation over the restricted activities may still include negotiations over which party will bear certain categories of risks based on investor and adviser risk preference, including compliance risks of the fund or adviser facing regulatory expenses, such as investigation expenses.[1069] Lastly, we have respected the different types of private fund structures and the needs of their investors, for example by not applying the private fund rules to advisers with respect to SAFs they advise,[1070] and with a provision of the mandatory audit rule that an adviser is only required to take all reasonable steps to cause its private fund client to undergo an audit that satisfies the rule when the adviser does not control the private fund and is neither controlled by nor under common control with the fund.[1071] We therefore believe the final rules mitigate burden where possible and continue to facilitate competition and facilitate flexible informed negotiations between private fund parties.[1072]

C. Economic Baseline

The economic baseline against which we evaluate and measure the economic effects of the final rules, including their potential effects on efficiency, competition, and capital formation, is the state of the world in the absence of the final rules. The economic analysis appropriately considers existing regulatory requirements, including recently adopted rules, as part of its economic baseline against which the costs and benefits of the final rule are measured.[1073]

Specifically, we consider the current business practices and disclosure practices of private fund advisers, as well as the current regulation and the forms of external monitoring and investor protections that are currently in place. In addition, in considering the current business, disclosure, and consent practices, we consider the usefulness of the information that investment advisers provide to investors about the private funds in which those investors invest, including information that may be helpful for deciding whether to invest (or remain invested) in the fund, monitoring an investment in the fund (in relation to fund documents and in relation to other funds), consenting to certain adviser activities, and other purposes. We further consider the effectiveness of current disclosures and consent practices in providing useful information to the investor. For example, fund disclosures and requirements to obtain investor consent can have direct effects on investors by affecting their ability to assess costs and returns and to identify the funds that align with their investment preferences and objectives. Disclosures and consent requirements can also help investors monitor their private fund advisers' conduct, depending in part on the extent to which private funds lack governance mechanisms that would otherwise help check adviser conduct. Disclosures and consent requirements can therefore influence the matches between investor choices of private funds and preferences over private fund terms, investment strategies, and investment outcomes, with more

[1058] *See, e.g., supra* footnotes 989, 1013, 1046 and accompanying text.

[1059] *See, e.g.,* AIC Comment Letter I, Appendix 2; Schulte Comment Letter; PIFF Comment Letter.

[1060] Clayton Comment Letter II; ILPA Comment Letter II; The Future of Private Equity Regulation, *supra* footnote 983; ILPA Private Fund Advisers Data Packet, *supra* footnote 983.

[1061] *See, e.g.,* PIFF Comment Letter; NYC Comptroller Letter.

[1062] *See, e.g.,* Carta Comment Letter; Meketa Comment Letter; Lockstep Ventures Comment Letter; NY State Comptroller Comment Letter; Weiss Comment Letter; AIC Comment Letter I; AIC Comment Letter I, Appendix 2; MFA Comment Letter II.

[1063] *See, e.g.,* LSTA Comment Letter.

[1064] *See supra* footnote 1050 and accompanying text; *see also, e.g.,* Carta Comment Letter; Meketa Comment Letter; Lockstep Ventures Comment Letter; NY State Comptroller Comment Letter; Weiss Comment Letter; AIC Comment Letter I; AIC Comment Letter I, Appendix 2; MFA Comment Letter II.

[1065] *See, e.g.,* PIFF Comment Letter; NYC Comptroller Letter; *see also supra* section II.B.

[1066] *See supra* section II.F.

[1067] *See infra* section VI.D.4.

[1068] *See supra* section II.E.

[1069] *Id., see also infra* section VI.D.3.

[1070] *See supra* section II.A.

[1071] *See supra* section II.C.7.

[1072] *See supra* sections II.E, II.F; *see also infra* sections VI.D.3, VI.D.4, VI.E.

[1073] *See, e.g., Nasdaq* v. *SEC,* 34 F.4th 1105, 1111–15 (D.C. Cir. 2022). This approach also follows SEC staff guidance on economic analysis for rulemaking. *See* Staff's Current Guidance on Economic Analysis in SEC Rulemaking, *supra* footnote 979 (''The economic consequences of proposed rules (potential costs and benefits including effects on efficiency, competition, and capital formation) should be measured against a baseline, which is the best assessment of how the world would look in the absence of the proposed action.''); *Id.* at 7 (''The baseline includes both the economic attributes of the relevant market and the existing regulatory structure.''). The best assessment of how the world would look in the absence of the proposed or final action typically does not include recently proposed actions, because doing so would improperly assume the adoption of those proposed actions. However, in some cases, proposals may impact the behavior of market participants, for example if market participants expect adoption to be likely to occur. In those cases, the effects of the proposal may be analyzed, to the extent it is possible to measure or infer changing behavior of market participants over time or in response to specific events, as part of baseline's assessment of relevant market conditions.

effective disclosures resulting in improved matches.

1. Industry Statistics and Affected Parties

The final quarterly statement, audit, and adviser-led secondary rules will apply to all SEC registered investment advisers (''RIAs'') with private fund clients.[1074] The final amendments to the books and records rule will also impose corresponding recordkeeping obligations on these advisers.[1075] The performance requirements of the quarterly statement rule will vary according to whether the RIA determines the fund is a liquid fund, such as an open-end hedge fund, or an illiquid fund, such as a closed-end private equity fund.[1076]

According to Form ADV filing data between October 1, 2021, and September 30, 2022, there were 5,517 RIAs with private fund clients. This includes 230 RIAs to 2554 SAFs.[1077] While Form ADV does not include questions for advisers to SAFs to further specify the type of securitized asset strategy the fund invests in, staff review of fund names in Form ADV indicates that SAFs are comprised of CLOs, CDOs, CBOs, and other structured products that issue asset-backed securities and primarily issue debt to their investors.[1078] We estimate, based on a review of fund names and their advisers in Form ADV, that funds reporting as SAFs advised by RIAs in Form ADV are almost 90% CLOs by assets under management and almost 70% by counts of funds.[1079] As discussed above, advisers will not be subject to the final rules with respect to their relationships with SAFs.[1080]

The final prohibited activity and preferential treatment rules will apply to all advisers to private funds, regardless of whether the advisers are registered with, required to be registered with, or reporting as exempt reporting advisers (''ERAs'') to the Commission or one or more State securities commissioners or are otherwise not required to register. ERAs generally rely on two possible exemptions to forgo registration: (1) an exemption for advisers that solely manage private funds and have less than $150 million regulatory assets under management in the United States, and (2) investment advisers that solely advise venture capital funds.[1081] To qualify as a venture capital fund, a fund must represent itself as pursuing a venture capital strategy, meet certain leverage limitations, prohibit redemptions by investors except in extraordinary circumstances, and have at least 80% of a fund's investments be direct equity investments into private companies.[1082]

The final amendments to the books and records rule will also impose corresponding recordkeeping obligations on private fund advisers if they are registered or required to be registered with the Commission.[1083] Based on Form ADV filing data between October 1, 2021, and September 30, 2022, this will include 5,517 advisers to private funds.[1084]

The final amendments to the compliance rule will affect all RIAs, regardless of whether they have private fund clients. According to Form ADV filing data between October 1, 2021, and September 30, 2022, there were 15,330 RIAs, across both those who did and did not have private fund clients.

The parties affected by the rules and amendments will include private fund advisers, advisers to other client types (with respect to the amendments to the compliance rule), private funds, private fund investors, certain other pooled investment vehicles and clients advised by private fund advisers and their related persons, accountants providing audits under the final audit rule, and others to whom those affected parties will turn for assistance in responding to the rules and amendments. Private fund investors are generally institutional investors (including, for example, retirement plans, trusts, endowments, sovereign wealth funds, and insurance companies), as well as high net worth individuals. In addition, the parties affected by these rules could include private fund portfolio investments, such as portfolio companies.

The relationships between the affected parties are governed in part by current rules under the Advisers Act, as discussed in Section V.B.3. In addition, relationships between funds and investors generally depend on fund governance.[1085] Private funds typically lack fully independent governance mechanisms, such as an independent board of directors, that would help monitor and govern private fund adviser conduct and check possible overreaching. Although some private funds may have LPACs or boards of directors, these types of bodies may not have sufficient independence, authority, or accountability to oversee and consent to these conflicts or other harmful practices as they may not have sufficient access, information, or authority to perform a broad oversight role, and they do not have a fiduciary obligation to private fund investors.[1086] As a result, to the extent the adviser has a potential conflict of interest, these bodies may not be positioned to negotiate for full and fair disclosure, or may not be positioned to provide informed consent to the adviser's potential conflicts, or may not be positioned to negotiate with the adviser to eliminate or reduce conflicts.

Similarly, relationships between advisers, funds, and investors may rely on investor consent to govern fund and adviser behavior. For example, one private equity fund document template uses investor consent as a prerequisite for revising fund documents.[1087] Some provisions may require an individual investor's consent, such as the fund documents designating that investor an ''ERISA Partner,'' other provisions may require majority investor consent, such as changing the fund's closing date, and still further provisions may require consent of 75% or 90% of investors in interest, with interest typically excluding the interests of the adviser and its related persons, and with other certain limitations.[1088] For example, modifying fund documents to change the fund's investment objectives may require consent from 90% of investors in interest.[1089] Hedge fund advisers may also rely on consent arrangements with respect to their hedge funds, with some activities requiring positive consent,

[1074] *See* final rules 206(4)–10, 211(h)(1)–2, 211(h)(2)–2. As discussed above, the final rules that pertain to registered investment advisers apply to all investment advisers registered, or required to be registered, with the Commission. *See supra* section II.

[1075] *See* final amended rules 204–2(a)(20) through (23).

[1076] *See* final rule 211(h)(1)–2(d).

[1077] Of these 230 RIAs to SAFs, 68 RIAs with combined SAF assets under management of approximately $166 billion only advise SAFs, and 162 RIAs with combined SAF assets under management of approximately $842 billion also manage at least one non-SAF private fund.

[1078] *See* Form ADV data between Oct. 1, 2021 and Sept. 30, 2022.

[1079] *See* Form ADV data as of Dec. 31, 2022. *See also infra* section VII.

[1080] *See supra* section II.A.

[1081] *See supra* footnote 123.

[1082] *Id.*

[1083] *See* final amended rules 204–2I(1), 204–2(a)(21), 204–2(a)(23), and 204–2(a)(7)(v).

[1084] *See infra* footnote 1845 (with accompanying text).

[1085] *See, e.g.,* Lucian Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors,* J. Econ. Perspectives (2017); *see also* John Morley, *The Separation of Funds and Managers: A Theory of Investment Fund Structure and Regulation, 123 Yale L. J. 1231* (2014); Paul G. Mahoney, *Manager-Investor Conflicts in Mutual Funds,* 18 J. Econ. Perspectives 161 (2004).

[1086] *See supra* section II.E.

[1087] *See, e.g., The ILPA Model Limited Partnership Agreement (Whole-of-Fund Waterfall),* ILPA, July 2020, *available at https://ilpa.org/wp-content/uploads/2020/07/ILPA-Model-Limited-Partnership-Agreement-WOF.pdf.*

[1088] *Id.*

[1089] *Id.*

some activities requiring negative consent, and some activities such as changing an auditor only requiring notice to investors.

However, the interests of one or more private fund investors may not represent the interests of, or may otherwise conflict with the interests of, other investors in the private fund due to business or personal relationships or other private fund investments, among other factors. To the extent investors are afforded governance or similar rights, such as LPAC representation, certain fund agreements permit such investors to exercise their rights in a manner that places their interests ahead of the private fund or the investors as a whole. For example, certain fund agreements state that, subject to applicable law, LPAC members owe no duties to the private fund or to any of the other investors in the private fund and are not obligated to act in the interests of the private fund or the other investors as a whole.[1090] These limitations may hinder the ability for LPAC oversight, including LPAC consent, to achieve the same benefits as investor consent.

Some commenters further stated that relationships between the affected parties are governed in part by reputational mechanisms and active monitoring directly by investors. For example, one commenter stated that preferential terms offered to certain investors provide flexibility for the adviser, but that if the adviser ''abuses the flexibility in some way (for example, by providing some benefit to a preferred client), it imposes a reputational cost for the adviser and adversely affects the adviser's future fundraising efforts.'' [1091] Another commenter stated that ''larger investors have strong incentives to actively monitor and communicate with their investment manager,'' and that ''this type of fund governance benefits all investors.''[1092] As a closely related matter, some commenters stated that larger investors negotiate for liquidity protections or other investor-favorable protections that, if adopted by the adviser, benefit all investors in the fund.[1093] However, no commenter made this argument with respect to preferential treatment secured by larger investors. That is, while larger investors' monitoring and negotiations for certain protections may benefit all investors, the preferential terms secured by larger investors can be to the detriment of smaller investors with fewer resources to bargain with advisers.[1094] Lastly, while commenters stated that the Commission should consider consent requirements instead of certain of the proposed rules,[1095] commenters did not generally discuss the prevalence of consent requirements today with respect to the activities considered in the final rules.

As discussed above, SAFs are special purpose vehicles or other entities that securitize assets by pooling and converting them into securities that are offered and sold in the capital markets.[1096] These vehicles primarily issue debt, structured as notes and issued in different tranches to investors, and paid in accordance with a waterfall established by the fund's initial indenture agreement. The residual profits from the fund after fees, expenses, and payments to debt tranches accrue to an equity tranche of the fund. Equity tranches are typically only a small portion of the CLO, on the order of 10% of initial capital raised to purchase the CLO loan portfolio.[1097] However, the equity tranche of a CLO differs from typical equity interests in other private funds, in particular with respect to the composition of investors in the equity tranche. For example, based on industry data, no pension funds invest in the equity tranches of CLOs (and pension funds are only a *de minimis* portion of the most senior debt tranches of CLOs).[1098] One commenter stated, consistent with industry reports, that the most common equity investors are hedge funds and structured credit funds.[1099] Investors in the equity tranche also typically include the adviser and its related persons. Moreover, as commenters stated, most third party investors in CLOs are Qualified Institutional Buyers (''QIBs''), each of which is generally an entity that owns and invests on a discretionary basis at least $100 million in securities of issuers that are not affiliated with the entity, and are thus typically among the larger private fund investors.[1100]

Some commenters stated that the governance structure of CLOs and other SAFs differ from other types of funds.[1101] One commenter stated, for example, that the structure of a CLO is governed by its indenture, which will describe the appointment and role of a trustee that represents the interests of the CLO investors, and a collateral administrator, both of whom are independent of the investment adviser.[1102] The trustee, along with a similarly unrelated collateral administrator, will maintain custody of the portfolio's assets, remit payments to investors, approve trades, generate reports for investors, and act as a representative of the investors in unusual events such as defaults or accelerations.[1103] The CLO will also appoint an independent CPA to perform specific procedures so the user of the results of the agreed upon procedures report can make their own determination about whether the fund follows procedures that are designed to ensure that the CLO is properly allocating cash flows, meeting the obligations in the indenture, and providing accurate information to investors.[1104] We understand that certain core characteristics of CLOs are generally shared across all SAFs: namely, that they are vehicles that issue asset-backed securities collateralized by an underlying pool of assets and that primarily issue debt.[1105] One commenter generally specified that these features are common to all asset-backed securitization vehicles, and so based on our definition we understand these features to be common to all SAFs.[1106]

Based on Form ADV filing data between October 1, 2021, and September 30, 2022, 5,517 RIAs and 5,381 ERAs reported that they are advisers to private funds.[1107] Based on Form ADV data, hedge funds and private equity funds are the most frequently reported private funds among RIAs, followed by real estate and venture capital funds, as shown in Figures 1A and 1B. This pattern also holds for the number of advisers to each of these types of funds. In comparison

[1090] LPACs may not have the necessary independence, authority, or accountability to oversee and consent to certain conflicts or other harmful practices.

[1091] AIC Comment Letter I, Appendix 1.

[1092] MFA Comment Letter I, Appendix A.

[1093] *See, e.g.,* Ropes & Gray Comment Letter.

[1094] *See supra* section II.G; *see also infra* sections VI.C.2, VI.D.4.

[1095] *See, e.g.,* BVCA Comment Letter; MFA Comment Letter I; AIMA/ACC Comment Letter.

[1096] *See supra* section II.A.

[1097] *See* LSTA Comment Letter; SFA Comment Letter I; SIFMA–AMG Comment Letter I; TIAA Comment Letter; *see also* Ares Mgmt. Corp., Understanding Investments in Collateralized Loan Obligations (''CLOS'') (2020), *available at https://www.aresmgmt.com/sites/default/files/2020-02/Understanding-Investments-in-Collateralized-Loan-ObligationsvF.pdf* (last visited June 26, 2023); *see also supra* section II.A.

[1098] *Id.*

[1099] LSTA Comment Letter.

[1100] *See* LSTA Comment Letter; SFA Comment Letter I; SIFMA–AMG Comment Letter I; TIAA Comment Letter.

[1101] *See supra* section II.A.

[1102] LSTA Comment Letter.

[1103] *Id.*

[1104] *Id.*

[1105] *See supra* section II.A.

[1106] *See* SFA Comment Letter I; SFA Comment Letter II.

[1107] Form ADV, Item 5.F.2. and Item 12.A.

to RIAs, ERAs have lower assets under management and are more frequently advisers to venture capital (VC) funds, followed by advisers to private equity funds and hedge funds, with advisers to real estate funds more uncommon. However, as some commenters stated, some advisers to venture capital funds may also be RIAs.[1108] In particular, some advisers to funds that hold themselves out as venture capital funds may not want to limit their capital allocation outside of direct equity stakes in private companies to 20% of their portfolio, and so may register to be able to hold a more diversified portfolio.[1109] Based on Form ADV filing data between October 1, 2021, and September 30, 2022, RIAs to venture capital funds who exceed this 20% threshold may account for as much as $539.1 billion in gross assets.

FIGURE 1A—PRIVATE FUNDS REPORTED BY RIAS

	Registered investment advisers			
	Private funds	Feeder funds	Gross assets (billions)	Advisers to private funds
Any private funds	51,767	13,222	21,120.70	5,517
Hedge funds	12,442	6,815	9,728.60	2,632
Private equity funds	22,709	3,910	6,542.10	2,106
Real estate funds	4,717	976	1,017	605
Venture capital funds	3,056	199	539.1	368
Securitized asset funds	2,554	85	1,008.40	230
Liquidity funds	88	9	305.5	47
Other private funds	6,201	1,218	1,980.10	1,113

Source: Form ADV submissions filed between Oct. 1, 2021, and Sept. 30, 2022. Funds that are listed by both registered investment advisers and SEC-exempt reporting advisers are counted under both categories separately. Gross assets include uncalled capital commitments on Form ADV.

FIGURE 1B—PRIVATE FUNDS REPORTED BY ERAS

	Exempt reporting advisers			
	Private funds	Feeder funds	Gross assets (billions)	Advisers to private funds
Any private funds	31,129	2,667	5,199.40	5,381
Hedge funds	2,060	1,223	1,445.50	1,205
Private equity funds	6,325	702	1,657.50	1,457
Real estate funds	849	180	374.1	242
Venture capital funds	20,627	351	1,206.10	1,994
Securitized asset funds	101	–	56.3	20
Liquidity funds	16	–	129.3	5
Other private funds	1,151	201	330.6	350

Source: Form ADV submissions filed between Oct. 1, 2021, and Sept. 30, 2022. Funds that are listed by both registered investment advisers and SEC-exempt reporting advisers are counted under both categories separately. Gross assets include uncalled capital commitments on Form ADV.

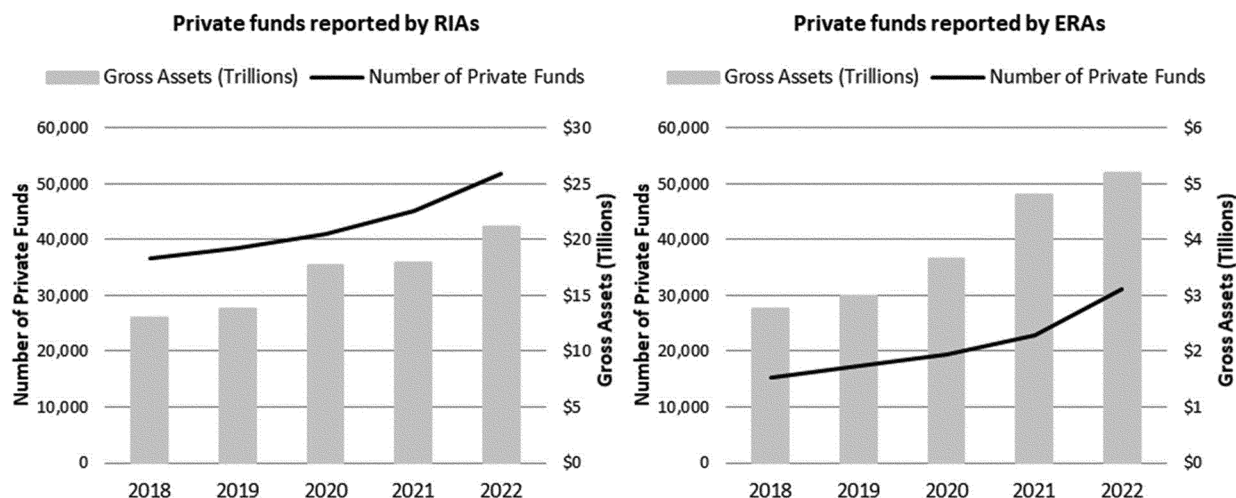
Also based on Form ADV data, the market for private fund investing has grown dramatically over the past five years. For example, the assets under management of private equity funds reported by RIAs on Form ADV during this period (from Oct. 1, 2017 to Sept. 30, 2022) grew from $2.9 trillion to $6.5 trillion, or by 124%. The assets under management of hedge funds reported by ERAs grew from $7.1 trillion to $9.7 trillion, or by 37%. The trends for private funds as a whole are given in Figure 2. The assets under management of all private funds reported by RIAs grew by 62% over the past five years from $13 trillion to over $21 trillion, while the number of private funds reported by RIAs grew by 42% from 36.5 thousand to 51.7 thousand. The assets under management of all private funds reported by ERAs grew by 89% over the past five years from $2.75 trillion to over $5.2 trillion, while the number of private funds reported by ERAs grew by 105% from 15.2 thousand to 31.1 thousand, as shown in Figure 2A.[1110] There has lastly been similar growth in the number of private fund advisers, as the number of RIAs advising at least one private fund grew from 4,783 in 2018 to 5,517 in 2022, and the number of ERAs advising at least one private fund grew from 3,839 in 2018 to 5,381 in 2022, as shown in Figure 2B.

[1108] *See, e.g.,* Andreessen Comment Letter; NVCA Comment Letter. In general, Figures 1A and 1B illustrate that advisers often advise multiple different types of funds, as the sum of advisers to each type of fund exceeds the total number of advisers.

[1109] *Id. See also, e.g.,* David Horowitz, *Why VC Firms Are Registering as Investment Advisers,* Medium.com (Sept. 23, 2019), *available at https://medium.com/touchdownvc/why-vc-firms-are-registering-as-investment-advisers-ea5041bda28d* (discussing why Andreessen Horowitz, General Catalyst, Foundry Group, and Touchdown Ventures, among other venture capitalists, have registered as RIAs).

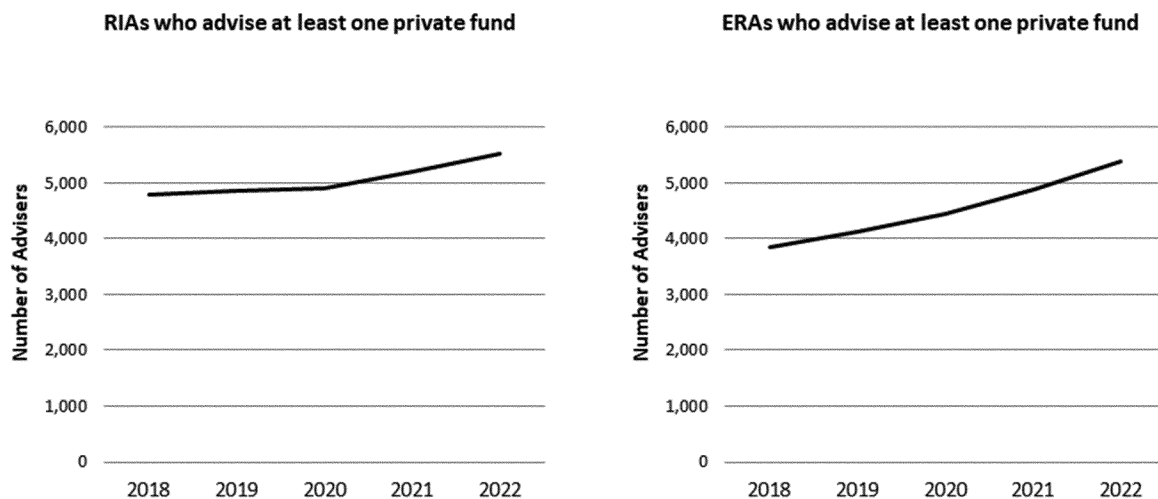
[1110] *See* Form ADV data.

Figure 2A:



Source: Form ADV submissions filed between Oct. 1, 2017, and Sept. 30, 2022.

Figure 2B:



Source: Form ADV submissions filed between Oct. 1, 2017, and Sept. 30, 2022.

Despite commenter assertions that all private fund investors are sophisticated and can ''fend for themselves,'' [1111] the staff have also observed a trend of rising interest in private fund investments by smaller investors, who may have sufficient capital to meet the regulatory requirements to invest in private funds but lack experience with the complexity of private funds and the practices of their advisers. While we do not believe there exists industry-wide data on the prevalence of investors of different levels of sophistication in private funds over time, there has been a distinct trend of media coverage and public interest in expanding private fund investing access. Platforms have emerged to facilitate individual investor access to private investments with small investment sizes.[1112] News outlets have reported other instances of amateur investor groups investing in private equity, or other instances of smaller individual investors accessing private investments.[1113] There is also evidence that this trend will continue into the future, with potential ongoing rising

[1111] *See supra* section VI.B; *see also, e.g.,* AIC Comment Letter I, Appendix 2.

[1112] *See, e.g., Private Equity Investments,* Moonfare, *available at https://www.moonfare.com/private-equity-investments*; *About Us,* Yieldstreet, *available at https://www.yieldstreet.com/about/* (''For decades, institutions and hedge funds have trusted private markets to grow their portfolios. Yieldstreet was founded in 2015 to unlock alternatives for more investors than ever before.'').

[1113] *See, e.g.,* Paul Sullivan, *D.I.Y. Private Equity is Luring Small Investors,* N.Y. Times (July 19, 2019); *How Can Smaller Investors Obtain Access to Private Equity Investment,* The Nest, *available at https://budgeting.thenest.com*; Nathan Tipping, *Private Equity is Finding Ways to Attract Smaller Investors,* Risk.net (May 20, 2022), available at *https://www.risk.net/investing/7948681/private-equity-is-finding-ways-to-attract-smaller-investors.*

participation in private funds by smaller investors with less bargaining power. One industry white paper found 80% of surveyed private fund advisers and 72% of surveyed private fund investors said non-accredited individuals should be able to invest in private markets.[1114] A 2022 survey of private market investors found that young individual investors were expressing increased demand for alternative investments, and that large private market firms are building out retail distribution capabilities and vehicles, providing greater access to private markets for individual portfolios.[1115] Even absent any changes in relevant law that would allow currently non-accredited individuals, or retail investors, greater access, these data points indicate rising interest and likelihood of rising future participation by more vulnerable investors in private funds.[1116]

Private funds and their advisers also play an increasingly important role in the lives of millions of Americans. Some of the largest groups of private fund investors include State and municipal pension plans, college and university endowments, non-profit organizations, and high net worth individuals.[1117] According to the U.S. Census Bureau, public sector retirement systems play a role in retirement savings for 15 million active working members and 11.7 million retirees.[1118]

Private fund advisers have also sought to be included in individual investors' retirement plans, including their 401(k)s,[1119] and some large private equity firms have created new private funds aimed at individual investors.[1120]

2. Sales Practices, Compensation Arrangements, and Other Business Practices of Private Fund Advisers

The relationship between the adviser and the private fund client in which the investor is participating begins with the investor conducting initial screening for private funds that meet the investor's specified criteria, potentially with the assistance of investment consultants.[1121] As noted above, many investors' internal diversification requirements and objectives and underwriting standards generally leave them with a smaller pool of advisers with whom they can negotiate.[1122] Many investors also face complex internal administrative and state regulatory requirements that govern their negotiations with advisers that they contact. For example, for retirement plans, investment committees who are responsible for determining plan strategy are often established by a plan sponsor, an investment board is formed, and the board acts according to an investment policy statement and charter. A survey by Plan Sponsor Council of America found that 95% of organizations that sponsor defined contribution retirement plans had such a committee, with 78% of them being established with formal legal documents.[1123] These percentages are both higher for organizations with a large number of participants. Investment committees then report portfolio performance strategy, plans, and results to the plan sponsor and other key stakeholders.[1124] This includes a determination of asset allocations for a portfolio, which an investment committee may make up to several years ahead of actual deployment of capital to those allocations. For example, CalPERS determines its asset mix on a four-year cycle, with the determination being made nearly a year before beginning its implementation.[1125] As another example, advisers may also face State pay-to-play or anti-boycott laws.[1126]

Once investors identify potential advisers, they enter into negotiations to determine whether they will invest in one or more of the adviser's private fund clients. The process during which fund terms may be disclosed and negotiated before investors commit to investing in a fund is known as the ''closing process.'' [1127] For closed-end, illiquid funds, such as private equity funds, there may be a series of closings from the initial closing to the final closing, after which new investors may generally not be admitted to the fund. The end of the fundraising period is the final closing date. For open-end, liquid funds, such as hedge funds, the closing process for allowing new investors to commit may be ongoing over the life of the fund.

Because different investors may receive disclosures or opportunities to negotiate over fund terms at different times, private funds face a fundamental incentive obstacle in making successful closings: later investors may be able to ask the fund adviser what contractual terms were awarded to early investors, and armed with that information they may attempt to negotiate contractual terms at least as good as the early investors. This is one of several difficulties advisers may currently face in successfully closing early investors into a private fund, as the early investor has an incentive to wait for the latest possible opportunity to close.[1128] New emerging advisers may also not have established reputations yet, and earlier investors may have to conduct supplemental due diligence on the adviser. Later investors can freeride on the due diligence, and resulting negotiated terms, conducted by earlier investors.[1129]

There are two leading ways that advisers may currently overcome these operational difficulties with respect to the closing process. First, an adviser may allow investors, particularly early investors, to have MFN status. An MFN investor may have, for example, subject to certain restrictions, the ability to receive substantially the same rights granted by the fund or the adviser in any side letter or similar agreement that are materially different from the rights granted to the MFN investor.[1130] These

[1114] SEI, Private Market Liquidity: Illogical or Inspired? (2021), *available at https://www.seic.com/sites/default/files/2022-05/SEI-IMS-Private-Market-Liquidity-WhitePaper-2021-US.pdf.*

[1115] McKinsey & Co., *US Wealth Management: A Growth Agenda for the Coming Decade* (Feb. 16, 2022), *available at https://www.mckinsey.com/industries/financial-services/our-insights/us-wealth-management-a-growth-agenda-for-the-coming-decade.*

[1116] For example, retail investors may continue increasing their participation in investor groups with pooled funds. *See supra* footnote 1113.

[1117] *See, e.g.,* Professor Clayton Public Investors Article, *supra* footnote 12.

[1118] *National Data,* Publicplansdata.Org, *available at https://publicplansdata.org/quick-facts/national/#:%7E:text=Collectively%2C%20these%20plans%20have%3A,members%20and%2011.7%20million%20retirees* (last visited May 30, 2023).

[1119] *See, e.g.,* Dep't of Labor, Info. Letter (June 3, 2020), *available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020.*

[1120] *See, e.g., Blackstone, Other Large Private-Equity Firms Turn Attention to Vast Retail Market,* Wall St. J. (June 7, 2022), *available at https://www.wsj.com/articles/blackstone-other-large-private-equity-firms-turn-attention-to-vast-retail-market-11654603201* (retrieved from Factiva database).

[1121] Advisers may also instead seek and identify investors through multiple potential channels.

[1122] *See, e.g.,* ILPA Comment Letter II; NY State Comptroller Comment Letter; *see also, e.g.,* Pension Funds, *supra* footnote 985.

[1123] *See* PSCA, *Retirement Plan Committees, available at https://www.psca.org/sites/psca.org/files/Research/2021/2021%20Snapshot_Ret%20Plan%20Com_FINAL.pdf.*

[1124] *See, e.g.,* Illinois Municipal Retirement Fund Investment Committee Charter, *available at https://www.imrf.org/en/investments/policies-and-charter/investment-committee-charter.*

[1125] *See California Public Employees' Retirement System Asset Liability Management Policy,* CalPERS, *available at https://www.calpers.ca.gov/docs/board-agendas/202009/financeadmin/item-6b-01_a.pdf.*

[1126] *See supra* sections II.A, II.G.1.

[1127] *See, e.g.,* Seth Chertok & Addison D. Braendel, *Closed-End Private Equity Funds: A Detailed Overview of Fund Business Terms, Part I,* 13 J. Priv. Equity 33 (Spring 2010).

[1128] *Id.*

[1129] *See, e.g.,* George Fenn, Nellie Liang & Stephen Prowse, *The Private Equity Market: An Overview,* 6 Fin. Mkts., Inst., & Instruments, at 50 (Nov. 1997).

[1130] *See, e.g.,* William Clayton, *Preferential Treatment and the Rise of Individualized Investing in Private Equity,* 11 Va. L. & Bus. Rev. (2017).

MFN rights can come with certain restrictions, such as not having the ability to receive any rights granted to an investor with a capital commitment in excess of the MFN investor's commitment.[1131] Second, an adviser may convince investors that the adviser can credibly commit to terms that will be more advantageous than the investor could receive by waiting. One possible path to this credibility would be for the adviser to establish a reputation for this behavior.

Once the closing process is complete, investors are participants in the adviser's private fund client, and the adviser has a fiduciary duty to the private fund client that is comprised of a duty of care and a duty of loyalty enforceable under the antifraud provision of Section 206.[1132] Many commenters cited the existing fiduciary duty in their comment letters.[1133] The duty of loyalty requires that an adviser not subordinate its private fund client's interests to its own.[1134] Private fund advisers are also prohibited from engaging in fraud more generally under the general antifraud provisions of the Federal securities laws, including section 10(b) of the Exchange Act (and 17 CFR 240.10b–5 (''rule 10b–5'') thereunder) and section 17(a) of the Securities Act.[1135] As discussed above, we believe that certain activities that we proposed to specifically prohibit are already inconsistent with an adviser's existing fiduciary duty, namely charging fees for unperformed services and attempting to waive an adviser's compliance with its Federal antifraud liability for breach of fiduciary duty to the private fund or with any other provision of the Advisers Act.[1136]

Private fund advisers are also subject to rule 206(4)–8 under the Advisers Act, which prohibits investment advisers to pooled investment vehicles, which include private funds, from (1) making any untrue statement of a material fact or omitting to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in the pooled investment vehicle; or (2) otherwise engaging in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in the pooled investment vehicle.

Despite existing fiduciary duties, existing antifraud provisions of section 206 and the other Federal securities laws, and existing rule 206(4)–8, there are no current particularized requirements that deal with many of the revised requirements in the final rule. For example, there is no current Federal regulation requiring a private fund adviser to disclose multiple different measures of performance to its investors, to refrain from borrowing from a private fund client without disclosure or investor consent, to obtain a fairness opinion or valuation opinion from an independent opinion provider when leading secondary transactions, or to disclose preferential treatment of certain investors to other investors.[1137]

In the absence of more particularized requirements, we have observed business practices of private fund advisers that enrich advisers without providing any benefit of services to the private fund and its underlying investors or that create incentives for an adviser to place its own interests ahead of the private fund's interests. For example, as discussed above, some private fund advisers or their related persons have entered into arrangements with a fund's portfolio investments to provide services which permit the adviser to accelerate the unpaid portion of fees upon the occurrence of certain triggering events, even though the adviser will never provide the contracted-for services.[1138] These fees enrich advisers without providing the benefit of any services to the private fund and its underlying investors. As stated above, even absent a particularized requirement, we believe charging fees for unperformed services is inconsistent with an adviser's fiduciary duty and may also violate antifraud provisions of the Federal securities laws on grounds other than an undisclosed breach of the adviser's fiduciary duty, even if disclosed and even if investors consented.[1139]

The Proposing Release cited a trend in the industry where certain advisers charge a private fund for fees and expenses incurred by the adviser in connection with the establishment and ongoing operations of its advisory business.[1140] The Proposing Release recognized, for example, that certain private fund advisers, most notably for hedge funds that utilize a ''pass-through'' expense model, employ an arrangement where the private fund pays for most, if not all, of the adviser's expenses, and that in exchange, the adviser does not charge a management, advisory, or similar fee.[1141] The adviser does charge an incentive or performance fee on net returns of the private fund.[1142] However, commenters stated that the Proposing Release did not demonstrate any economic problems with pass-through expense models, and stated the pass-through expense models should not be prohibited.[1143] Other commenters stated that pass-through expense models are often optimal outcomes of negotiations, and that pass-through expense models still provide incentives for advisers to minimize expenses.[1144]

However, we continue to believe that, to the extent advisers charge to a private fund certain expenses that benefit the adviser more than the investors, such as fees and expenses related to regulatory, compliance, and examination costs, and expenses related to investigations of the adviser or its related persons by any governmental or regulatory authority, that practice represents a potentially economically problematic outcome.[1145] This is because, since these expenses may benefit the adviser more directly than the investors, including where the expense pertains to an investigation of the adviser or its related persons by any governmental or regulatory authority, any instance of this practice occurring risks representing an exercise of the adviser's bargaining power in securing

---

[1131] *See, e.g., MFN Clause Sample Clauses,* Law Insider, *available at https://www.lawinsider.com/clause/mfn-clause*.

[1132] *See* 2019 IA Fiduciary Duty Interpretation, *supra* footnote 5. Investment advisers also have antifraud liability with respect to prospective clients under section 206 of the Advisers Act, which, among other aspects, applies to transactions, practices, or courses of business which operate as a fraud or deceit upon prospective clients.

[1133] *See, e.g.,* SIFMA–AMG Comment Letter I; PIFF Comment Letter.

[1134] *See* 2019 IA Fiduciary Duty Interpretation, *supra* footnote 5. The duty of care includes, among other things: (i) the duty to provide advice that is in the best interest of the private fund client, (ii) the duty to seek best execution of a private fund client's transactions where the adviser has the responsibility to select broker-dealers to execute private fund client trades, and (iii) the duty to provide advice and monitoring over the course of the relationship with the private fund client. *Id.* The final rules predominantly relate to issues regarding the duty of loyalty and not the duty of care.

[1135] Advisers' dealings with private fund investors may also implicate the antifraud provisions of the Federal securities laws depending on the facts and circumstances.

[1136] *See supra* section II.E.

[1137] State laws generally require disclosure of information that would not have a material, negative effect on other investors, such as fee and expense transparency. *See supra* footnote 854 and accompanying text.

[1138] *See supra* section II.E.

[1139] *Id.*

[1140] Proposing Release, *supra* footnote 3, at 140.

[1141] *Id.*

[1142] *Id.*

[1143] *See, e.g.,* Sullivan & Cromwell Comment Letter; ATR Comment Letter; Comment Letter of James A. Overdahl, Ph.D., Partner, Delta Strategy Group (Apr. 25, 2022) (''Overdahl Comment Letter'').

[1144] *See, e.g.,* Overdahl Comment Letter.

[1145] *See supra* section II.E.2.a).

contractual terms allowing these expenses.[1146] Some investors may not anticipate the performance implications of these costs, or may avoid investments out of concern that such costs may be present.[1147] This could lead to a mismatch between investor choices of private funds and their preferences over private fund terms, investment strategies, and investment outcomes, relative to what would occur in the absence of such unexpected or uncertain costs.

Whether such arrangements distort adviser incentives to pay attention to compliance and legal matters, including matters related to investigations of potential conflicts of interest, may vary from adviser to adviser. This is because adviser-level attention to compliance and legal matters can depend on both investor and adviser risk preferences. As one commenter stated, in some cases, if advisers bear the cost of compliance, including costs of compliance for investigations by government or regulatory authorities, advisers may have incentives to recommend investments that are less diversified.[1148] We agree with this possibility. For example, complex investment strategies may require significant registration with multiple regulators and reporting in multiple jurisdictions. The additional compliance work on the part of the adviser to execute a more complex investment strategy can be to the benefit of investors in the fund. By contrast, as the same commenter stated, if investors bear the cost, then so long as disclosures are made the investors can decide for themselves whether they are willing to pay extra compliance costs to achieve better diversification (or, in other cases, higher risks and thus higher potential returns).[1149]

However, we also continue to believe that, when investors bear the costs, advisers may have distorted incentives with respect to their treatment of compliance and legal matters, namely incentives to pay suboptimal attention to these matters. Advisers who pay suboptimal attention to compliance costs, for example, receive profits associated with their reduced compliance expenses, but in doing so generate risks that may be borne by investors. Thus, for some advisers, funds, and their investors, it may align economic incentives for the fund (and, by extension, the investors) to bear regulatory, compliance, and examination costs, and expenses related to investigations of the adviser or its related persons by any governmental or regulatory authority. In other cases, it may better align economic incentives for the adviser to bear these expenses, if the benefits from undertaking the expenses primarily accrue to the adviser.

Even when investors may benefit from bearing these costs, full disclosure is necessary and investors may not be able to secure such disclosures today. As the above commenter stated, even when economic incentives are aligned by investors bearing the costs of compliance expenses, it is so that the investor can determine for themselves the appropriate magnitude of compliance expenses (subject to minimum required amounts of expenses, for example minimum expenses necessary for compliance with rule 206(4)-7).[1150] This requires disclosure, but we believe that allocation of these types of fees and expenses to private fund clients can be deceptive in current market practice. For example, investors may be deceived to the extent the adviser does not disclose the total dollar amount of such fees and expenses before charging them. These expenses may also change over time in ways not expected by investors, requiring consistent ongoing disclosures. Investors may also be deceived if advisers describe such fees and expenses so generically as to conceal their true nature and extent.[1151]

As a final matter, we believe that these considerations vary according to the type of expense. For regulatory, compliance, and examination expenses, the risk of distorted adviser incentives when the investor bears the costs may be comparatively low, and with disclosure many investors may prefer to bear these costs and determine appropriate allocation of fund resources towards these expenses themselves. For example, investors are more likely to have varying preferences over whether the adviser hires a compliance consultant, the scope of legal services that will be provided to the fund, or whether the fund will conduct mock examinations in order to prepare for real examinations.

Meanwhile, the risk of distorted adviser incentives may be higher in the case of investors bearing the costs of investigations by government or regulatory authorities. A fund in which the adviser, without having secured consent from investors, is able to pass on expenses associated with an investigation has adverse incentives to engage in conduct likely to trigger an investigation. While reputational effects may mitigate the effects of these adverse incentives, as advisers who pass on such expenses may be less able to attract investors in the future, reputational effects do not resolve these effects. Examinations may not necessarily implicate the adviser's wrongdoing,[1152] but investigations may carry a higher risk of such an implication. In particular, we do not believe there are reasonable cases where incentives are aligned by investors bearing the costs of investigations by government or regulatory authorities that result or have resulted in the governmental or regulatory authority, or a court of competent jurisdiction, sanctioning the adviser or its related persons for violating the Act or the rules thereunder. Our staff has also observed instances in which advisers have entered into agreements that reduce the amount of clawbacks by taxes paid, or deemed to be paid, by the adviser or its owners without sufficient disclosure as to the effects of these clawbacks,[1153] and instances in which limited partnership agreements limit or eliminate liability for adviser misconduct.[1154] While these agreements are negotiated between fund advisers and investors, as discussed above advisers often have discretion over the timing of fund payments, and so may have greater control over risks of clawbacks than anticipated by investors.[1155] As such, reducing the amount of clawbacks by actual, potential, or hypothetical taxes can therefore pass an unnecessary and avoidable cost to investors when the investor has insufficient transparency into the effect of the taxes on the clawback. This cost, when not transparent to the investor, denies the investor the opportunity to understand the potential restoration of distributions or allocations to the fund that it would have been entitled to receive in the absence of an excess of performance-based compensation paid to the adviser or a related person. These clawback terms can therefore reduce the alignment between the fund adviser's and investors' interests when not properly disclosed. However, as many

[1146] *Id.*

[1147] *See supra* section VI.B.

[1148] *See, e.g.,* Weiss Comment Letter; Maskin Comment Letter.

[1149] *Id.*

[1150] *Id.*

[1151] *See supra* section II.E.1.a), II.E.2.a).

[1152] *Id.*

[1153] *See supra* section II.E.1.b). Form PF recently was revised to include new reporting requirements (though the effective date has not arrived) requiring large private equity fund advisers (*i.e.,* those with at least $2 billion in regulatory assets under management as of the last day of the adviser's most recently completed fiscal year) to report annually on the occurrence of general partner and limited partner clawbacks. Form PF Release, *supra* footnote 564.

[1154] *See supra* section II.E.

[1155] *See supra* section II.E.1.b).

commenters stated, because this practice is widely implemented and negotiated, we do not believe there is a risk of investors being unable, today, to refuse to consent to this practice and being harmed as a result of being unable to consent to this practice.[1156]

We have also observed some cases where private fund advisers have directly or indirectly (including through a related person) borrowed from private fund clients.[1157] This practice carries a heightened risk of investor harm because the adviser faces a direct conflict of interest: The adviser's interests are on both sides of the borrowing transaction. This conflict of interest may result in the adviser borrowing from the fund even when it is harmful to the fund. For example, the fund client may be prevented from using borrowed assets to further the fund's investment strategy, and so the fund may fail to maximize the investor's returns. This risk is relatively higher for those investors that are not able to negotiate or directly discuss the terms of the borrowing with the adviser, and for those funds that do not have an independent board of directors or LPAC to review and consider such transactions.[1158]

However, as commenters stated, advisers may also borrow from funds in cases where it is beneficial to the fund and its investors for the adviser to do so, such as borrowing to facilitate tax advances,[1159] borrowing arrangements outside of the fund structure,[1160] and the activity of service providers that are affiliates of the adviser, especially with large financial institutions that play many roles in a private fund complex.[1161] Therefore, whether an adviser borrowing from a fund is harmful to the fund varies not only from adviser to adviser and from fund to fund, but also varies according to each individual instance of the adviser borrowing, as the harm or benefit to the fund depends on the facts and circumstances surrounding that specific borrowing activity.

As a final matter, unlike the case of adviser-led secondaries, it can be easier to reduce the risk of this conflict of interest distorting the terms, price, or interest rate of the fund's loan to the adviser with disclosure and consent practices.[1162] This is because the fund's investors can, if the borrow is disclosed and investor consent is sought, compare the terms of the loan to publicly available commercial rates to determine if the terms are appropriate given market conditions, or may generally withhold consent if they perceive a conflict of interest. However, we do not understand that such disclosures and consent practices are always implemented today.[1163]

The staff also has observed harm to investors when advisers lead co-investments, leading multiple private funds and other clients advised by the adviser or its related persons to invest in a portfolio investment.[1164] In those instances, the staff observed advisers allocating fees and expenses among those clients on a non pro rata basis, resulting in some fund clients (and investors in those funds) being charged relatively higher fees and expenses than other clients.[1165] This may particularly occur when one co-investment vehicle is made up of larger investors with specific fee and expense limits.[1166] Advisers may make these decisions to avoid charging some portion of fees and expenses to funds with insufficient resources to bear their pro rata share of expenses related to a portfolio investment (whether due to insufficient reserves, the inability to call capital to cover such expenses, or otherwise) or funds in which the adviser has greater interests. These non pro rata allocations may also occur if an investor's side letter has reached an expense cap, or if an investor's side letter negotiates that the investor will not bear a particular type of expense. More generally, in any type of private fund, an adviser may choose to charge or allocate lower fees and expenses to a higher fee paying client to the detriment of a lower fee paying client. However, commenters stated that investors may also often benefit from these co-investment opportunities,[1167] and the benefit to main fund investors may fairly and equitably lead to non-pro rata allocations of expenses. Commenters also stated that expenses may be generated disproportionately by one fund investing in a portfolio company, and so non-pro rata allocations that charge such expenses entirely to one fund could also be fair and equitable.[1168] For example, this could occur under a bespoke structuring arrangement for one private fund client to participate in the portfolio investment.[1169] However, our staff understand that investors today may not always receive disclosure of such non-pro rata allocations or the reasons for those allocations.[1170]

The staff also has observed harm to investors from disparate treatment of investors in a fund. For example, our staff has observed scenarios where an adviser grants certain private fund investors and/or investments in similar pools of assets with better liquidity terms than other investors.[1171] These preferential liquidity terms can disadvantage other fund investors or investors in a similar pool of assets if, for instance, the preferred investor is able to exit the private fund or pool of assets at a more favorable time.[1172] Similarly, private fund advisers, in some cases, disclose information about a private fund's investments to certain, but not all, investors in a private fund, which can result in profits or avoidance of losses among those who were privy to the information beforehand at the expense of those kept in the dark.[1173] Currently, many investors need to engage in their own research regarding what terms may be obtained from advisers, as well as whether other investors are likely to be obtaining better terms than those they are initially offered.

We believe that it may be hard for many investors, even with full and fair disclosure and if investor consent is obtained, to understand the future implications of materially harmful contractual terms, in particular when certain investors are granted preferential liquidity terms or preferential information, at the time of investment and during the investment. Further, some investors may find it relatively difficult to negotiate agreements that would fully protect them from bearing unexpected portions of fees and expenses or from other decreases in the value of investments associated with these practices. For example, some forms of negotiation may occur through repeat-dealing that may not be available to some smaller private fund investors. While commenters argue that many investors are sophisticated, for whom disclosure may suffice, other smaller investors may be more vulnerable and thus still be harmed even with disclosure and if investor consent is

[1156] *See supra* section II.E.1.b).

[1157] *See supra* section II.E.2.b).

[1158] *Id.*

[1159] Tax advances occur when the private fund pays or distributes amounts to the general partner to allow the general partner to cover tax obligations.

[1160] *See* SBAI Comment Letter; CFA Comment Letter I; AIC Comment Letter I.

[1161] *See* IAA Comment Letter II.

[1162] *See infra* section VI.C.4.

[1163] *See supra* section II.E.2.b).

[1164] *See supra* section II.E.1.c).

[1165] *Id.*

[1166] *Id.*

[1167] *Id.*

[1168] *Id.*

[1169] *Id.*

[1170] *Id.*

[1171] *See supra* section II.F.

[1172] *Id.*

[1173] *Id.*

obtained.[1174] As another example, to the extent investors accept these terms because of their inability to coordinate their negotiations, they would still be unable to coordinate their negotiations even if consent was sought from each individual investor for a particular adviser practice.[1175] Majority consent mechanisms, even to the extent they are implemented today, may have minimal ability to protect disadvantaged investors specifically in the case of preferred investors with sufficient bargaining power securing preferential terms over disadvantaged investors, as we would expect larger, preferred investors to outvote the disadvantaged investors.[1176] For any investors affected by these issues, there may be mismatches between investor choices of private funds and preferences over private fund terms, investment strategies, and investment outcomes, relative to what would occur in the absence of such unexpected or uncertain costs.

Our staff has also observed that investors are generally not provided with detailed information about broader types of preferential terms.[1177] This lack of transparency prevents investors from understanding the scope or magnitude of preferential terms granted, and as a result, may prevent such investors from requesting additional information on these terms or other benefits that certain investors, including the adviser's related persons or large investors, receive. In this case, these investors may simply be unaware of the types of contractual terms that could be negotiated, and may not face any limitations over their ability to consent to these terms or their ability to negotiate these terms once the terms are sufficiently disclosed. To the extent this lack of transparency affects investor choices of where to allocate their capital, it can result in mismatches between investor choices of private funds and their preferences over private fund terms, investment strategies, and investment outcomes.

3. Private Fund Adviser Fee, Expense, and Performance Disclosure Practices

Current rules under the Advisers Act do not require advisers to provide quarterly statements detailing fees and expenses (including fees and expenses paid to the adviser and its related persons by portfolio investments) to private fund clients or to fund investors. The custody rule does, however, generally require registered advisers whose private fund clients are not undergoing a financial statement audit to have a reasonable basis for believing that the qualified custodians that maintain private fund client assets provide quarterly account statements to the fund's limited partners. Those account statements may contain some of this information, though in our experience certain fees and expenses typically are not presented with the level of detail the final quarterly statement rule will require. In addition, Form ADV Part 2A (''brochure'') requires certain information about a registered adviser's fees and compensation. For example, Part 2A, Item 6 of Form ADV requires a registered adviser to disclose in its brochure whether the adviser accepts performance-based fees, whether the adviser manages both accounts that are charged a performance-based fee and accounts that are charged another type of fee, and any potential conflicts. The information on Form ADV is available to the public, including private fund investors, through the Commission's Investment Adviser Public Disclosure (''IAPD'') website.[1178] We understand that many prospective fund investors obtain the brochure and other Form ADV data through the IAPD public website.

Similarly, there currently are no requirements under current Advisers Act rules for advisers to provide investors with a quarterly statement detailing private fund performance, although advisers are subject to the antifraud provisions of the federal securities laws and any relevant requirements of the marketing rule and private placement rules. Although our recently adopted marketing rule contains requirements that pertain to displaying performance information and providing information about specific investments in adviser advertisements, these requirements do not *compel* the adviser to provide performance information to all private fund clients or investors. Rather, the requirements apply when an adviser *chooses* to include performance or address specific investments within an advertisement.[1179]

Form PF requires certain additional fee, expense, and performance reporting, but unlike Form ADV, Form PF is not an investor-facing disclosure form. Information that private fund advisers report on Form PF is provided to regulators on a confidential basis and is nonpublic.[1180] Form PF recently was revised to include new current reporting requirements (though the effective date has not arrived) requiring large hedge fund advisers to qualifying hedge funds (*i.e.,* hedge funds with a net asset value of at least $500 million) to file a current report with the Commission when their funds experience certain stress events, several of which may affect the fund's performance.[1181] However, Form PF reporting, both in its regularly scheduled reporting and in its current reporting, often only requires reporting on the basis of how advisers report information to investors. For example, Form PF Section 1A, Item C, Question 17 requires reporting of gross performance and performance net of management fees, incentive fees, and allocations ''as reported to current and prospective investors (or, if calculated for other purposes but not reported to investors, as so calculated)'' and requires reporting ''only if such results are calculated for the reporting fund (whether for purposes of reporting to current or prospective investors or otherwise).'' [1182] Similarly, the events in the current reporting framework that rely on performance measurements are based on the fund's ''reporting fund aggregate calculated value,'' which only requires valuation of positions ''with the most recent price or value applied to the position for purposes of managing the investment portfolio'' and need not be subject to fair valuation procedures.[1183]

Within this framework, advisers have exercised discretion in responding to the needs of private fund investors for periodic statements regarding fees, expenses, and performance or similar information on their current investments, and we discuss this variety in practices throughout this section. Broadly, current investors often use this information in determining whether to invest in subsequent funds and investment opportunities with the same adviser, or to pursue alternative

[1174] *See supra* sections VI.B, VI.C.1.

[1175] *See supra* section VI.B.

[1176] *Id.*

[1177] *See supra* section II.G.

[1178] Advisers generally are required to update disclosures on Form ADV on both an annual basis, or when information in the brochure becomes materially inaccurate. Additionally, although advisers are not required to deliver the Form ADV Part 2A brochure to private fund investors, many private fund advisers choose to provide the brochure to investors as a best practice.

[1179] The marketing rule's compliance date was Nov. 4, 2022. As discussed above, the marketing rule and its specific protections generally will not apply in the context of a quarterly statement. *See supra* footnote 312.

[1180] Commission staff publish quarterly reports of aggregated and anonymized data regarding private funds on the Commission's website. *See* Form PF Statistics Report, *supra* at footnote 12.

[1181] Form PF Release, *supra* footnote 564. Advisers to private equity funds must file new quarterly reports on the occurrence of certain events, in particular the execution of an adviser-led secondary transaction. *See infra* sections VI.C.4, VI.D.6.

[1182] Form PF Release, *supra* footnote 564.

[1183] *Id.*

investment opportunities. When fund advisers raise multiple funds sequentially, they often consider current investors to also be prospective investors in their subsequent funds, and so may make disclosures to motivate future capital commitments. The format, scope and reporting intervals of these disclosures vary across advisers and private funds. Some disclosures provide limited information while others are more detailed and complex. A private fund adviser may agree, contractually or otherwise, to provide disclosures to a fund investor, and on the details of these disclosures, at the time of the investment or subsequently. A private fund adviser also may provide such information in the absence of an agreement. The flexibility in these options has led to the development of diverse approaches to the disclosure of fees, expenses, and performance, resulting in informational asymmetries among investors in the same private fund.[1184]

The private equity investor industry group ILPA, observing the variation in reporting practices across funds, has suggested the use of a standardized template for this purpose.[1185] In its comment letter, ILPA cited that in 2021, 59% of private equity LPs in a survey reported receiving the template more than half the time, indicating that LPs must continue to use their negotiating resources to receive the template, and many private equity investors do not receive it at all.[1186] Ongoing experience demonstrates that advisers do not provide the same transparency to all investors: In a more recent survey, 56% of private equity investor respondents indicated that information transparency requests granted to one investor are generally not granted to all investors, and 75% find that an adviser's agreement to report fees and expenses consistent with the ILPA reporting template was made through the side letter, or informally, and not reflected in the fund documents presented to all investors.[1187]

Investors may, as a result, find it difficult to assess and compare alternative fund investments, which can make it harder to allocate capital among competing fund investments or among private funds and other potential investments. In one industry survey, 55% of respondents either disagreed or strongly disagreed that the reporting provided by advisers across fees, expenses, and performance provides the needed level of transparency.[1188] Limitations in required disclosures by advisers may therefore result in mismatches between investor choices of private funds and their preferences over private fund terms, investment strategies, and investment outcomes.

While a variety of practices are used, as the market for private fund investing has grown, some patterns have emerged. We understand that most private fund advisers currently provide current investors with quarterly reporting, and many private fund advisers contractually agree to provide fee, expense, and performance reporting.[1189] Further, advisers typically provide information to existing investors about private fund fees and expenses in periodic financial statements, schedules, and other reports under the terms of the fund documents.[1190]

However, reports that are provided to investors may report only aggregated expenses, or may not provide detailed information about the calculation and implementation of any negotiated rebates, credits, or offsets.[1191] Investors may use the information that they receive about their fund investments to monitor the expenses and performance from those investments. Their ability to measure and assess the impact of fees and expenses on their investment returns depends on whether, and to what extent, they are able to receive detailed disclosures regarding those fees and expenses and regarding fund performance. Some investors currently do not receive such detailed disclosures, and this reduces their ability to monitor the performance of their existing fund investment or to compare it with other prospective investments.

In other cases, adviser reliance on exemptions from specific regulatory burdens for other regulators can lead advisers to make certain quarterly disclosures. For example, while we believe that many advisers to hedge funds subject to the jurisdiction of the U.S. Commodity Futures Trading Commission (''CFTC'') rely on an exemption provided in CFTC Regulation § 4.13 from the requirement to register with CFTC as a ''commodity pool operator,'' some may rely on other CFTC exemptions, exclusions or relief. Specifically, we believe that some advisers registered with the CFTC may operate with respect to a fund in reliance on CFTC Regulation § 4.7, which provides certain disclosure, recordkeeping and reporting relief and to the extent that the adviser does so, the adviser would be required to, no less frequently than quarterly, prepare and distribute to pool participants statements that present, among other things, the net asset value of the exempt pool and the change in net asset value from the end of the previous reporting period.

In addition, information about advisers' fees and about expenses is often included in advisers' marketing documents, or included in the fund documents, yet the information may not be standardized or uniform. Many advisers to private equity funds and other illiquid funds provide prospective investors with access to a virtual data room for the fund, containing the fund's offering documents (including categories of fees and expenses that may be charged), as well as the adviser's brochure and other ancillary items, such as case studies.[1192] These advisers meet the contractual and other needs of investors for updated information by updating the documents in the data room. Many advisers to funds that would be considered liquid funds under the rule, such as hedge funds, tend not to use data rooms. They instead take the approach of sending email or using other methods to convey updated information to investors. For instance, prior to closing on a prospective investor's investment, some advisers send out preclosing email messages containing updated versions of these and other documents. Prospective investors at the start of the life of a fund, or at or before the time of their investment, may use this information in conducting due diligence, in deciding whether to seek to negotiate the terms of investment, and ultimately in deciding whether to invest in the adviser's fund.

The adviser's and related persons' rights to compensation, which are set forth in fund documents, vary across

[1184] *See, e.g.,* Professor Clayton Public Investors Article, *supra* footnote 12.

[1185] *See, e.g., Reporting Template,* ILPA, *available at https://ilpa.org/reporting-template/.* ILPA is a trade group for investors in private funds.

[1186] ILPA Comment Letter I; *see also* ILPA Comment Letter II; The Future of Private Equity Regulation, *supra* footnote 983, at 17.

[1187] *Id.;* ILPA Private Fund Advisers Data Packet, *supra* footnote 983.

[1188] ILPA Comment Letter II; The Future of Private Equity Regulation, *supra* footnote 983, at 16–17; ILPA Private Fund Advisers Data Packet, *supra* footnote 983, at 23.

[1189] *See supra* sections II.B.1, II.B.2.

[1190] *Id.*

[1191] *See supra* section II.B.

[1192] To the extent that a private fund's securities are offered pursuant to 17 CFR 230.500 through 230.508 (Regulation D of the Securities Act) and such offering is made to an investor who is not an ''accredited investor'' as defined therein, that investor must be provided with disclosure documents that generally contain the same type of information required to be provided in offerings under Regulation A of the Securities Act, as well as certain financial statement information. *See* 17 CFR 230.502(b). However, private funds generally do not offer interests in funds to non-accredited investors.

fund types and advisers and can be difficult to quantify at the time of the initial investment. For example, advisers of private equity funds generally receive a management fee (compensating the adviser for managing the affairs of the fund) and performance-based compensation (incentivizing advisers to maximize the fund's profits).[1193] Performance-based compensation arrangements in private equity funds typically require that investors recoup capital contributions plus a minimum annual return (called the ''hurdle rate'' or ''preferred return''), but these arrangements can vary according to the waterfall arrangement used, meaning that distribution entitlements between the adviser (or its related persons) and the private fund investors can depend on whether the proceeds are distributed on a whole-fund (known as European-style) basis or a deal-by-deal (known as American-style) basis.[1194] In the whole-fund (European) case, the fund typically allocates all investment proceeds to the investors until they recoup 100% of their capital contributions attributable to both realized and unrealized investments plus their preferred return, at which point fund advisers typically begin to receive performance-based compensation.[1195] In the deal-by-deal (American) case (or modified versions thereof), it is common for investment proceeds from each portfolio investment to be allocated 100% to investors until investors recoup their capital contributions attributable to that specific investment, any losses from other realized investments, and their applicable preferred return, and then fund advisers can begin to receive performance-based compensation from that investment.[1196] Under the deal-by-deal waterfall, advisers can potentially receive performance-based compensation earlier in the life of the fund, as successful investments can deliver advisers performance-based compensation before investors have recouped their entire capital contributions to the fund.[1197]

Management fee compensation figures and performance-based compensation figures are not widely disclosed or reported publicly,[1198] but the sizes of certain of these fees have been estimated in industry and academic literature. For example, one study estimated that from 2006–2015, performance-based compensation alone for private equity funds averaged $23 billion per year.[1199] Private fund fees increase as assets under management increase, and the private fund industry has grown since 2015, and as a result private equity management fees and performance-based compensation fees may together currently total over $100 billion dollars in fees per year.[1200] Private equity represents $4.2 trillion of the $11.5 trillion dollars in net assets under management by private funds,[1201] and so total fees across private funds may be over $200 billion dollars in fees per year.[1202]

In addition, advisers or their related persons may receive a monitoring fee for consulting services targeted to a specific asset or company in the fund portfolio.[1203] Whether they ultimately retain the monitoring fee depends, in part, on whether the fund's governing documents require the adviser to offset portfolio investment compensation against other revenue streams or otherwise provide a rebate to the fund (and so indirectly to the fund investors).[1204] There can be substantial variation in the fees private fund advisers charge for similar services and performances.[1205] Ultimately, the fund

---

[1193] *See supra* section II.B.1.

[1194] *See, e.g.,* David Snow, *Private Equity: A Brief Overview,* PEI Media (2007), *available at https://www.law.du.edu/documents/registrar/adv-assign/Yoost_PrivateEquity%20Seminar_PEI%20Media's%20Private%20Equity%20-%20A%20Brief%20Overview_318.pdf.*

[1195] *Id.*

[1196] *Id.*

[1197] Waterfalls (especially deal-by-deal waterfalls) typically have clawback arrangements to ensure that advisers do not retain carried interest unless investors recoup their entire capital contributions on the whole fund, plus a preferred return. The result is that total distributions to investors and advisers under the two waterfalls can be equal (but may not always be), conditional on correct implementation of clawback provisions. In that case, the key difference in the two arrangements is that deal-by-deal waterfalls result in fund advisers potentially receiving their performance-based compensation faster. However, some deal-by-deal waterfalls may also require fund advisers to escrow their performance-based compensation until investors receive their total capital contributions to the fund plus their preferred return on the total capital contributions. These escrow policies can help secure funds that may need to be available in the event of a clawback. *Id.*

[1198] Ludovic Phalipoou, *An Inconvenient Fact: Private Equity Returns & The Billionaire Factory,* Univ. of Oxford (Said Bus. Sch. Working Paper, June 10, 2020), *available at https://ssrn.com/abstract=3623820.*

[1199] *Id.; see also* SEC, Div. of Investment Mgmt: Analytics Office, Private Funds Statistics Report: Fourth Calendar Quarter 2015, at 5 (July 22, 2016), *available at https://www.sec.gov/divisions/investment/private-funds-statistics/private-funds-statistics-2015-q4.pdf.*

[1200] Private equity management fees are currently estimated to typically be 1.76% and performance-based compensation is currently estimated to typically be 20.3% of private equity fund profits. *See, e.g.,* Ashley DeLuce & Pete Keliuotis, *How to Navigate Private Equity Fees and Terms,* Callan's Rsch. Café (Oct. 7, 2020), *available* at *https://www.callan.com/uploads/2020/12/2841fa9a3ea9dd4dddf6f4daefe1cec4/callan-institute-private-equity-fees-terms-study-webinar.pdf.* Private equity net assets under management as of the fourth quarter of 2020 were approximately $4.2 trillion. SEC, Div. of Investment Mgmt: Analytics Office, Private Funds Statistics Report: Fourth Calendar Quarter 2020, at 5 (Aug. 4, 2021), *available at https://www.sec.gov/divisions/investment/private-funds-statistics/private-funds-statistics-2020-q4.pdf.* Total fees may be estimated by multiplying management fee percentages by net assets under management, and by multiplying performance-based compensation percentages by net assets under management and again by an estimate of private equity annual returns, which may conservatively be assumed to be approximately 10%. *See, e.g.,* Michael Cembalest, *Food Fight: An Update on Private Equity Performance vs. Public Equity Markets,* J.P. Morgan Asset and Wealth Mgmt. (June 28, 2021), *available at https://privatebank.jpmorgan.com/content/dam/jpm-wm-aem/global/pb/en/insights/eye-on-the-market/private-equity-food-fight.pdf.*

[1201] *See* Form PF Statistics Report, *supra* footnote 12.

[1202] For example, hedge fund management fees are currently estimated to typically be 1.4% per year and performance-based compensation is currently estimated to typically be 16.4% of hedge fund profits, approximately consistent with private equity fees. *See, e.g.,* Leslie Picker, *Two and Twenty is Long Dead: Hedge Fund Fees Fall Further Below Onetime Industry Standard,* CNBC (June 28, 2021), *available at https://www.cnbc.com/2021/06/28/two-and-twenty-is-long-dead-hedge-fund-fees-fall-further-below-one-time-industry-standard.html* (citing HRF Microstructure Hedge Fund Industry Report Year End 2020). Hedge funds, as of the fourth quarter of 2020, represented another approximately $4.7 trillion in net assets under management. *See* Form PF Statistics Report, *supra* footnote 12.

[1203] *See, e.g.,* Ludovic Phalippou, Christian Rauch & Marc Umber, *Private Equity Portfolio Company Fees,* 129 J. Fin. Econ. 3, 559–585 (2018).

[1204] *See supra* section II.B.1. There may be certain economic arrangements where only certain investors to the fund receive credits from rebates.

[1205] *See, e.g.,* Juliane Begenau & Emil Siriwardane, *How Do Private Equity Fees Vary Across Public Pensions?* (Harvard Bus. Sch. Working Paper, Jan. 2020, Revised Feb. 2021) (concluding that a sample of public pension funds investing in a sample of private equity funds would have received an average of an additional $8.50 per $100 invested had they received the best observed fees in the sample); Tarun Ramadorai & Michael Streatfield, *Money for Nothing? Understanding Variation in Reported Hedge Fund Fees* (Paris, Dec. 2012 Finance Meeting, EUROFIDAI–AFFI Paper, Mar. 28, 2011), *available at https://ssrn.com/abstract=1798628* (retrieved from SSRN Elsevier database) (finding that in a sample of hedge fund advisers, management fees ranging from less than 0.5% to over 2% and finding incentive fees ranging from less than 5% to over 20%, with no detectible difference in performance by funds with different management fees and only modest evidence of higher incentive fees yielding higher returns). One commenter states that ''[t]he Commission is concerned'' about this substantial variation in fees, and argues that we have overlooked that there are economic reasons for different fees or prices charged to investors. *See* AIC Comment Letter I, Appendix 1. We do not believe this argument correctly characterizes the Proposing Release or the final rules. While we agree that there are economic reasons for different fees or prices charged, in particular that charging different fees may be a plausible substitute for other more harmful types of preferential treatment, we believe that this substantial variation in fees across funds means that achieving appropriate transparency is crucial for investors. *See* Proposing Release, *supra* footnote 3, at 204; *see also supra* section VI.B, *infra* sections VI.D.2, VI.D.4. Another commenter stated that ''[t]o

(and indirectly the investors) bears the costs relating to the operation of the fund and its portfolio investments.[1206]

Regarding performance disclosure, advisers typically provide information about fund performance to investors through the account statements, transaction reports, and other reports. Some advisers, primarily private equity fund advisers, also disclose information about past performance of their funds in the private placement memoranda that they provide to prospective investors.

Many standardized industry methods have emerged that private funds rely on to report returns and performance.[1207] However, each of these standardized industry methods has a variety of benefits and drawbacks, including differences in the information they are able to capture and their susceptibility to manipulation by fund advisers.

For private equity and other funds that would be determined to be illiquid under the final rules, standardized industry methods for measuring performance must contend with the complexity of the timing of potentially illiquid investments and must also reflect the adviser's discretion in the timing of distributing proceeds to investors.

One approach that has emerged for computing returns for private equity and other funds that would be determined to be illiquid funds is the internal rate of return (''IRR'').[1208] As discussed above, an important benefit of IRR that drives its use is that IRR can reflect the timing of cash flows more accurately than other performance measures.[1209] All else equal, a fund that delivers returns to its investors faster will have a higher IRR.

However, current use of IRR to measure returns has a number of drawbacks, including an upward bias in the IRR that comes from a fund's use of leverage, assumptions about the reinvestment of proceeds, and a large effect on measured IRR from cash flows that occur early in the life of the pool. For example, as discussed above, some private equity funds borrow extensively at the fund level.[1210] This can cause IRRs to be biased upwards. Since IRRs are based in part on the length of time between the fund calling up investor capital and the fund distributing profits, private equity funds can delay capital calls by first borrowing from fund-level subscription facilities to finance investments.[1211]

This practice has several key implications for investors. First, this practice has been used by private equity funds to artificially boost reported IRRs, but investors must pay the interest on the debt used and can potentially suffer lower total returns.[1212] Second, because the increases to IRR can reflect a manipulation of financing timing (and can distort total returns) rather than being a reflection of the adviser's skill and return opportunities, or even a reflection of the adviser's skill in cash flow management, the higher reported performance can distort fund performance rankings and distort future fundraising outcomes.[1213] Lastly, use of subscription lines to boost IRRs can artificially boost IRRs over the fund's preferred return hurdle rate, resulting in the adviser receiving carried interest compensation in a scenario where the adviser would not have received carried interest without the subscription line, and where the investor may not agree that the subscription line improved total returns and warranted a carried interest payment.[1214] If the use of a subscription line artificially boosts the IRR and does not actually reflect the adviser's investment skill, losses later in the fund's life may be more likely, potentially resulting in a clawback.[1215] While investors have grown aware of these issues, utilization of subscription lines has continued to grow, and investor industry groups continue to report challenges in achieving visibility into fund liquidity and cash management practices around subscription lines.[1216] As for reinvestment assumptions, the IRR as a performance measure assumes that cash proceeds have been reinvested at the IRR over the entire investment period. For example, if a private equity or other fund determined to be illiquid reports a 50% IRR but has exited an investment and made a distribution to investors early in its life, the IRR assumes that the investors were able to reinvest their distribution again at a 50% annual return for the remainder of the life of the fund.[1217]

Although IRR remains one of the leading standardized methods of reporting returns at present, these and other drawbacks make IRR difficult as a singular return measure, especially for investors who likely may not understand the limitations of the IRR metric, and the differences between IRR and total return metrics used for public equity or registered investment funds.

Several other measures have emerged for measuring the performance of private equity and other funds that would be determined to be illiquid under the final rule. These measures compensate for some of the shortcomings of IRR at the cost of their own drawbacks. Multiple of invested capital (''MOIC''), used by private equity funds, is the sum of the net asset value of the investment plus all the distributions received divided by the total amount paid in. MOIC is simple to understand in that it is the ratio of value received divided by money invested, but has a key drawback that, unlike IRR, MOIC does not take into account the time value of money.[1218]

---

support [their] assertion with respect to hedge funds, [the Commission] cites a lone study . . . . However, a meaningful assessment of price competition . . . cannot be based on unsubstantiated assertions and a lone study.'' CCMR Comment Letter IV. We believe this mischaracterizes the Proposing Release. The additional statistics cited by this commenter speak to average alpha, average returns, and average risk-adjusted returns of hedge funds, among other average statistics. The Proposing Release, by contrast, discusses substantial variation across advisers in fees charged and in their performance. Additional literature cited in the commenter's analysis states '''[i]n contrast to the perception of a common 2/20 fee structure,' there are 'considerable cross-sectional and time series variations in hedge fund fees,''' which we also believe supports the Proposing Release's discussion. *Id., see also* Proposing Release, *supra* footnote 3, at 196.

[1206] *See supra* section II.B.1.

[1207] As discussed above, certain factors are currently used for determining how certain types of private funds should report performance under U.S. GAAP. *See supra* section II.B.2.

[1208] *See supra* section II.B.2.b).

[1209] *Id.*

[1210] *Id.*

[1211] *Id.*

[1212] *See, e.g.,* James F. Albertus & Matthew Denes, Distorting Private Equity Performance: The Rise of Fund Debt, Frank Hawkins Kenan Institute of Private Enterprise Report (June 2019), *available at https://www.kenaninstitute.unc.edu/wp-content/uploads/2019/07/DistortingPrivateEquityPerformance_07192019.pdf*; *Recommendations Regarding Private Asset Fund Subscription Lines,* Cliffwater LLC (July 10, 2017); *Subscription Lines of Credit and Alignment of Interest,* ILPA (June 2017), *available at https://ilpa.org/wp-content/uploads/2020/06/ILPA-Subscription-Lines-of-Credit-and-Alignment-of-Interests-June-2017.pdf.*

[1213] *See, e.g.,* Pierre Schillinger, Reiner Braun & Jeroen Cornel, *Distortion or Cash Flow Management? Understanding Credit Facilities in Private Equity Funds* (Aug. 7, 2019), *available at https://ssrn.com/abstract=3434112*; Enhancing Transparency Around Subscription Lines of Credit, *supra* footnote 1001.

[1214] Subscription Lines of Credit and Alignment of Interest, *supra* footnote 1212.

[1215] *Id.*

[1216] Enhancing Transparency Around Subscription Lines of Credit, *supra* footnote 1001.

[1217] *See, e.g.,* Oliver Gottschalg & Ludovic Phalippou, *The Truth About Private Equity Performance,* Harvard Bus. Rev. (Dec. 2007), *available at https://hbr.org/2007/12/the-truth-about-private-equity-performance.*

[1218] One commenter argues that neither IRR nor MOIC takes into account the timing of fund transactions, and provides as an example three funds with different timing of contributions and distributions but the same IRR. *See* XTAL Comment Letter. We disagree. The fact that it is possible to construct examples in which two funds with different timings of payments can have the same IRRs does not mean that IRR broadly fails to take into account the time value of money. Rather, this only indicates that in any such examples, the

Continued

Another measure closely related to MOIC is the TVPI, or ''total value to paid-in capital'' ratio.[1219] When applied to an entire fund, MOIC and TVPI are similar performance metrics. However, both MOIC and TVPI have analogous measures than can be applied to just the realized and unrealized portions of a fund, and differ in their approaches to these portions of funds. For TVPI, the unrealized and realized analogues are RVPI (''residual value to paid-in capital'') and DPI (''distributions to paid-in capital'') ratios, and the denominator in both of these cases is the total called capital of the entire fund.[1220] For MOIC, unrealized and realized MOIC have as denominators just the portions of the called capital attributable to unrealized and realized investments in the portfolio. RVPI and DPI sum to TVPI, while unrealized MOIC and realized MOIC must be combined as a weighted average to yield total MOIC. In the staff's experience, in the TVPI framework, substantial misvaluations applied to unrealized investments, when unrealized investments are a small portion of the fund's portfolio, may go undetected because in that case the denominator in the RVPI will be very large compared to the size of the misevaluation. By comparison, unrealized MOIC will have as a denominator just the called capital contributed to the unrealized investments, and so the misevaluation may be easier to detect.

Another measure, Public Market Equivalent (''PME''), also used by private equity and other illiquid funds, is sometimes used to compare the performance of a fund with the performance of an index.[1221] The measure is an estimate of the value of fund cash flows relative to the value of a public market index. Relative to a given benchmark, differences in PME can indicate differences in the performance of different private fund investments. However, the computation of the PME for a fund requires the availability of information about fund cash flows including their timing and magnitude.

Regardless of the performance measure applied, another fundamental difficulty in reporting the performance of illiquid funds is accounting for differences in realized and unrealized gains. Illiquid funds generally pursue longer-term investments, and reporting of performance before the fund's exit requires estimating the unrealized value of investments.[1222] There are often multiple methods that may be used for valuing an unrealized illiquid investment. As discussed above, the valuations of these unrealized illiquid investments are typically determined by the adviser and, given the lack of readily available market values, can be challenging. Such methods may rely on unobservable models and other inputs.[1223] Because advisers are typically evaluated (and, in certain cases, compensated) based on the value of these illiquid investments, unrealized valuations are at risk of being inflated, such that fund performance may be overstated.[1224] Some academic studies have found broadly that private equity performance is overstated, driven in part by inflated accounting of ongoing investments.[1225]

One paper cited by commenters argues that even when advisers do manipulate their investment valuations, ''investors can see through [the adviser's] manipulation on average.'' [1226] Brown et al. (2013) agree that there is evidence of underperforming managers inflating reported returns during times when fundraising takes place, but they also find that, on average, those managers are less likely to raise a subsequent fund.[1227] We disagree with the commenter's assessment that this study indicates that investors in private funds are all equipped to protect their interests without any further regulation. The paper cited itself concedes that in its findings, unskilled investors may misallocate capital, and that it is only the more sophisticated investors who may prefer the status quo to a regime with more regulation.[1228] We believe the commenter's interpretation of this paper also ignores the costs that investors must currently undertake to ''see through'' manipulation, even on average.

Commenters also added to this discussion that there are different methods and norms for calculating gross performance and then net performance that is net of fees and expenses. In particular, the CFA Institute described the role of GIPS standards in providing definitions and methods for calculating gross returns and net returns.[1229] The GIPS standards define ''gross-of-fees returns'' as the return on investments reduced only by trading expenses.[1230] GIPS states that gross-of-fees returns demonstrates the firm's expertise in managing assets without the impact of the firm's or client's skills in negotiating fees.[1231] GIPS defines ''net-of-fees returns'' as gross-of-fees returns reduced by management fees, including performance-based fees and carried interest.[1232]

The CFA Institute also acknowledged the role of the recent marketing rule in defining gross and net performance.[1233] The marketing rule defines gross performance as ''the performance results of a portfolio (or portions of a portfolio that are included in extracted performance, if applicable) before the deduction of all fees and expenses that a client or investor has paid or would have paid in connection with the investment adviser's investment advisory services to the relevant portfolio.'' [1234] However, the final rule also offers guidance that ''the final rule does not prescribe any particular calculation of gross performance . . . Under the final rule, advisers may use the type of returns appropriate for their strategies provided that the usage does not violate the rule's general prohibitions.'' [1235] Thus, gross reporting under GIPS standards deducts transaction fees, but under the marketing rule may or may not, depending on the adviser's internal calculation methodologies.

comparable funds are offering similar performances to their investors, taking the time value of money into consideration. We continue to understand that, in general, IRR takes into account the time value of money.

[1219] *See supra* section II.B.2.b).

[1220] *See, e.g., Private Capital Performance Terms,* Preqin, *available at https://www.preqin.com/academy/industry-definitions/private-capital-performance-terms-definitions.*

[1221] *See, e.g.,* Robert Harris, Tim Jenkinson & Steven Kaplan, *Private Equity Performance: What Do We Know?,* 69 J. Fin. 1851 (2014), *available at https://onlinelibrary.wiley.com/doi/full/10.1111/jofi.12154;* Steven Kaplan & Antoinette Schoar, *Private Equity Performance: Returns, Persistence, and Capital Flows, 60 J. Fin. 1791* (2005), *available https://onlinelibrary.wiley.com/doi/full/10.1111/j.1540-6261.2005.00780.x.*

[1222] *See supra* section II.B.2.b).

[1223] *Id.*

[1224] *Id.*

[1225] *See, e.g.,* Ludovic Phalippou & Oliver Gottschalg, *The Performance of Private Equity Funds,* 22 Rev. Fin. Stud. 1747–1776 (Apr. 2009).

[1226] AIC Comment Letter I; Gregory W. Brown, Oleg Gredil & Steven N. Kaplan, *Do Private Equity Funds Manipulate Reported Returns?* J. Fin. Econ., Forthcoming, Fama-Miller Working Paper (Apr. 30, 2017) (''Brown et al.''), *available at https://ssrn.com/abstract=2271690.*

[1227] Brown et al., *supra* footnote 1226.

[1228] *Id.*

[1229] CFA Comment Letter I; CFA Comment Letter II.

[1230] GIPS, *Guidance Statement on Fees* (Sept. 28, 2010), *available at http://www.gipsstandards.org/wp-content/uploads/2021/03/fees_gs_2011.pdf.*

[1231] *Id.*

[1232] *Id.*

[1233] *See, e.g.,* CFA Comment Letter I; CFA Comment Letter II.

[1234] Marketing Release, *supra* footnote 127.

[1235] *Id.*

The marketing rule defines net performance as ''the performance results of a portfolio (or portions of a portfolio that are included in extracted performance, if applicable) after the deduction of all fees and expenses that a client or investor has paid or would have paid in connection with the investment adviser's investment advisory services to the relevant portfolio, including, if applicable, advisory fees, advisory fees paid to underlying investment vehicles, and payments by the investment adviser for which the client or investor reimburses the investment adviser.'' [1236] Thus, net returns under GIPS standards only deduct management fees, performance-based fees, and carried interest, but under the marketing rule all fees and expenses may be deducted, depending on the adviser's treatment of certain fees and expenses, such as custodian fees for safekeeping funds and securities.

For illiquid funds under the final rules, standard industry methods for reporting performance do not use annual returns, because annual returns for individual years may be substantially less informative for investors. For an investor in an illiquid fund who has limited or no ability to withdraw or redeem from a fund, we understand that the investor's primary concern is more typically measurement of the total increase in the value of its investment over the life of the illiquid fund and the average cumulative return as measured by MOIC and IRR, rather than the annual returns in any given year. Consistent with this, many commenters expressed support for the proposal's rules that would require MOIC and IRR for private equity funds and other illiquid funds, as compared to requiring annual returns.[1237]

Private equity funds and other illiquid funds also must, as discussed above,[1238] more frequently measure performance of the fund both with respect to realized and unrealized investments. In addition to the challenges described above, the difficulty of valuing unrealized investments often contributes to what is deemed a ''J-Curve'' to illiquid fund performance, causing many performance metrics to report negative returns for investors in early years (as investor capital calls occur, funds deploy capital, and funds hold unrealized investments) and large positive returns in later years (as investments succeed and are exited, and proceeds are distributed).[1239] As discussed above and in the Proposing Release, these problems are exacerbated by a potential lack of reliable valuation data prior to realization of an investment, in particular when the fund primarily invests in illiquid assets.[1240] For investors in those funds, an annual return in the middle of the life of the fund therefore does not provide the same information as the cumulative impact of their investments since the fund's inception, as measured by MOIC and IRR.[1241]

Other approaches tend to be used for evaluating the performance of hedge funds and other liquid funds. In particular, investors who are determining whether and when to withdraw from or request a redemption from a liquid fund typically find annual net total returns more informative than metrics such as an IRR measured since the fund's inception, as annual net total returns allow the investor to measure whether the liquid fund's performance is likely to continue to outperform its next best investment alternative. Consistent with this, many commenters disagreed with the proposed rule requirement of annual net total returns since inception, stating that more recent returns are more relevant.[1242] Other methods include a fund's ''alpha'' and its ''Sharpe ratio.'' A fund's alpha is its excess return over a benchmark index of comparable risk. A fund's Sharpe ratio is its excess return above the risk-free market rate divided by the investment's standard deviation of returns. Many, but not all, hedge funds disclose these and other performance measures, including net returns of the fund. Many hedge fund-level performance metrics can be calculated by investors directly using data on the fund's historical returns, by either combining with publicly available benchmark index data (in the case of alpha) or by combining with an estimate of the standard deviation of the fund's returns (in the case of the Sharpe ratio). Despite these detailed methods, data in commercial databases on hedge fund performance reporting may also be biased, because hedge funds choose whether and when to make their performance results available to commercial databases.[1243]

[1236] *Id.*

[1237] *See, e.g.,* OPERS Comment Letter; CFA Comment Letter II.

[1238] *See supra* footnote 1222 and accompanying text.

[1239] *See, e.g., J Curve,* Corp. Fin. Inst. (June 28, 2023), *available at https://corporatefinance institute.com/resources/economics/j-curve/.*

[1240] *See supra* footnote 1222 and accompanying text; *see also* Proposing Release, *supra* footnote 3, at 59–60.

[1241] Because these problems are exacerbated when the fund primarily invests in illiquid assets, as separate from when the investors' interests in the fund are illiquid, certain funds that will be defined to be liquid funds under the final rules may also rely on IRR and MOIC performance reporting today.

[1242] *See, e.g.,* ATR Comment Letter; ICM Comment Letter.

[1243] *See, e.g.,* Philippe Jorion & Christopher Schwarz, *The Fix Is In: Properly Backing Out Backfill Bias,* 32 Soc'y Fin. Stud. 5048–5099 (Dec. 2019); *see also* Nickolay Gantchev, *The Costs of Shareholder Activism: Evidence From A Sequential Decision Model,* 107 J. Fin. Econ. 610–631 (2013). One commenter stated that ''[t]he Proposed Rule also casts doubt on the reliability of public data on hedge fund performance . . . implying that these data may [ ] overstate fund performance. The Proposed Rule then suggests that its proposed restrictions will remedy this purported lack of price and quality competition.'' CCMR Comment Letter IV. We believe this mischaracterizes the Proposing Release. The discussion in the Proposing Release, and in this release, pertain to whether existing private tools are sufficient for investors seeking to evaluate the performance of hedge fund advisers and other liquid fund advisers. The paragraph cited by the commenter discusses that there are limitations to the extent to which investors may be able to conduct complete evaluations of the performance of their adviser using existing methods because, for example, public commercial databases may have biased data. We agree with the commenter that, for example, there is no literature concluding that hedge fund performance is low, and that public data on hedge fund performance indicating otherwise are not a reliable rebuttal to assertions of low hedge fund performance. *See* Proposing Release, *supra* footnote 3, at 208, 230. Moreover, the commenter then cites additional literature illustrating that some hedge fund advisers may understate their performance in public commercial databases, for example to prevent disclosing clues about their proprietary trading strategies. We believe this result means the literature demonstrates that there is likely variation in the bias of performance reporting by hedge fund advisers. Variation in the bias of performance reporting by advisers further limits the ability to which commercial databases today can satisfy investor needs when evaluating their advisers, as investors cannot tell the direction of bias of any given adviser in the data.

Because CLOs and other SAFs primarily issue debt to investors, typically structured as notes and issued in different tranches to investors, typical fee, expense, and performance reporting practices for these funds differ from other types of funds.[1244] Typical reporting for SAFs is designed to provide relevant information to different debt tranches of a fund, which offer different defined returns based on different priorities of payments and different defined levels of risk associated with their notes. Because debt interests in a SAF are not structured to provide variable investment returns like an equity interest, SAF reporting metrics prioritize measuring the likelihood of the debt investor receiving its previously agreed-upon defined return. For example, commenters stated that CLOs typically report overcollateralization ratios, examinations of the average credit rating of the portfolio, the diversity of holdings within the portfolio, and the promised yield of portfolio assets.[1245] Monthly reports of the portfolio holdings will also often include one or more credit ratings for each individual asset in the portfolio,[1246] and also often include summaries of cash flows and mark to market valuations for every asset in the portfolio.[1247] Finally, commenters stated that CLO managers typically earn three types of management fees, all of which are set out in the indenture and paid in accordance with the waterfall, and that a CLO's quarterly reports include the calculation of the amounts to be distributed or paid in accordance with the waterfall on the payment date.[1248]

While the Commission believes that many advisers currently select from these varying standardized industry methods to prepare and present performance information, the difficulty in measuring and reporting returns on a basis comparable with respect to risk, coupled with the potentially high fees and expenses associated with these funds, can present investors with difficulty in monitoring and selecting their investments. Specifically, without disclosure of detailed performance measures and accounting for the impact of risk, debt, the varying impact of realized and unrealized gains, performances across funds can be highly overstated or otherwise manipulated, and so impossible to compare.[1249]

4. Fund Audits, Fairness Opinions, and Valuation Opinions

Currently under the custody rule, private fund advisers may obtain financial statement audits as an alternative to the requirement of the rule that an RIA with custody of client assets obtain an annual surprise examination from an independent public accountant.[1250] Advisers of funds that obtain these audits, regardless of the type of fund, are thus able to provide fund investors with reasonable assurances of the accuracy and completeness of the fund's financial statements and, specifically, that the financial statements are free from material misstatements.[1251]

Also under the custody rule, an adviser's choice for a fund to obtain an external financial statement audit (in lieu of a surprise examination) may depend on the benefit of the audit from the adviser's perspective, including the benefit of any assurances that an audit might provide investors about the reliability of the financial statement. The adviser's choice also may depend on the cost of the audit, including fees and expenses.

Based on Form ADV data and as shown below, approximately 90% of the total number of hedge funds and private equity funds that are advised by RIAs currently undergo a financial statement audit, by a PCAOB-registered independent public accountant that is subject to regular inspection.[1252] Other types of private funds advised by RIAs undergo financial statement audits with similarly high frequency, with the exception of SAFs, of which fewer than 20% are audited according to the recent ADV data.

FIGURE 3

Fund type	Total funds	Unaudited funds	Unaudited pct. (%)	Audited pct. (%)
Hedge Fund	12,442	1,188	9.6	90.4
Liquidity Fund	88	28	31.8	68.2
Other Private Fund	6,201	1,282	20.7	79.3
Private Equity Fund	22,709	2,110	9.3	90.7
Real Estate Fund	4,717	756	16	84.0
Securitized Asset Fund	2,554	2,319	90.8	9.20
Venture Capital Fund	2,558	498	16.3	83.7

[1244] *See supra* section II.A.

[1245] LSTA Comment Letter; SFA Comment Letter I; SFA Comment Letter II; SIFMA–AMG Comment Letter I; TIAA Comment Letter.

[1246] Id.

[1247] *Id.*

[1248] *Id.*

[1249] *See, e.g.,* Phalippou et al., *supra* footnote 1225; Cembalest, *supra* footnote 1200.

[1250] *See supra* section II.C; rule 206(4)–2(b)(4). We note that the staff has stated that, in order to meet the requirements of rule 206(4)–2(b)(4), these financial statements must be prepared in accordance with U.S. GAAP or, for certain non-U.S. funds and non-U.S. advisers, prepared in accordance with other standards, so long as they contain information substantially similar to statements prepared in accordance with U.S. GAAP, with material differences reconciled. *See* SEC, *Staff Responses to Questions About the Custody Rule, available at https://www.sec.gov/divisions/investment/custody_faq_030510.htm.*

[1251] *See, e.g.,* PCAOB, *AS 2301: The Auditor's Responses to the Risks of Material Misstatement, available at https://pcaobus.org/oversight/standards/auditing-standards/details/AS2301*; AICPA, *AU–C Section 240: Consideration of Fraud in a Financial Statement Audit* (2021), *available at https://us.aicpa.org/content/dam/aicpa/research/standards/auditattest/downloadabledocuments/au-c-00240.pdf.*

[1252] Rule 206(4)–2(a)(4) requires that an adviser that is registered or required to be registered under Section 203 of the Act with custody of client assets to obtain an annual surprise examination from an independent public accountant. An adviser to a pooled investment vehicle that is subject to an annual financial statement audit by a PCAOB-registered independent public accountant that is subject to regular inspection is not, however, required to obtain an annual surprise examination if the vehicle distributes the audited financial statements prepared in accordance with generally accepted accounting principles to the pool's investors within 120 days of the end of its fiscal year. *See* rule 206(4)–2(b)(4). One commenter stated that the Proposing Release's analysis of audit frequencies did not limit analysis of current audit rates to PCAOB-registered and -inspected auditors. We agree, and also note that the Proposing Release did not limit its analysis to audits of financial statements prepared in accordance with U.S. GAAP. The analysis here is limited to PCAOB-registered and -inspected independent auditors conducting audits of financial statements prepared in accordance with U.S. GAAP, and we still find that approximately 90% of funds undergo such an audit. *See* AIMA/ACC Comment Letter.

FIGURE 3—Continued

Fund type	Total funds	Unaudited funds	Unaudited pct. (%)	Audited pct. (%)
Unique Totals	51,767	8,181	15.8	84.2

Source: Form ADV, Schedule D, Section 7.B.(1) filed between Oct. 1, 2021, and Sept. 30, 2022.

These audits, while currently valuable to investors, do not obviate the issues with fee, expense, and performance reporting discussed above.[1253] First, as shown in Figure 3 above, not all funds advised by RIAs currently undergo annual financial statement audits from a PCAOB-registered and -inspected auditor. Second, statements regarding fees, expenses, and performance tend to be more frequent, and thus more timely, than audited annual financial statements. Third, there currently exists a discrepancy in reporting requirements to the Commission between surprise examinations and audits: Problems identified during a surprise exam must currently be reported to the Commission under the custody rule, but problems identified during an audit, even if the audit is serving as the replacement for the surprise examination under the custody rule, do not need to be reported to the Commission.[1254] Lastly, more frequent fee, expense, and performance disclosures can include incremental and more granular information that would be useful to investors and that would not typically be included in an annual financial statement.[1255]

Funds of different sizes do vary in their propensity to get audits, but audits are common for funds of all sizes. Figures 4A and 4B below show that for funds of size <$2 million, excluding securitized asset funds, approximately 4800 out of approximately 6100 funds already get an audit from a PCAOB-registered and -inspected independent auditor, or approximately 76%. For funds of size $2 million to $10 million, this percentage is approximately 82%. This percentage generally increases as funds get larger, such that for funds of size >$500 million, approximately 6400 out of approximately 7000 funds already get an audit from a PCAOB-registered and -inspected independent auditor, or approximately 91%. However, of course, because larger funds have more assets, these larger funds still represent a large volume of unaudited assets. Funds of size <$10 million have approximately $7.1 billion in assets not audited by a PCAOB registered and inspected independent auditor, while funds of size >$500 million have approximately $1.9 trillion in assets not audited by a PCAOB-registered and -inspected independent auditor.[1256]

Funds also vary by their fund type in their propensity to get audits. Many commenters stated that CLOs and other asset-backed securitization vehicles generally do not get such audits, in particular because audited financial statements prepared under U.S. GAAP may not be as useful for investors with debt interests in cash flow vehicles such as CLOs and other such vehicles who are primarily focused on the underlying cash flows of the fund.[1257] CLOs are generally captured in Form ADV data under ''securitized asset funds.'' The low rates of audits for securitized asset funds, as seen in Figure 3 above and Figure 4B below, is therefore likely driven by the low propensity for CLO funds and other SAFs to get audits, consistent with commenters' statements. Some commenters further stated that CLOs and other such funds are more likely to engage independent accounting firms to perform ''agreed upon procedures'' on quarterly reports.[1258] These procedures are often related to the securitized asset fund's cash flows and the calculations relating to a securitized asset fund portfolio's compliance with the portfolio requirements and quality tests (such as overcollateralization, diversification, interest coverage, and other tests) set forth in the fund's securitization transaction agreements.[1259] The agreed-upon-procedures report details the results of procedures performed that provide the user of the report with information regarding these complex cash allocations and distributions, whereas a financial statement audit focuses on potential investor harm regarding whether or not the financial statements are presented fairly in accordance with applicable accounting framework.[1260]

BILLING CODE 8011–01–P

[1253] *See supra* section VI.C.3.

[1254] *See* 17 CFR 275; rule 206(4)–2. However, the proposal of a new rule to address how investment advisers safeguard client assets considered closing this discrepancy. *See* Safeguarding Release, *supra* footnote 467.

[1255] For example, annual financial statements may not include both gross and net IRRs and MOICs, separately for realized and unrealized investments, and with and without the impact of fund-level subscription facilities. Annual financial statements may also vary in the level of detail provided for portfolio investment-level compensation. *See, e.g., Illustrative Financial Statements: Private Equity Funds,* KPMG (Nov. 2020), *available at https://audit.kpmg.us/articles/2020/illustrative-financial-statements-2020.html*; *Illustrative Financial Statements: Hedge Funds,* KPMG (Nov. 2020), *available at https://audit.kpmg.us/articles/2020/illustrative-financial-statements-2020.html.*

[1256] Based on staff analysis of Form ADV Schedule D, Section 7.B.(1) data filed between Oct. 1, 2017 and Sept. 30, 2022.

[1257] *See, e.g.,* Canaras Comment Letter; TIAA Comment Letter; SFA Comment Letter I; SFA Comment Letter II; LSTA Comment Letter.

[1258] *See, e.g.,* Canaras Comment Letter; LSTA Comment Letter; SFA Comment Letter I; SFA Comment Letter II. As discussed above, one commenter stated that GAAP's efforts to assign, through accruals, a period to a given expense or income may not be useful, and potentially confusing, for SAF investors because principal, interest, and expenses of administration of assets can only be paid from cash received. We note that vehicles that issue asset-backed securities are specifically excluded from other Commission rules that require issuers to provide audited GAAP financial statements, and we have stated that GAAP financial information generally does not provide useful information to investors in asset-backed securitization vehicles. *See supra* section II.A; *see also* SFA Comment Letter I; SFA Comment Letter II.

[1259] *Id., see also supra* sections II.C, VI.C.1.

[1260] *Id.*

Figure 4A:

	Funds that Currently Get an Audit from a PCAOB-Registered, -Inspected, and Independent Auditor					All Funds				
	2018	2019	2020	2021	2022	2018	2019	2020	2021	2022
$0 - $2mil funds										
Hedge Fund	946	795	800	814	845	1,117	961	1,003	1,004	1,040
Liquidity Fund	2	1	4	3	1	7	5	7	7	4
Other Private Fund	413	388	468	433	541	613	559	648	621	740
Private Equity Fund	1,910	1,928	2,028	2,152	2,562	2,365	2,325	2,460	2,602	3,080
Real Estate Fund	388	443	395	413	482	547	597	581	690	770
Venture Capital Fund	139	156	178	211	348	184	215	249	393	501
Total (for size range, excluding securitized asset funds):	3,798	3,711	3,873	4,026	4,779	4,833	4,662	4,948	5,317	6,135
$2mil - $10mil funds										
Hedge Fund	872	921	852	851	880	991	1,029	985	982	1,021
Liquidity Fund	5	5	3	2	3	5	5	4	2	3
Other Private Fund	418	467	477	513	606	546	600	623	693	786
Private Equity Fund	1,863	2,007	2,156	2,385	2,741	2,133	2,278	2,512	2,807	3,231
Real Estate Fund	439	438	514	569	655	572	606	640	745	851
Venture Capital Fund	175	190	243	286	501	222	249	317	402	650
Total (for size range, excluding securitized asset funds):	3,772	4,028	4,245	4,606	5,386	4,469	4,767	5,081	5,631	6,542
$10mil - $500mil funds										
Hedge Fund	6,603	6,720	6,641	6,761	6,965	7,203	7,335	7,235	7,380	7,581
Liquidity Fund	18	26	20	29	33	27	36	31	41	46
Other Private Fund	2,349	2,458	2,617	2,893	3,229	2,882	2,984	3,249	3,618	3,949
Private Equity Fund	7,909	8,789	9,652	10,704	12,691	8,480	9,412	10,337	11,493	13,669
Real Estate Fund	1,726	1,902	2,049	2,197	2,419	2,000	2,170	2,288	2,425	2,651
Venture Capital Fund	530	644	751	941	1,486	572	708	836	1,074	1,665
Total (for size range, excluding securitized asset funds):	19,135	20,539	21,730	23,525	26,823	21,164	22,645	23,976	26,031	29,561
>$500mil funds										
Hedge Fund	2,133	2,093	2,178	2,356	2,564	2,289	2,246	2,360	2,594	2,800
Liquidity Fund	23	24	29	28	23	35	36	39	41	35
Other Private Fund	428	419	464	505	543	599	576	619	674	726
Private Equity Fund	1,139	1,364	1,581	1,963	2,605	1,192	1,423	1,653	2,059	2,729
Real Estate Fund	227	256	299	325	405	247	279	327	354	445
Venture Capital Fund	44	67	86	136	223	50	73	96	148	240
Total (for size range, excluding securitized asset funds):	3,994	4,223	4,637	5,313	6,363	4,412	4,633	5,094	5,870	6,975
Total: ALL	30,699	32,501	34,485	37,470	43,351	34,878	36,707	39,099	42,849	49,213

Source: Form ADV Schedule D, Section 7.B.(1) data filed between Oct. 1st, 2017, and Sept. 30th, 2022.

The Growth in the Total Number of Audits from a PCAOB-Registered and -Inspected Independent Auditor

	2019	2020	2021	2022
$0 - $2mil funds				
Hedge Fund	-151	5	14	31
Liquidity Fund	-1	3	-1	-2
Other Private Fund	-25	80	-35	108
Private Equity Fund	18	100	124	410
Real Estate Fund	55	-48	18	69
Venture Capital Fund	17	22	33	137
Total (for size range, excluding securitized asset funds):	-87	162	153	753
$2mil - $10mil funds				
Hedge Fund	49	-69	-1	29
Liquidity Fund	0	-2	-1	1
Other Private Fund	49	10	36	93
Private Equity Fund	144	149	229	356
Real Estate Fund	-1	76	55	86
Venture Capital Fund	15	53	43	215
Total (for size range, excluding securitized asset funds):	256	217	361	780
$10mil - $500mil funds				
Hedge Fund	117	-79	120	204
Liquidity Fund	8	-6	9	4
Other Private Fund	109	159	276	336
Private Equity Fund	880	863	1,052	1,987
Real Estate Fund	176	147	148	222
Venture Capital Fund	114	107	190	545
Total (for size range, excluding securitized asset funds):	1,404	1,191	1,795	3,298
>$500mil funds				
Hedge Fund	-40	85	178	208
Liquidity Fund	1	5	-1	-5
Other Private Fund	-9	45	41	38
Private Equity Fund	225	217	382	642
Real Estate Fund	29	43	26	80
Venture Capital Fund	23	19	50	87
Total (for size range, excluding securitized asset funds):	229	414	676	1,050
Total: ALL	1,802	1,984	2,985	5,881

Source: Form ADV Schedule D, Section 7.B.(1) data filed between Oct. 1st, 2017, and Sept. 30th, 2022.

Figure 4B:

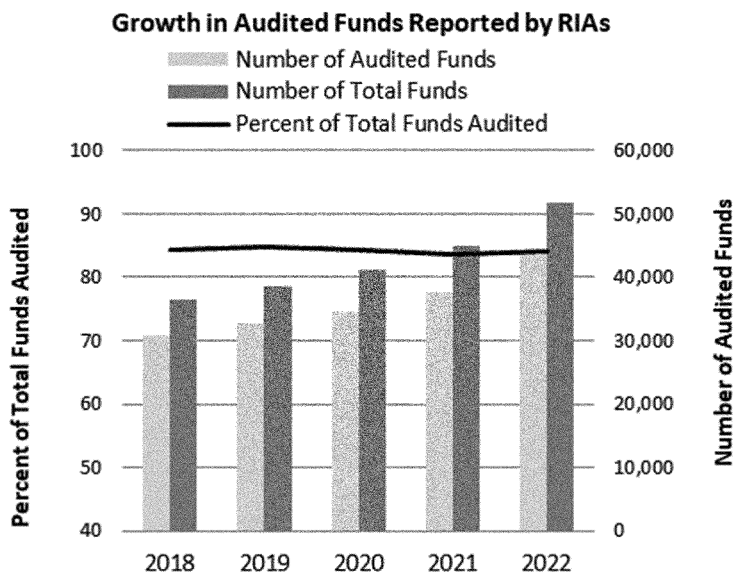
	Funds that Currently Get an Audit from a PCAOB-Registered, -Inspected, and Independent Auditor					All Funds				
	2018	2019	2020	2021	2022	2018	2019	2020	2021	2022
$0 - $2mil funds										
Securitized Asset Fund	25	18	19	18	25	302	256	230	180	232
Total (for size range, including securitized assets):	3,823	3,729	3,892	4,044	4,804	5,135	4,918	5,178	5,497	6,367
$2mil - $10mil funds										
Securitized Asset Fund	12	17	15	23	18	93	95	69	73	92
Total (for size range, including securitized assets):	3,784	4,045	4,260	4,629	5,404	4,562	4,862	5,150	5,704	6,634
$10mil - $500mil funds										
Securitized Asset Fund	90	120	129	142	147	793	948	1,121	1,383	1,494
Total (for size range, including securitized assets):	19,225	20,659	21,859	23,667	26,970	21,957	23,593	25,097	27,414	31,055
>$500mil funds										
Securitized Asset Fund	27	33	34	35	45	482	514	558	556	736
Total (for size range, including securitized assets):	4,021	4,256	4,671	5,348	6,408	4,894	5,147	5,652	6,426	7,711
Total: ALL	30,853	32,689	34,682	37,688	43,586	36,548	38,520	41,077	45,041	51,767

Source: Form ADV Schedule D, Section 7.B.(1) data filed between Oct. 1st, 2017, and Sept. 30th, 2022.

The Growth in the Total Number of Audits from a PCAOB-Registered and -Inspected Independent Auditor				
	2019	2020	2021	2022
$0 - $2mil funds				
Securitized Asset Fund	-7	1	-1	7
Total (for size range, including securitzed asset funds):	-94	163	152	760
$2mil - $10mil funds				
Securitized Asset Fund	5	-2	8	-5
Total (for size range, including securitzed asset funds):	261	215	369	775
$10mil - $500mil funds				
Securitized Asset Fund	30	9	13	5
Total (for size range, including securitzed asset funds):	1,434	1,200	1,808	3,303
>$500mil funds				
Securitized Asset Fund	6	1	1	10
Total (for size range, including securitzed asset funds):	235	415	677	1,060
Total: ALL	1,836	1,993	3,006	5,898

Source: Form ADV Schedule D, Section 7.B.(1) data filed between Oct. 1st, 2017, and Sept. 30th, 2022.

Figure 5:



Source: Form ADV Schedule D, Section 7.B.(1) data filed between Oct. 1, 2017, and Sept. 30, 2022.

BILLING CODE 8011–01–C

Figures 4A, 4B, and 5 also show that fund audits have also grown over time at a rate approximately consistent with the growth of the rest of private funds. Figure 5 shows that the average percentage of audited funds, across all fund sizes, has remained high at approximately 85% for the last five years. An implication of this fact is that the number of audits being added to the industry each year is not substantially larger than the number of outstanding funds not receiving audits: Figure 4B shows that approximately 8,100 funds did not get audits in 2022 from PCAOB-registered and -inspected independent auditors. Figure 4A shows that, excluding securitized asset funds, approximately 5,800 funds did not get audits in 2022 from PCAOB-registered and -inspected independent auditors. There was growth in the number of audits from PCAOB-registered and -inspected independent private fund auditors of approximately 2,000 in 2020, approximately 3,000 in 2021, and approximately 6,000 in 2022.[1261]

As a final matter, several commenters state that certain funds get an audit from a Big Four firm because of their investors' demands, but none of the Big Four firms would meet the independence requirement under the proposed rules.[1262] These funds get an audit from a non-independent auditor, often in response to client demands for an audit, and then undergo an additional surprise exam from a PCAOB-registered and -inspected independent auditor. Another commenter stated that some funds are currently unable to get an audit from a PCAOB-registered and -inspected independent auditor, because there is a shortage of audit firms meeting those criteria for many advisers.[1263]

FIGURE 6

Fund type	Total funds	Funds who get an annual audit that is by a PCAOB-registered and -inspected auditor but who is not independent	Get a surprise exam from an independent public accountant	Funds who get an annual audit by an independent public accountant who is not PCAOB-registered and -inspected	Get a surprise exam from an independent public accountant
Hedge Fund	12,442	20	14	46	2
Liquidity Fund	88	0	0	0	0
Other Private Fund	6,201	175	172	16	1
Private Equity Fund	22,709	71	70	65	10
Real Estate Fund	4,717	23	5	11	3
Securitized Asset Fund	2,554	0	0	8	6
Venture Capital Fund	3,056	14	14	11	0
Unique Totals	51,767	303	275	157	22

Source: Form ADV Schedule D, Section 7.B.(1) and 9.C. data filed between Oct. 1, 2017, and Sept. 30, 2022.

[1261] *Id.* We discuss the implications of these facts for the final mandatory audit requirement below. *See infra* section VI.D.5.

[1262] LaSalle Comment Letter; PWC Comment Letter.

[1263] CFA Comment Letter I.

Figure 6 further analyzes the funds from Figure 4 who do not get an audit by a PCAOB-registered and -inspected independent auditor. In particular, while some funds do not get audits at all, Figure 6 analyzes the funds that may get an audit, but not an audit from a PCAOB-registered and -inspected independent auditor. Figure 6 shows that less than one percent of all funds get an additional surprise exam alongside an audit from an auditor who is not independent, which indicates that no more than one percent of funds are managed by advisers who face difficulty in complying with existing audit requirements because of the independence standard. Figure 6 also shows that only a *de minimis* number of funds, namely 149 out of almost 50 thousand, excluding securitized asset funds, are managed by advisers who get an audit from an auditor who is not PCAOB-registered and -inspected.

Regarding fairness opinions, our staff has observed a recent rise in adviser-led secondary transactions where an adviser offers fund investors the choice between selling their interests in the private fund or converting or exchanging them for new interests in another vehicle advised by the adviser.[1264] These transactions involve direct conflicts of interest on the part of the adviser in structuring and leading these transactions because the adviser is on both sides of the transaction. In any such transaction, the adviser may face an incentive to structure the price of the transaction to be particularly beneficial to one of the vehicles, in particular by under-valuing or over-valuing the asset instead of engaging in an arms-length transaction, and so investors in one fund or the other are likely to be harmed.[1265] Advisers also may face an incentive to pursue these transactions even when it is not in the best interest of the fund to engage in the transaction at all. For example, it has been reported that adviser-led secondaries occur during times of stress and may be associated with an adviser who needs to restructure a portfolio investment.[1266] In other instances, an adviser may use an adviser-led secondary transaction to extend an investment beyond the contractually agreed upon term of the fund that holds it.[1267] While commenters stated that advisers may also pursue adviser-led secondaries for the benefit of investors,[1268] and we agree, the advisers' incentives to distort price or terms are present in each such transaction. Advisers also have the ability and discretion to distort price or terms in many such transactions, as many transactions in adviser-led secondaries contain level 3 or illiquid assets.[1269]

In part because of these risks of conflicts of interest, we understand that some, but not all, advisers obtain fairness opinions in connection with these transactions that typically address whether the price offered is fair. These fairness opinions are meant to provide investors with some third-party assurance as a means to help protect participating investors. The Commission's recently adopted amendments to Form PF require advisers to private equity funds who must file Form PF (registered advisers with at least $150 million in private fund assets under management) to file on a quarterly basis on the occurrence of adviser-led secondary transactions.[1270] However, as discussed above, Form PF is not an investor-facing disclosure form. Information that private fund advisers report on Form PF is provided to regulators on a confidential basis and is nonpublic.[1271]

Some commenters stated that other alternatives to fairness opinions are also commonly used tools.[1272] A valuation opinion is a written opinion stating the value (either as a single amount or a range) of any assets being sold as part of an adviser-led secondary transaction. By contrast, a fairness opinion addresses the fairness from a financial point of view to a party paying or receiving consideration in a transaction.[1273] One commenter stated that the financial analyses used to support a fairness opinion and valuation opinion are substantially similar.[1274] Both types of opinions generally yield implied or indicative valuation ranges.[1275] However, commenters stated that the costs of valuation opinions are typically lower than the costs of fairness opinions, all else equal.[1276] We understand this to typically be because of the extra burden of a fairness opinion in which the opinion often speaks to prices paid or received, not just to the value of the assets in the transaction.[1277]

We believe, based on commenter arguments and typical fairness opinion and valuation opinion practices, that to the extent that the information asymmetry between investors and advisers is concentrated in the valuation of the assets, and not other terms of the deal, a valuation opinion can alleviate this problem as effectively as a fairness opinion. We believe valuation opinions are viable options for providing price transparency to an investor, and that a valuation opinion will still provide investors with a strong basis to make an informed decision.[1278]

As discussed above, adviser-led secondaries may differ from other practices such as tender offers.[1279] Tender offers may include, for example, a transaction where the investor is not truly faced with the decision between (1) selling all or a portion of its interest and (2) converting or exchanging all or a portion of its interest.[1280] Tender offers may also include the case where the investor is allowed to continue to receive exposure to the asset by retaining its interest in the same fund on the same terms.[1281]

5. Books and Records

The books and records rule includes requirements for recordkeeping to promote, and facilitate internal and external monitoring of, compliance. For example, the books and records rule requires advisers registered or required to be registered under Section 203 of the Act to make and keep true, accurate and current certain books and records

[1264] *See supra* section II.C.

[1265] Unlike the case of adviser borrowing, there is a heightened risk of this conflict of interest distorting the terms or price of the transaction, and it may be difficult for disclosure practices or consent practices alone to resolve these conflicts, because in an adviser-led secondary there may be limited market-driven price discovery processes available to investors. Even where market-driven price discovery processes are available, they may be particularly subject to manipulation in the case of adviser-led secondaries. For example, if a recent sale improperly valued an asset, an adviser could be incentivized to initiate a transaction with the same valuation, which, depending on the terms of the transaction, may benefit the adviser at the expense of the investors. Similarly, if the market price of shares in a publicly traded underlying asset is volatile and drops suddenly or is depressed for an extended period of time, an adviser may be incentivized to seek to execute an adviser-led secondary with respect to such asset as soon as possible to lock in the lower price to the detriment of investors. *See supra* sections II.D, VI.C.2.

[1266] *See, e.g.,* Rae Wee, *Turnover Surges As Funds Rush To Exit Private Equity Stakes,* Reuters (Dec. 18, 2022), *available at https://www.reuters.com/business/finance/global-markets-privateequity-pix-2022-12-19/* (retrieved from Factiva database).

[1267] *See, e.g.,* Madeline Shi, *Investors Up Allocation To Secondaries As GPs Seek Alternative Liquidity Sources,* PitchBook (Sep. 15, 2022), *available at https://pitchbook.com/news/articles/investor-secondaries-growth-alternative-liquidity.*

[1268] *See supra* section II.D.

[1269] *Id.*

[1270] Form PF Release, *supra* footnote 564.

[1271] *See supra* section VI.C.3.

[1272] *See, e.g.,* IAA Comment Letter II; Houlihan Comment Letter; Cravath Comment Letter.

[1273] Houlihan Comment Letter.

[1274] *Id.*

[1275] *Id.*

[1276] *See, e.g.,* IAA Comment Letter II; Houlihan Comment Letter; Cravath Comment Letter.

[1277] Cravath Comment Letter.

[1278] *See supra* section II.D.2; *see also* Houlihan Comment Letter.

[1279] *See supra* section II.D.1.

[1280] *Id.*

[1281] *Id.*

relating to their investment advisory businesses, including advisory business financial and accounting records, and advertising and performance records.[1282] Advisers are required to maintain and preserve these records in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on such record, the first two years in an appropriate office of the investment adviser.[1283] Commenters did not provide further perspectives on the current state of books and records compliance practices.

6. Documentation of Annual Review Under the Compliance Rule

Under the Advisers Act compliance rule, advisers registered or required to be registered under Section 203 of the Act must review no less frequently than annually the adequacy of their compliance policies and procedures and the effectiveness of their implementation. Currently, there is no requirement to document that review in writing.[1284] This rule applies to all investment advisers, not just advisers to private funds.[1285] We understand that many investment advisers routinely make and preserve written documentation of the annual review of their compliance policies and procedures, even while the compliance rule does not require such written documentation. Many advisers retain such documentation for use in demonstrating compliance with the rule during an examination by our Division of Examinations. As discussed above, several commenters stated that written documentation of the annual review has been widely adopted as a standard practice by investment advisers.[1286] However, based on staff experience, we understand that not all advisers make and retain such documentation of the annual review. One commenter also described that there are a variety of ways advisers may document the annual review of their policies and procedures, including written reports, presentations, and informal compilations of notes, among other methods.[1287]

D. Benefits and Costs

1. Overview

The final rules will (a) require registered investment advisers to provide certain disclosures in quarterly statements to private fund investors, (b) require all investment advisers, including those that are not registered with the Commission, to make certain disclosures of preferential terms offered to prospective and current investors, (c) with certain exceptions, prohibit all private fund advisers, including those that are not registered with the Commission, from providing certain types of preferential treatment that the advisers reasonably expect to have a material negative effect on other investors, (d) restrict all private fund advisers, including those that are not registered with the Commission, from engaging in certain activities with respect to the private fund or any investor in that private fund, with certain exceptions for when the adviser satisfies certain disclosure requirements and, in some cases, when the adviser also satisfies certain consent requirements, (e) require a registered private fund adviser to obtain an annual financial statement audit of a private fund and, in connection with an adviser-led secondary transaction, a fairness opinion or valuation opinion from an independent opinion provider, and (f) impose compliance rule amendments and recordkeeping requirements, including certain requirements that apply to all advisers, to enhance the level of regulatory and other external monitoring of private funds and other clients.

Without Commission action, private funds and private fund advisers would have limited abilities and incentives to implement effective reforms such as those in the final rules. As discussed in the Proposing Release, private fund investments can have insufficient transparency in negotiations as well as in reporting of performance and fees/expenses, and certain sales practices, conflicts of interest, and compensation schemes are either not transparent to investors or can be harmful and have significant negative effects on private fund returns.[1288] As discussed above, because of the asymmetries in investor and adviser bargaining power, investors may have limited ability to negotiate for enhanced transparency, and even new rules that mandate enhanced transparency may not give investors the ability to negotiate for safer contractual terms with respect to certain sales practices, conflicts of interest, and compensation schemes that can negatively impact investors.[1289]

The results are costs and risks of investor harm in financial markets, and by extension costs and risks of harm to millions of Americans through State and municipal pension plans, college and university endowments, and non-profit organizations. The relationship between fund adviser and investor can provide valuable opportunities for diversification of investments and an efficient avenue for the raising of capital, enabling economic growth that would not otherwise occur. However, the current opacity of the market can prevent even sophisticated investors from optimally obtaining certain terms of agreement from fund advisers, and this can result in investors paying excess costs, bearing excess risk, receiving limited and less reliable information about investments, and receiving contractual terms that may reduce their returns relative to what they would obtain otherwise. The final rules provide a regulatory solution that enhances the protection of investors and improves the current state of many of these problems. Moreover, the final rules do so in a way that does not deprive fund advisers of compensation for their services: Insofar as the rules shift costs and risks back onto fund advisers, the rules strengthen the incentives of advisers to manage risk in the interest of fund investors and, in doing so, does not preclude fund advisers from responding by raising prices of services that are not prohibited and are transparently disclosed and, in some cases, where investor consent is obtained.

Effects. In analyzing the effects of the final rules, we recognize that investors may benefit from access to more useful information about the fees, expenses, and performance of private funds. They also may benefit from more intensive monitoring of funds and fund advisers by third parties, including auditors and persons who prepare assessments of secondary transactions. Finally, investors may benefit from more specific disclosure and, in some cases, consent requirements involving certain sales practices, conflicts of interest, and compensation schemes that may result in investor harm, and a restriction of certain practices where they are not specifically disclosed or, in some cases, where investor consent is not obtained. The specific provisions of the final rules will benefit investors, and by extension costs and risks of harm to millions of

[1282] *See* rule 204–2 under the Advisers Act.

[1283] *Id.*

[1284] Rule 206(4)–7 under the Advisers Act.

[1285] *Id.*

[1286] *See supra* section III; *see also* SBAI Comment Letter; IAA Comment Letter II.

[1287] *See supra* section III; *see also* NSCP Comment Letter.

[1288] Proposing Release, *supra* footnote 3, at 213–214.

[1289] *See supra* section VI.B. The lack of transparency in private fund investments can also negatively affect investors because of the lack of independent governance mechanisms, which leaves limited ability for investors to cause funds to effectively oversee and give consent to adviser practices. *See supra* sections I, VI.B, VI.C.2.

Americans through State and municipal pension plans, college and university endowments, and non-profit organizations, through each of these basic effects. Further effects on efficiency, competition, and capital formation are analyzed below.[1290]

Some commenters stated that the proposed private fund adviser rules and other recently proposed or adopted rules would have interacting effects, and that the effects should not be analyzed independently.[1291] The Commission acknowledges that the effects of any final rule may be impacted by recently adopted rules that precede it. Accordingly, each economic analysis in each adopting release considers an updated economic baseline that incorporates any new regulatory requirements, including compliance costs, at the time of each adoption, and considers the incremental new benefits and incremental new costs over those already resulting from the preceding rules. That is, as stated above, the economic analysis appropriately considers existing regulatory requirements, including recently adopted rules, as part of its economic baseline against which the costs and benefits of the final rule are measured.[1292]

In particular, the Commission's analysis here considers three primary ways in which preceding adopted rules impact the baseline, meaning the state of the world in the absence of the final rules, and as such we believe the analysis is responsive to commenter concerns. First, as a general matter, the incremental effect of new compliance costs on advisers from the final rules can vary depending on the total amount of compliance costs already facing advisers. Whether an adviser is likely to respond to new compliance costs without exiting or without substantially passing on costs to investors depends on the adviser's profits today above existing compliance costs. Recently adopted rules impact advisers' profits, and so impact the degree to which new compliance costs may result in advisers exiting the market or in costs being passed on to investors. Second, as a related matter, if other rules have been adopted sufficiently recently, the state of the world in the absence of the final rules may specifically include the transition periods for recently adopted rules. Certain advisers may face increased costs from coming into compliance with multiple rules simultaneously. Third, to the extent recently adopted rules address matters related to those in the final rules, the benefits of the final rules may be mitigated to the extent recently adopted rules already offer certain investor protections.

Specifically, the recent amendments to Form PF may result in these three effects. First, the recent amendments to Form PF result in economic costs of new required current reporting for advisers to hedge funds and new quarterly and annual reporting for advisers to private equity funds. Second, the incremental new costs of the final private fund adviser rules may be borne, in part, at the same time as the new Form PF costs, as the effective date of the new Form PF current reporting is December 11, 2023. Third, the recently adopted Form PF amendments result in required reporting related to performance, clawbacks, and adviser-led secondaries, which may impact the benefits of the final quarterly statement rule and the final adviser-led secondaries rule.[1293]

While the Commission acknowledges these potential effects, we also believe we have mitigated the consequences of these overlapping costs for many advisers in the final rules by adopting a longer transition period for the private fund adviser rules, in particular for smaller advisers, as discussed further below.[1294] We have also responded to commenter concerns on compliance costs by offering certain disclosure-based exceptions and, in some cases, certain consent-based exceptions rather than outright prohibitions.[1295] Still, we understand that, at the margin, the sequencing of these rules may still result in heightened costs for certain advisers.[1296] To the extent heightened costs occur, these heightened costs are analyzed together with the benefits of the final rules.

More useful information for investors. Investors rely on information from fund advisers in deciding whether to continue an investment, how strictly to monitor an ongoing investment or their adviser's conduct, whether to consider switching to an alternative, whether to continue investing in subsequent funds raised by the same adviser, and how to potentially negotiate terms with their adviser on future investments.[1297] By requiring detailed and standardized disclosures across certain funds, the final rules will improve the usefulness of the information that current investors receive about private fund fees, expenses, and performance, and that both current and prospective investors receive about preferential terms granted to certain investors. This will enable them to evaluate more easily the performance of their private fund investments, net of fees and expenses, and to make comparisons among investments.

Finally, enhanced disclosures and, in some cases, consent requirements will help investors shape the terms of their relationship with the adviser of the private fund. As discussed above, many investors report that they accept poor terms because they do not know what is "market." [1298] Many investors may benefit from the enhanced information they receive by being in a better position to negotiate the terms of their relationship with a private fund's adviser.

The rules may also improve the quality and accuracy of information received by investors through the final audit requirement, both by providing independent checks of financial statements, and by potentially improving advisers' regular performance reporting, to the extent that regular audits improve the completeness and accuracy of fund adviser valuation of investments. The final rules will lastly improve the quality and accuracy of information received by investors through the rules providing for restrictions of certain activities unless those activities are specifically disclosed.

Enhanced external monitoring of fund investments. Many investors currently rely on third-party monitoring of funds for prevention and timely detection of specific harms from misappropriation,

[1290] *See infra* section VI.E.

[1291] *See, e.g.,* MFA Comment Letter II; Comment Letter of the Managed Funds Association (July 21, 2023) ("MFA Comment Letter III"); AIC Comment Letter IV. These commenters discussed generally the cumulative costs of these proposed and adopted rules, as well as possible costs of simultaneous adoption; they did not identify other specific interactions from the rules that result in benefits or costs that would not be purely additive.

[1292] *See supra* section VI.C.

[1293] *See infra* sections VI.D.2, VI.D.6.

[1294] *See infra* section VI.E.2.

[1295] *See supra* section II.E.

[1296] The competitive effects of these heightened costs are discussed below. *See infra* section VI.E.2. The effects of these compliance costs on advisers, including their competitive effects, are difficult to quantify. Some advisers may have high profit margins but low ability or willingness to pass on new costs to funds, and so may earn lower profits but with no further effects. Other advisers may pass on some or all of the new costs to funds, and by extension their investors, reducing fund and investor returns. Still other advisers may exit the market or forgo entry. Measuring the likelihood of each of these outcomes for the purposes of quantifying effects would require individualized inquiry into the conditions and characteristics of each adviser, or would require speculative assumptions that may not be reliable.

[1297] For example, private equity fund agreements often allow the adviser to raise capital for new funds before the end of the fund's life, as long as all, or substantially all, of the money in prior fund has been invested. *See supra* section VI.C.2.

[1298] *See supra* section VI.B.

theft, or other losses to investors. This monitoring occurs through surprise exams or audits under the custody rule, as well as through other audits of fund financial statements. The final rules will expand the scope of circumstances requiring third-party monitoring, and investors will benefit to the extent that such expanded monitoring increases the speed of detection of misappropriation, theft, or other losses and so results in more timely remediation. Audits may also broadly improve the completeness and accuracy of fund performance reporting, to the extent these audits improve fund valuations of their investments. Even investors who rely on the recommendations of consultants, advisers, private banks, and other intermediaries will benefit from the final rules to the extent the recommendations by these intermediaries are also improved by the protections of expanded third-party monitoring by independent public accountants.

Restrictions of certain activities that are contrary to public interest and to the protection of investors, with certain exceptions for disclosures and, in some cases, where investor consent is also obtained. Certain practices represent potential conflicts of interest and sources of harm to funds and investors. As discussed above, private funds typically lack fully independent governance mechanisms more common to other markets that would help protect investors from harm in the context of the activities considered.[1299] While many of these conflicts of interest and sources of harm may be difficult for investors to detect or negotiate terms over, we are convinced by commenters that disclosure of the activities considered in the final rule, and, in some cases, investor consent, can resolve the potential investor harm. The final rule will benefit investors and serve the public interest by restricting such practices to be restricted, with certain exceptions where the adviser makes certain disclosures and, in some cases, where the adviser also obtains the required investor consent. This will further enhance investors' ability to monitor their funds through enhanced disclosures and, in some cases, consent requirements. Investors will also benefit from fund investments where advisers cease the restricted activities altogether, either because there is no exception made for disclosures or consent requirements (for example, as is the case for prohibitions on certain preferential treatment that advisers reasonably expect to have a material negative effect on other investors in the fund), or because the adviser ceases the activity voluntarily instead of making required disclosures, or in a follow-on fund where investors used the enhanced disclosure in the prior fund to negotiate the removal of the restricted activities in those future funds.[1300]

The direct costs of the final rules will include the costs of meeting the minimum regulatory requirements of the rules, including the costs of providing standardized disclosures, in some cases obtaining the required investor consent, and, for some advisers, refraining from restricted activities, and obtaining the required external financial statement audit and fairness opinions or valuation opinions.[1301] Additional costs will arise from the new compliance requirements of the final rules. For example, some advisers will update their compliance programs in response to the requirement to make and keep a record of their annual review of the program's implementation and effectiveness. Certain fund advisers may also face costs in the form of declining revenue, declining compensation to fund personnel and a potential resulting loss of employees, or losses of investor capital. Some of these costs may be passed on to investors in the form of higher fees. However, some of these costs, such as declining compensation to fund personnel, will be a transfer to investors depending on the fund's economic arrangement with the adviser. Other indirect costs of the rule may include unintended consequences to investors, such as potential losses of preferential terms for investors currently receiving them (specifically in the case of preferential terms that would not be prohibited if disclosed, but where the adviser does not want to make the required disclosures), delays in fund closing processes associated with advisers making disclosures of preferential terms.

Scope. There are four aspects of the scope that impact the benefits and costs of the rule. First, as discussed above, all of the elements of the final rule will in general not apply with respect to non-U.S. private funds managed by an offshore investment adviser, regardless of whether that adviser is registered.[1302] Second, the quarterly statements, mandatory audit, and adviser-led secondaries rules will not apply to ERAs or State-registered investment advisers.[1303] Third, certain elements of the rules provide for certain relief for advisers to funds of funds. For example, the quarterly statement rule requires advisers to private funds that are not funds of funds to distribute statements within 45 days after the first three fiscal quarter ends of each fiscal year (and 90 days after the end of each fiscal year), but advisers to funds of funds are allowed 75 days after the first three quarter ends of each fiscal year (and 120 days after fiscal year end).[1304] Investors in funds outside the scope of the rule may benefit from general pro-competitive effects of the rule,[1305] to the extent private funds outside the scope of the rule revise their terms to compete with funds inside the scope of the rules, and there may be risks to capital formation from the contours of the scope impacting adviser incentives,[1306] but investors in such funds will not otherwise be impacted. Lastly, the final rules will not apply to advisers with respect to their SAFs, such as CLOs.[1307]

[1299] *See supra* section VI.C.1.

[1300] Investors will also have similar benefits in cases where advisers curtail the restricted activities by ceasing them in certain cases and pursuing compliance through enhanced disclosure in others.

[1301] One commenter, in evaluating these potential costs, states that "it is impossible or too costly to write and enforce a contract contingent on all the possible outcomes of negotiations between advisers and all the potential coinvestors." AIC Comment Letter I, Appendix 1. We believe this argument is inapt. The proposed rules were not, and did not purport to be, an enforced contract contingent on all the possible outcomes of negotiations between advisers and investors. Neither are the final adopted rules. We agree that such a contract would be too costly to write and enforce. As discussed above, we agree with commenters who stated that policy choices benefit from taking into consideration the specific market failure the policy is designed to address. We believe the final rules are consistent with this approach. *See supra* section VI.B.

[1302] *See supra* section II.

[1303] *Id.*

[1304] *See supra* section II.B.3.

[1305] *See infra* section VI.E.2.

[1306] *See infra* section VI.E.3.

[1307] As discussed above, not all funds reported as SAFs in Form ADV will meet this definition. We recognize that certain private funds have, in recent years, made modifications to their terms and structure to facilitate insurance company investors' compliance with regulatory capital requirements to which they may be subject. These funds, which are typically structured as rated note funds, often issue both equity and debt interests to the insurance company investors, rather than only equity interests. Whether such rated note funds meet the SAF definition depends on the facts and circumstances. However, based on staff experience, the modifications to the fund's terms generally leave "debt" interests substantially equivalent in substance to equity interests, and advisers typically treat the debt investors substantially the same as the equity investors (*e.g.,* holders of the "debt" interests have the same or substantially the same rights as the holders of the equity interests). We would not view investors that have equity-investor rights (*e.g.,* no right to repayment following an event of default) as holding "debt" under the definition, even if fund documents refer to such persons as "debt investors" or they otherwise hold "notes." Further, we do not believe that certain rated note funds will meet the second prong of the definition (*i.e.,* a private fund whose primary purpose is to issue asset backed securities), because they generally do not issue asset-backed securities. *See supra* section II.A. This

Continued

Legacy Status. Commenters requested legacy status for various portions of the rule.[1308] We are providing for legacy status under the prohibitions aspect of the preferential treatment rule, which prohibits advisers from providing certain preferential redemption rights and information about portfolio holdings, and for the aspects of the restricted activities rule that require investor consent.[1309] The legacy status provisions apply to governing agreements, as specified above, that were entered into prior to the compliance date if the rule would require the parties to amend such an agreement.[1310] Outside of these exceptions, the benefits and costs of the rule will accrue across all private funds and advisers. This application of legacy status mean that benefits and costs of the prohibition may not accrue with respect to private funds and advisers whose agreements were entered into prior to the compliance date. In the case of advisers to evergreen private funds, where the fund agreements have no defined end of life of the fund, such preferential terms with legacy status may persevere long after the compliance date. However, those advisers will now need to compete with advisers that are subject to the final rules with respect to their newer funds. To the extent that investors prefer private funds and advisers who do not rely on such practices, then to compete to attract those investors, even some private funds with legacy status may revise their practices over time.

Below we discuss these benefits and costs in more detail and in the context of the specific elements of the final rule.

2. Quarterly Statements

The final rules will require a registered investment adviser to prepare a quarterly statement for any private fund that it advises, directly or indirectly, that has at least two full fiscal quarters of operating results, and distribute the quarterly statement to the private fund's investors within 45 days after each fiscal quarter end after the first three fiscal quarter ends of each fiscal year (and 90 days after the end of each fiscal year), unless such a quarterly statement is prepared and distributed by another person.[1311] The rule provides that, to the extent doing so would provide more meaningful information to the private fund's investors and would not be misleading, the adviser must consolidate the quarterly statement reporting to cover, as defined above, similar pools of assets.[1312]

We discuss the costs and benefits of these requirements below. It is generally difficult to quantify these economic effects with meaningful precision, for a number of reasons. For example, there is a lack of quantitative data on the extent to which advisers currently provide information that will be required to be provided under the final rule to investors. Even if these data existed, it would be difficult to quantify how receiving such information from advisers may change investor behavior. In addition, the benefit from the requirement to provide the mandated performance disclosures will depend on the extent to which investors already receive the mandated information in a clear, concise, and comparable manner. As discussed above, however, we believe that the format and scope of these disclosures vary across advisers and private funds, with some disclosures providing limited information while others are more detailed and complex.[1313] As a result, parts of the discussion below are qualitative in nature.[1314]

Quarterly Statement—Fee and Expense Disclosure

The final rule will require an investment adviser that is registered or required to be registered and that provides investment advice to a private fund to provide each of the private fund investors with a quarterly statement containing certain information regarding fees and expenses, including fees and expenses paid by underlying portfolio investments to the adviser or its related persons. The quarterly statement will include a table detailing all adviser compensation to advisers and related persons, fund expenses, and the amount of offsets or rebates carried forward to reduce future payments or allocations to the adviser or its related persons.[1315] Further, the quarterly statement will include a table detailing portfolio investment compensation.[1316] The quarterly statement rule will require each quarterly statement to be distributed within 45 days after each the first, second, and third fiscal quarter ends and 90 days after the final fiscal quarter end.[1317] Statements must include clear and prominent, plain English disclosures regarding the manner in which all expenses, payments, allocations, rebates, waivers, and offsets are calculated, and include cross-references to the sections of the private fund's organizational and offering documents that set forth the applicable calculation methodology.[1318] If the private fund is a fund of funds, then a quarterly statement must be distributed within 75 days after the first, second, and third fiscal quarter ends and 120 days after the final fiscal quarter end.[1319] [1320]

Benefits

The effect of this requirement to provide a standardized minimum amount of information in an easily understandable format will be to lower the cost to investors of monitoring fund fees and expenses, lower the cost to investors of monitoring any conflicting arrangements, improve the ability of investors to negotiate terms related to the governance of the fund, and improve the ability of investors to evaluate the value of services provided by the adviser and other service providers to the fund. The lack of legacy status for this rule provision means that these benefits will accrue across all private funds and advisers.

We continue to believe that the final rules will achieve the benefits as stated in the Proposing Release. For example, investors could more easily compare actual investment returns to the projections they received prior to investing. As discussed above, any waterfall arrangements governing fund adviser compensation may be complex and opaque.[1321] As a result, investor returns from a fund may be affected by whether investors are able to follow, and verify, payments that the fund is making to investors and to the adviser in the form of performance-based

means that SAFs for the purposes of this definition are likely even more disproportionately CLOs than is indicated by the statistics in section VI.C.1.

[1308] *See supra* section IV.

[1309] *Id.*

[1310] *Id.*

[1311] *See supra* section II.B.

[1312] *See supra* section II.B.4.

[1313] *See supra* section VI.C.3.

[1314] Some commenters criticized this approach to the costs and benefits discussion. These commenters state that the analysis is deficient, not appropriate, and sparse, among other criticisms. *See, e.g.,* AIC Comment Letter I, Appendix 1; AIMA/ACC Comment Letter. We continue to believe that the economic analysis is mindful of the costs imposed by, and the benefits obtained from, the final rules, and have considered, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. The following analysis considers, in detail, the potential economic effects that may result from this final rulemaking, including the benefits and costs to market participants as well as the broader implications of the final rules for efficiency, competition, and capital formation. One commenter was broadly supportive of the depth and scope of the economic analysis offered in the Proposing Release. *See* Better Markets Comment Letter.

[1315] *See supra* section II.B.1.b).

[1316] *See supra* section II.B.1.b).

[1317] *See supra* section II.B.1.

[1318] *Id.*

[1319] *Id.*

[1320] *Id.*

[1321] *See supra* section VI.C.3.

compensation, as these payments are often only made after investors have recouped the applicable amount of capital contributions and received any applicable preferred returns from the fund. This information may also help investors evaluate whether they are entitled to the benefit of a clawback. For example, for deal-by-deal waterfalls, where advisers may be more likely to be subject to a clawback,[1322] even sophisticated investors have reported difficulty in measuring and evaluating compensation made to fund advisers and determining if adviser fees comply with the fund's governing agreements.[1323] Any such investors would benefit to the extent that the required disclosures under the final rules address these difficulties. Fee and compensation arrangements for other types of private funds also vary in their approach and complexity, and investors in all types of private funds will therefore benefit from the standardization under the final rules.[1324]

With respect to hedge funds, as discussed above, one commenter criticized the Proposing Release's statement that there can be substantial variation in the fees private fund advisers charge for similar services and performances.[1325] We believe this mischaracterizes the potential benefits of the proposal and of the final rules. First, the additional statistics cited by this commenter speak to average alpha, average returns, and average risk-adjusted returns of hedge funds, among other average statistics.[1326] The Proposing Release, by contrast, discusses substantial variation across advisers in fees charged and in their performance. Additional literature cited in the commenter's analysis states " '[i]n contrast to the perception of a common 2/20 fee structure,' there are 'considerable cross-sectional and time series variations in hedge fund fees,' " which we also believe supports the Proposing Release's discussion.[1327]

Investors may also find it easier to compare alternative funds to other investments. As a result, some investors may reallocate their capital among competing fund investments and, in doing so, achieve a better match between their choice of private fund and their preferences over private fund terms, investment strategies, and investment outcomes. For example, investors may discover differences in the cost of compensating advisers across funds that lead them to move their assets into funds (if able to do so) with less costly advisers or other service providers. Investors may also have an improved ability to negotiate expenses and other arrangements in any subsequent private funds raised by the same adviser. Investors may therefore face lower overall costs of investing in private funds as a benefit of the standardization. In addition, an investor may more easily detect errors by reading the adviser's disclosure of any offsets or rebates carried forward to subsequent periods that would reduce future adviser compensation. This information will make it easier for investors to understand whether they are entitled to additional reductions in future periods.

Because the rule requires disclosures at both the private-fund level and the portfolio level, investors can more easily evaluate the aggregate fees and expenses of the fund, including the impact of individual portfolio investments. The private fund level information will allow investors to more easily evaluate their fund fees and expenses relative to the fund governing documents, evaluate the performance of the fund investment net of fees and expenses, and evaluate whether they want to pursue further investments with the same adviser or explore other potential investments. The portfolio investment level information will allow investors to evaluate the fees and costs of the fund more easily in relation to the adviser's compensation and ownership of the portfolio investments of the fund. For example, investors will be able to evaluate more easily whether any portfolio investments are providing compensation that could entitle investors to a rebate or offset of the fees they owe to the fund adviser. This information will also allow investors to compare the adviser's compensation from the fund's portfolio investments relative to the performance of the fund and relative to the performance of other investments available to the investor. To the extent that this heightened transparency encourages advisers to make more substantial disclosures to prospective investors, investors may also be able to obtain more detailed fee and expense and performance data for other prospective fund investments. As a result of these required disclosures, investor choices over private funds may more closely match investor preferences over private fund terms, investment strategies, and investment outcomes.

The magnitude of the effect depends on the extent to which investors do not currently have access to the information that will be reported in the quarterly statement in an easily understandable format and will use the information once provided. Several commenters argue that advisers are already providing investors with sufficient disclosures on all items described in the required quarterly statements, or that investors rarely ask for more information than is provided by current practices.[1328] One commenter stated that the increasing demand for private equity advisory services suggests that investors are satisfied with the level of disclosure provided to them.[1329]

However, many other commenters broadly supported these categories of benefits, both from the required quarterly statements in general and from the final rule's overall enhancement of disclosures.[1330] Other commenters specifically supported the general enhancement of fee and expense disclosure.[1331] Two commenters supported enhanced disclosure of adviser compensation.[1332]

Moreover, as discussed above, industry literature provides a countervailing view to these industry commenters, at least for private equity investors.[1333] In 2021, 59% of private equity LPs in a survey reported receiving ILPA's reporting template more than half the time, indicating that LPs must continue to use their negotiating resources to receive the template, and many investors do not receive reporting consistent with the template.[1334] In a more recent survey, 56% of private equity investor respondents indicated that information transparency requests granted to one investor are generally not granted to all investors, and 75% find that an adviser's agreement to report fees and expenses consistent with the ILPA

[1322] *Id.*

[1323] *See supra* section II.B.1.

[1324] *See supra* sections II.B, VI.C.3. In particular, commenters stated that the proposed disclosure requirements were appropriate for investors to all types of private funds. *See, e.g.,* CFA Comment Letter II.

[1325] *See supra* section VI.C.3; *see also* CCMR Comment Letter IV.

[1326] *Id.*

[1327] *Id. See also* Proposing Release, *supra* footnote 3, at 218.

[1328] *See, e.g.,* NYC Bar Comment Letter II; AIMA/ACC Comment Letter; Dechert Comment Letter; AIC Comment Letter I; ICM Comment Letter; Schulte Comment Letter.

[1329] AIC Comment Letter I, Appendix 1.

[1330] *See, e.g.,* InvestX Comment Letter; NEA and AFT Comment Letter; United For Respect Comment Letter I; Public Citizen Comment Letter; Better Markets Comment Letter.

[1331] *See, e.g.,* Segal Marco Comment Letter; Seattle Retirement System Comment Letter; Morningstar Comment Letter; CFA Comment Letter II.

[1332] Morningstar Comment Letter; CFA Comment Letter II.

[1333] *See supra* section VI.C.3.

[1334] *See supra* section VI.C.3; *see also* ILPA Comment Letter II; The Future of Private Equity Regulation, *supra* footnote 983, at 17.

reporting template was made through the side letter, or informally, and not reflected in the fund documents presented to all investors.[1335]

Because we have not applied the rules to advisers with respect to their CLOs and other SAFs,[1336] no benefits will accrue to investors in those funds. However, we understand from commenters and from staff understanding that these forgone benefits associated with fee and expense reporting, relative to the proposal, are minimal, based on existing practices for fee and expense reporting associated with CLOs and other SAFs, and based on the fee, expense, and performance reporting needs of CLO investors and other SAF investors.[1337] This is because debt interests in a SAF are not structured to provide variable investment returns like an equity interests, and so SAF reporting metrics that are of value to SAF investors should prioritize measuring the likelihood of the debt investor receiving its previously agreed-upon defined return.[1338] While this means that the reporting metrics required by the final rules could be of value to investors in the equity tranche of a CLO or other SAF, equity tranches are typically only a small portion of the CLO, on the order of 10%, and a portion of the holders of the equity tranche of CLOs and other SAFs consists of the adviser and its related persons, further reducing the forgone benefits from not applying the rules to advisers in those cases.[1339]

Benefits of the required disclosures may also be slightly reduced for investors in funds of funds, because (1) investors in funds of funds will generally receive the information in a less timely manner as compared to other types of funds, and because (2) certain fund of funds advisers may lack information or may not be given information in respect of underlying entities, and depending on a private fund's underlying investment structure, a fund of funds adviser may have to rely on good faith belief to determine which entity or entities constitute a portfolio investment under the rule.[1340] However, investors in funds of funds will benefit from their fund managers receiving quarterly statements from the underlying fund advisers, allowing the fund of fund manager to better monitor and negotiate with unaffiliated advisers to underlying funds.

Lastly, while many advisers not required to send quarterly statements choose to do so anyway, existing quarterly statements are not standardized across advisers and may vary in their level of detail. For example, we understand that many private equity fund governing agreements are broad in their characterization of the types of expenses that may be charged to portfolio investments and that investors receive reports of fund expenses that are aggregated to a level that makes it difficult for investors to verify that the individual charges to the fund are justified.[1341]

As a result of this variation across advisers in quarterly statement practices, the final rules will have two key interactions with Form PF reporting that affect the benefits of the final rules. First, Form PF requires information pertaining to fees and expenses (namely gross performance and then net performance after management fees, incentive fees, and allocations). The Commission may rely on data in Form PF to pursue potential outreach, examinations, or investigations, in response to any potential harm to investors associated with fees and expenses being charged to investors.[1342] Therefore, any investor protection benefits of the final rules may be mitigated to the extent that Form PF is already a sufficient tool for investor protection purposes on matters related to fees and expenses.[1343] However, we do not believe the benefits will be meaningfully mitigated for two reasons. First, the information Form PF collects on fees and expenses is limited to performance net of management fees and performance fees, which may be compared to gross performance to infer the value of those fees.[1344] Second, Form PF is not an investor-facing disclosure form. Information that private fund advisers report on Form PF is provided to regulators on a confidential basis and is nonpublic.[1345] The benefits from the final rules accrue substantially from investors receiving enhanced and standardized information.

Second, the final rules may enhance the benefits from Form PF reporting, because Form PF reporting often only requires reporting on the basis of how advisers report information to investors.[1346] Standardizing practices of disclosures of fee and expense reporting may improve data collected by Form PF, including data collected by the recently adopted Form PF current reporting regime (after the new current reporting regime's effective date of 180 days after publication in the **Federal Register**), improving Form PF's systemic risk assessment and investor protection benefits.

As discussed above, we believe that some investors in hedge funds whose advisers are operating in reliance on the exemption set forth in CFTC Regulation §4.7 may currently receive quarterly statements that present, among other things, the net asset value of the exempt pool and the change in net asset value from the end of the previous reporting period.[1347] While this could have the effect of mitigating some of the benefits of the rule if this information is already provided, and one commenter suggested excluding investors in private funds for which the adviser is a registered commodity pool operator or is relying on the exemption under CFTC Regulation §4.7,[1348] we do not believe that reports provided to investors pursuant to CFTC Regulation § 4.7 require all of the information as required under the final rule.

The magnitude of the effect also depends on how investors will use the fee and expense information in the quarterly statement. In addition, reports of fund expenses often do not include data about payments at the level of portfolio investments, or about how offsets are calculated, allocated and applied. Lack of disclosure has been at issue in enforcement actions against fund managers.[1349]

Costs

The cost of the changes in fee and expense disclosure will include the cost of compliance by the adviser. For advisers that currently maintain the records needed to generate the required information, the cost of complying with this new disclosure requirement will be limited to the costs of compiling, preparing, and distributing the information for use by investors and the cost of distributing the information to investors. We expect these costs will generally be ongoing costs. For advisers who already both maintain the records needed to generate the required

[1335] *See supra* section VI.C.3; *see also* ILPA Comment Letter II; The Future of Private Equity Regulation, *supra* footnote 983; ILPA Private Fund Advisers Data Packet, *supra* footnote 983.

[1336] *See supra* section II.A.

[1337] *See supra* sections II.A, VI.C.3.

[1338] *Id.*

[1339] *Id.*

[1340] *See supra* section II.B.1.

[1341] *See, e.g.,* StepStone, *Uncovering the Costs and Benefits of Private Equity* (Apr. 2016), *available at https://www.stepstonegroup.com/wp-content/uploads/2021/07/StepStone_Uncovering_the_Costs_and_Benefits_of_PE.pdf.*

[1342] Form PF Release, *supra* footnote 564.

[1343] *Id.*

[1344] *Id.*

[1345] *See supra* section VI.C.3.

[1346] *See supra* section VI.C.3.

[1347] *See supra* section VI.C.3.

[1348] AIMA/ACC Comment Letter.

[1349] *See supra* footnotes 217–222 (with accompanying text).

information and make the required disclosures, the costs will be even more limited. We anticipate this may be the case for many private fund advisers, as we believe many private fund advisers already maintain and disclose similar information to what is required by the rule.[1350]

Costs of delivery may be mitigated by the fact that the final rule generally allows for distribution of statements via a data room, if the adviser notifies investors when the quarterly statements are uploaded to the data room within the applicable time period under the rule and ensures that investors have access to the quarterly statement therein.[1351] Because certain of the rules will not apply to SAF advisers, there will be no costs for SAF advisers or their investors.[1352]

Other costs may include advisers needing to make determinations about what must be included on their fee and expense quarterly statements. In particular, even though portfolio investments of certain private funds may not pay or allocate portfolio investment compensation to an adviser or its related persons, advisers to those funds may still have costs associated with reviewing payments and allocations made by their portfolio investments to determine whether they must provide the required portfolio investment compensation disclosures under the final rule.[1353]

Advisers will also incur costs associated with determining and verifying that the required disclosures comply with the format requirements under the final rule, including demands on personnel time required to verify that disclosures are made in plain English regarding the manner in which calculations are made and to verify that disclosures include cross-references to the sections of the private fund's organizational and offering documents. This also includes demands on personnel time to verify that the information required to be provided in tabular format is distributed with the correct presentation. Advisers may also choose to undertake additional costs of ensuring that all information in the quarterly statements is drafted consistently with the information in fund offering documents, to avoid inconsistent interpretations across fund documents and resulting confusion for investors. Many of these costs we would expect would be borne more heavily in the initial compliance phases of the rule and would wane on an ongoing basis.[1354] The lack of legacy status for this rule provision means that these costs will be borne across all private fund advisers and potentially passed through to the funds they advise.[1355]

Some commenters emphasized the potential costs of the required quarterly statements, and that these costs would be likely to be borne by the fund and thus investors instead of by advisers.[1356] Comments also stated that the reporting requirement would be excessively burdensome where the fund has a bespoke expense arrangement.[1357] Other commenters stated that the quarterly statement requirements would be overly burdensome for smaller or emerging advisers.[1358]

Some commenters lastly expressed concerns over unintended consequences from the rule from changes in adviser behavior in response to the rule. For example, some commenters stated that, with a required framework in place governing fund expense reporting, investors would face difficulties in negotiating for any reporting not specified in the final rules.[1359] While at the margin this may occur, we believe the final rules and this release appropriately leave investors and advisers free to negotiate any fee and expense reporting terms not specified in the final rules (though any additional reporting must still comply with other regulations, such as the final marketing rule when applicable).[1360] Similarly, one commenter stated that disclosing sub-adviser fees separately could disincentivize sub-advisers from offering discounted or reduced fees to private funds.[1361] As discussed above, we believe the final rules are designed to mitigate burden where possible and continue to facilitate competition and facilitate flexible negotiations between private fund parties.[1362]

Some of these costs of compliance could be reduced by the rule provision providing that, to the extent doing so would provide more meaningful information and not be misleading, advisers must consolidate the quarterly statement reporting to cover similar pools of assets, avoiding duplicative costs across multiple statements. However, in other cases the rule provision requiring consolidation may further increase the costs of compliance with the rules, not decrease the costs of compliance. For example, in the case where a private fund adviser is preparing quarterly statements for investors in a feeder fund and is consolidating statements between a master fund and its feeder funds, the consolidation may require the adviser to calculate the feeder fund's proportionate interest in the master fund on a consolidated basis. The additional costs of these calculations of proportionate interest in the master fund, to the extent the adviser does not already undertake this practice, may offset any reduced costs the adviser receives from not being required to undertake duplicative costs across multiple statements. Commenters did not offer any opinion as to which of these two scenarios is generally more likely to be the case.

Advisers to funds of funds may face certain additional costs associated with needing to determine whether an entity paying itself, or a related person, is a portfolio investment of the fund of funds under the final rule.[1363] We understand there are means available to funds of funds to mitigate these costs, such as being able to ask any such payor whether certain underlying funds hold an investment in the payor, or requesting a list of investments from underlying funds to determine whether any of those underlying portfolio investments have a business relationship with the adviser or its

[1350] *See supra* section VI.C.3.

[1351] *See supra* section II.B.3.

[1352] *See supra* section II.A.

[1353] *See supra* section II.B.1.b).

[1354] One commenter quantified all of the costs of the rule over a 20-year horizon, assuming constant costs over time but applying a discount rate to costs in the future. *See* LSTA Comment Letter, Exhibit C. However, we believe forecasts of costs over such a horizon face substantial difficulties in reliably taking into account changes in technology over time, changes in market practices, changes in asset allocations between private funds and other asset allocations, or changes in the regulatory landscape. Doing so requires sophisticated econometric modeling, with many assumptions beyond the use of a discount rate, and long-horizon forecasting often cannot be done reliably. *See, e.g.,* Kenichiro McAlinn & Mike West, *Dynamic Bayesian Predictive Synthesis in Time Series Forecasting,* 210 J. Econometrics 155–169 (May 2019) (''However, forecasting over longer horizons is typically more difficult than over shorter horizons, and models calibrated on the short-term basis can often be quite poor in the longer-term.''). As such, we do not incorporate forecasts of total costs over long horizons in our quantification of costs here or for other categories of costs.

[1355] There do not exist reliable data for quantifying what percentage of private fund advisers today engage in this activity or the other restricted activities. For the purposes of quantifying costs, including aggregate costs, we have applied the estimated costs per adviser to all advisers in the scope of the rule, as detailed in section VII.

[1356] *See, e.g.,* Alumni Ventures Comment Letter; Segal Marco Comment Letter; Roubaix Comment Letter; ATR Comment Letter; AIC Comment Letter I.

[1357] Alumni Ventures Comment Letter; ATR Comment Letter.

[1358] AIC Comment Letter I; SBAI Comment Letter. We discuss the impact of the final rules on smaller or emerging advisers more generally below. *See infra* section VI.E.

[1359] *See, e.g.,* PIFF Comment Letter; NYC Comptroller Comment Letter.

[1360] *See supra* section II.B.1.

[1361] *See* AIMA/ACC Comment Letter.

[1362] *See supra* section VI.B.

[1363] *See supra* section II.B.1.b).

related persons.[1364] However, at the margin, there may be such increased costs, in particular in the case where certain fund of funds advisers may lack information or may not be given information in respect of underlying entities.[1365]

There are other aspects of the rule that will impose costs. In particular, some advisers may choose to update their systems and internal processes and procedures for tracking fee and expense information to better respond to this disclosure requirement. The costs of those improvements would be an indirect cost of the rule, to the extent they would not occur otherwise, and they are likely to be higher initially than they would be on an ongoing basis.

*Preparation and distribution of Quarterly Statement*s. As discussed below, for purposes of the PRA, we anticipate that the compliance costs associated with preparation and distribution of quarterly statements (including the preparation and distribution of fee and expense disclosure, as well as the performance disclosure discussed below) will include an aggregate annual internal cost of $339,493,120 and an aggregate annual external cost of $148,229,760, or a total cost of $487,722,880 annually.[1366] For costs associated with potential upgrades to fee tracking and expense information systems, funds are likely to vary in the intensity of their upgrades, because for example some advisers may not pursue any system upgrades at all, and moreover the costs may be pursued or amortized over different periods of time. Advisers are similarly likely to vary in their choices of whether to invest in increasing the quality of their services. For both of these categories of costs, the data do not exist to estimate how funds or investors may respond to the reporting requirements, and so the costs may not be practically quantified.

Under the final rule, these compliance costs may be borne by advisers and, where permissible, could be imposed on funds and therefore indirectly passed on to investors. For example, under current practice, advisers to private funds generally charge disclosure and reporting costs to the funds, so that those costs are ultimately paid by the fund investors. Also, currently, to the extent advisers use service providers to assist with preparing statements (*e.g.,* fund administrators), those costs often are borne by the fund (and thus indirectly investors). We expect similar arrangements may be made going forward to comply with the final rule, with disclosure where required. Advisers could alternatively attempt to introduce substitute charges (for example, increased management fees) in order to cover the costs of compliance with the rule, and their ability to do so may depend on the willingness of investors to incur those substitute charges.

Further, to the extent that the additional standardization and comparability of the information in the required disclosures makes it more difficult to charge fees higher than those charged for similar adviser services or otherwise to continue current levels and structures of fees and expenses, the final rules may reduce revenues for some advisers and their related persons. These advisers may respond by reducing their fees or by differentiating their services from those provided by other advisers, including by, for example, increasing the quality of their services in a manner that could attract additional capital to funds they advise. To the extent these reduced revenues result in reduced compensation for some advisers and their related persons, those entities may become less competitive as employers. However, this cost may be mitigated to the extent that some advisers attract new capital under the final rules, and so those advisers and their related persons may become more competitive as employers.

Quarterly Statement—Performance Disclosure

Advisers will also be required to include standardized fund performance information in each quarterly statement provided to fund investors. Specifically, the final rules will require an adviser to a fund considered a liquid fund under the final rule to disclose the fund's annual net total returns for each fiscal year for the prior year, prior five-year period, and prior 10-year period or since inception (whichever is shorter) and the cumulative result for the year as of the most recent quarter.[1367] For illiquid funds, the final rule will require an adviser to show the internal rate of return (IRR) and multiple of invested capital (MOIC) (each, on a gross and net basis), the gross IRR and the gross MOIC for the unrealized and realized portions of the portfolio (each shown separately), and a statement of contributions and distributions.[1368] Performance reporting, save for the statement of contributions and distributions, must be computed with and without the effect of any fund level subscription facilities.[1369] The statement of contributions and distributions must provide certain cash flow information for each fund.[1370] Further, advisers must include clear and prominent plain English disclosure of the criteria used and assumptions made in calculating the performance.[1371]

Benefits

As a result of these performance disclosures, some investors will find it easier to obtain and use information about the performance of their private fund investments. They may, for example, find it easier to monitor the performance of their investments and compare the performance of the private funds in their portfolios to each other and to other investments.[1372] In addition, they may use the information as a basis for updating their choices between different private funds or between private fund and other investments. In doing so, they may achieve a better alignment between their investment choices and preferences. Cash flow information will be provided in a form that allows investors to compare the performance of the fund (or a fund investment) with the performance of other investments, such as by computing PME or other metrics. The lack of legacy status for this rule provision means that these benefits will accrue across all private funds and advisers.

We understand that some investors receive the required performance information under the baseline, independently of the final rule. For

[1364] *Id.*

[1365] *Id.*

[1366] We have adjusted the estimates from the proposal to reflect that the five private fund rules will not apply to SAF advisers regarding SAFs they advise. *See infra* section VII.B. As explained in that section, this estimated annual cost is the sum of the estimated recurring cost of the proposed rule in addition to the estimated initial cost annualized over the first three years. One commenter broadly criticized the hours estimates underlying these cost estimates as unsupported, arbitrary, and possibly underestimated, further stating that none of the calculations rely on survey data or wage and hour studies. *See* AIC Comment Letter I, Appendix 1. We disagree. These cost estimates are based on industry survey data on wages, and we have stated the assumptions underlying the number of hours. *See infra* section VII.B. To reflect commenter concerns that quantified costs of the proposal were potentially understated, and recognizing certain changes from the proposal, we are revising the estimates upwards as reflected here and in section VII.B. For example, to address the commenter's contention that we underestimated the burdens generally, and recognizing the changes from the proposal, we are revising the internal initial burden for the preparation of the quarterly statement estimate upwards to 12 hours. We believe this is appropriate because advisers will likely need to develop, or work with service providers to develop, new systems to collect and prepare the statements.

[1367] *See supra* section II.B.2.a).

[1368] *See supra* section II.B.2.b).

[1369] *Id.*

[1370] *Id.*

[1371] *See supra* section II.B.2.c).

[1372] *Id; see also* Brown et al., *supra* footnote 1226.

example, some investors receive performance disclosures from advisers on a tailored basis. As noted above, many commenters stated, generally, that advisers are already providing investors with sufficient disclosures on all items described in the required quarterly statements.[1373] Another adviser commented that it finds investors rarely express that they want more information regarding historical performance of a fund.[1374] Other commenters stated that the existence of a variety of market practices reflects differing desires by investors, and that standardization would not yield any benefits, given varying investor preferences.[1375]

Because the rules will not apply to advisers with respect to SAFs that they advise, investors in SAFs will not benefit under the final rules.[1376] There may be forgone benefits because, for example, junior tranches of debt in SAFs carry higher risks that deteriorating performance of the SAF as measured by IRR and MOIC could impact their cash flows, and thus investors in junior tranches could have benefited from reporting of IRR and MOIC metrics as would have been required by the proposal.[1377] While equity tranches are typically only a small portion of the CLO, on the order of 10%, and a portion of the equity tranche of CLOs and other SAFs consists of the adviser and its related persons, there are still allocations of the equity tranche to certain outside investors, and those investors could have benefited under the final rules as well.[1378] The Commission staff are not aware of any data, and we did not receive any comment letters, that could measure SAF investor sensitivity to IRR and MOIC metrics, but to the extent investors are sensitive to such metrics, SAF investor benefits under the final rules have been reduced relative to the proposal by the loss of required reporting of those metrics.

However, we believe these forgone benefits are likely to be minimal, consistent with statements by commenters.[1379] Because investors in SAFs primarily hold debt interests in the fund, by definition,[1380] their primary performance concern is in evaluating the likelihood of full payment of the cash flows they are owed under the indenture corresponding to their agreed-upon defined return.[1381] This view is supported by industry comment letters.[1382] Because the final rules require reporting of performance metrics that pertain to the fund itself, those performance metrics may be of little or no informative use to debt investors receiving fixed payments along a waterfall structure. For example, a fund with a high IRR or MOIC that then experiences a reduction in its IRR or MOIC may not experience a reduction in its likelihood of repaying debt investors, and debt investors may not be able to determine if or when a reduction in IRR or MOIC results in a likelihood of their debt interests becoming impaired.

The performance reporting terms that CLOs and other SAFs typically currently rely on, by contrast, focus on tests of fund performance designed to measure the likelihood of successful payment of cash flows owed under an indenture, such as overcollateralization tests and interest coverage tests (*i.e.,* information relating to the quality, composition, characteristics and servicing of the fund's portfolio assets).[1383] As a final matter, because CLO industry standard independent collateral administrator reports typically provide all relevant cash flows, and provide for estimated market values of every loan in the portfolio, investors in CLOs who would value information from IRR and MOIC could, in principle, estimate their own values from these metrics.[1384] Therefore, these forgone benefits relative to the proposal may be minimal.

Other commenters supported the proposed economic benefits of the enhanced and standardized performance disclosures.[1385] For example, to the extent that investors share the complete, comparable data with consultants or other intermediaries they work with (as is often current practice to the extent permitted under confidentiality provisions), this may allow such intermediaries to provide broader views across the private funds market or segments of the market. This may facilitate better decision making and capital allocation more broadly.

Similar to fee and expense reporting, variation across advisers in reporting practices means that the final rules will have two key interactions with Form PF reporting that affect the benefits of the final rules. First, because Form PF already collects performance information, the Commission may rely on data in Form PF to pursue potential outreach, examinations, or investigations, in response to any potential harm to investors associated with fund performance.[1386] Therefore, any investor protection benefits of the final rules may be mitigated to the extent that Form PF is already a sufficient tool for investor protection purposes regarding issues related to fund performance.[1387] This may also be the case for investors in funds advised by large hedge fund advisers, whose advisers will be subject to the new current reporting regime (after the new current reporting regime's effective date of 180 days after publication in the **Federal Register**).[1388] However, as with fee and expense reporting, we do not believe the benefits will be substantially mitigated, because Form PF is not an investor-facing disclosure form. Information that private fund advisers report on Form PF is provided to regulators on a confidential basis and is nonpublic.[1389] The benefits from the final rules accrue substantially from investors receiving enhanced and standardized information.

Second, the final rules may enhance the benefits from Form PF reporting, because Form PF reporting often only requires reporting on the basis of how advisers report information to investors.[1390] Standardizing practices of disclosures of performance reporting may improve data collected by Form PF, including data collected by the recently adopted Form PF current reporting regime (after the new current reporting regime's effective date of 180 days after publication in the **Federal Register**), improving Form PF's systemic risk assessment and investor protection benefits.

The required presentation of performance information and the resulting economic benefits will vary based on whether the fund is determined to be a liquid fund or an illiquid fund. For example, for private equity and other illiquid funds, investors will benefit from receiving multiple pieces of performance information, because the shortcomings discussed above that are associated with each method of measuring performance

[1373] *See, e.g.,* NYC Bar Comment Letter II; AIMA/ACC Comment Letter; Dechert Comment Letter; AIC Comment Letter I.

[1374] ICM Comment Letter.

[1375] *See, e.g.,* Schulte Comment Letter; PIFF Comment Letter.

[1376] *See supra* sections II.AII.B, VI.C.3.

[1377] *Id.*

[1378] *Id.*

[1379] *See, e.g.,* LSTA Comment Letter; SFA Comment Letter II; TIAA Comment Letter.

[1380] *See supra* sections II.A, VI.C.3.

[1381] *Id.*

[1382] *See, e.g.,* LSTA Comment Letter; SFA Comment Letter II; TIAA Comment Letter.

[1383] *See supra* sections II.A, VI.C.3.

[1384] *Id.*

[1385] *See, e.g.,* CII Comment Letter; NEA and AFT Comment Letter; OPERS Comment Letter.

[1386] Form PF Release, *supra* footnote 564.

[1387] *See supra* section VI.C.3.

[1388] Form PF Release, *supra* footnote 564.

[1389] *See supra* section VI.C.3.

[1390] *See supra* section VI.C.3.

make it difficult for investors to evaluate fund performance from any singular piece of performance information alone, such as IRR or MOIC.[1391] This will improve investors' ability to interpret performance reporting, and assess the relationship between the fees paid in connection with an investment and the return on that investment as they monitor their investment and consider potential future investments.

One commenter questioned the benefits of mandatory reporting of performance without the impact of subscription facilities, stating that reporting of performance without the impact of subscription facilities ''does not provide a better view of 'actual' performance.'' [1392] The commenter also states that ''the Commission is mistaken that the levered performance obscures 'actual' performance.'' [1393] We disagree with the argument underlying these statements. As discussed above, there is a documented literature on the use of subscription facilities to distort the results of performance reporting.[1394] We do not believe, and have not stated, that borrowing necessarily, or always, distorts actual performance: The Proposing Release stated, and we continue to believe, that subscription facilities can be and have been used to artificially boost reported IRRs, but because investors must pay the interest on the debt used, subscription facilities can potentially lower total returns for investors.[1395] We have further stated that subscription facilities can distort fund performance rankings and distort future fundraising outcomes,[1396] and we further understand from literature by investor groups that subscription facilities can artificially boost IRRs over the fund's preferred return hurdle rate, resulting in the adviser receiving carried interest compensation in a scenario where the adviser would not have received carried interest without the subscription line, and where the investor may not agree that the subscription line improved total returns and warranted a carried interest payment or where such early carried interest can create clawback complications later in the life of the fund.[1397]

We believe, therefore, that reporting of performance without the impact of subscription facilities does provide the investor with a better understanding of the value delivered by the adviser, absent any possible distortionary effect of the subscription facility, and enhances the standardization of disclosures about private funds.[1398] We also believe that performance without the impact of a subscription facilities does not tell the investor the actual dollar value of returns delivered. This motivates the final rule, in which reporting both with and without the impact of subscription facilities is required.[1399]

This commenter also stated that ''the Commission is mistaken that excluding the impact of subscription facilities would necessarily increase net returns.'' [1400] We have not stated that we believe there is any mathematical, necessary relationship between the impact of subscription facilities and net returns. We stated in the Proposing Release, and continue to believe, that subscription facilities *can be* and *sometimes are* used to manipulate reporting of returns, but not that they necessarily do in all cases. We believe subscription lines often deliver value to investors. However, we also continue to believe that there are cases when investors may not fully understand the impacts of subscription facilities on performance, and may not understand that a performance measure that depends on the timing of capital calls (such as IRR) has been distorted by use of a subscription facility.[1401]

One commenter questioned the benefits of disclosure of MOIC for unrealized and realized portions of a portfolio, and questioned if the proposed framework was intended to be analogous to TVPI/RVPI/DPI.[1402] As discussed above, there are key distinctions between unrealized and realized MOIC as separate from RVPI/DPI.[1403] We believe these distinctions result in key benefits from the disclosure of unrealized and realized MOIC. In the staff's experience, in the TVPI framework, substantial misvaluations applied to unrealized investments, when unrealized investments are a small portion of the fund's portfolio, may go undetected because in that case the denominator in the RVPI will be very large compared to the size of the misvaluation. By comparison, unrealized MOIC will have as a denominator just the called capital contributed to the unrealized investments, and so the misvaluation may be easier to detect.[1404]

For hedge funds, the primary benefit is the mandating of regular reporting of returns by advisers, standardizing the information provided by advisers across investors and over time.[1405] This will improve investors' ability to interpret performance reporting, and assess the relationship between the fees paid in connection with an investment and the return on that investment as they monitor their investment and consider potential future investments. The benefits from the final requirements are, however, potentially more substantial for illiquid funds, as the breadth of the performance information that will be required under the final rule for the private equity and other illiquid funds is designed to address the shortcomings of individual performance metrics.

For both types of funds, because the factors used to distinguish between liquid and illiquid funds rely on a narrow set of key distinguishing features that are included in the set of factors for determining how certain types of

[1391] *See supra* section VI.C.3.

[1392] AIC Comment Letter I, Appendix 1.

[1393] *Id.*

[1394] *See supra* section VI.C.3.

[1395] Proposing Release, *supra* footnote 3, at 205–206; *see also supra* section VI.C.3.

[1396] *See supra* section VI.C.3; *see also, e.g.,* Schillinger et al., *supra* footnote 1213; Enhancing Transparency Around Subscription Lines of Credit, *supra* footnote 1001.

[1397] *See supra* section VI.C.3; *see also* Subscription Lines of Credit and Alignment of Interest, *supra* footnote 1211.

[1398] *See supra* sections VI.B, VI.C.3; *see also* Enhancing Transparency Around Subscription Lines of Credit, *supra* footnote 1001.

[1399] *See supra* section II.B.2.b).

[1400] AIC Comment Letter I, Appendix 1.

[1401] One commenter stated that in certain cases, the calculation of performance without the impact of subscription facilities could be challenging, particularly for historical periods. The commenter stated that advisers may not have identified the reasons for each capital call from investors, and may need to make assumptions about which historical capital calls would have been impacted. To the extent these assumptions by advisers are not accurate, the benefits of the information to investors will be reduced (and, as discussed below, the resulting complexity of the calculation may result in increased costs to advisers, which may be passed on to the fund and investors). *See* CFA Comment Letter I.

[1402] CFA Comment Letter I.

[1403] *See supra* section VI.C.3.

[1404] *Id.*

[1405] As a key related benefit that may accrue as a result of standardization, the required performance reporting under the final rules may mitigate potential biases associated with hedge funds choosing whether and when to report returns, as discussed above. *Id.* As discussed above, one commenter stated that ''[t]he Proposed Rule also casts doubt on the reliability of public data on hedge fund performance . . . implying that these data may [ ] overstate fund performance. The Proposed Rule then suggests that its proposed restrictions will remedy this purported lack of price and quality competition.'' *See supra* section VI.C.3; *see also* CCMR Comment Letter IV. As discussed above, we believe this mischaracterizes the Proposing Release. *See* Proposing Release, *supra* footnote 3, at 208, 230. Moreover, also as discussed above, additional literature illustrating variation in the bias of performance reporting by advisers. *See supra* section VI.C.3. We believe this further limits the ability to which commercial databases today can satisfy investor needs when evaluating their advisers, as investors cannot tell the direction of bias of any given adviser in the data. The literature cited by the commenter therefore further increases the likelihood of the benefits of the final rules, by mitigating these potential biases, instead of reducing the likelihood of the final rules generating the intended benefits. *Id.*

private funds should report performance under U.S. GAAP, market participants may be more likely to understand the presentation of performance. Investors will also benefit because the types of performance information required for each of liquid and illiquid funds are tailored to the circumstances facing investors in those funds. For illiquid fund investors who have limited or no ability to withdraw or redeem from a fund, annual returns in the middle of the life of the fund do not provide the same information as the cumulative or average performance of their investments since the fund's inception, as is measured by the MOIC and IRR.[1406] Illiquid funds also typically experience what is deemed a ''J-Curve'' to their performance, making negative returns for investors in early years (as investor capital calls occur) and large positive returns in later years (as investments succeed and are exited, and proceeds are distributed), and annual returns for those individual years are therefore typically less informative for investors.[1407] By contrast, investors who are determining whether and when to withdraw from or request a redemption from a liquid fund will find annual net total returns over the past (at minimum) 10 years more informative than an IRR or MOIC measured since the fund's inception.[1408]

Costs

The cost of the required performance disclosure by fund advisers will vary according to the existing practices of the adviser and the complexity of the required disclosure. For advisers who already (under their current practice) incur the costs of generating the necessary performance data, presenting and distributing it in a format suitable for disclosure to investors, and checking the disclosure for accuracy and completeness, the cost will likely be small. In particular, for those advisers, the cost of the performance disclosure may be limited to the cost of reformatting the performance information for inclusion in the mandated quarterly report. For example, because most advisers with fund-level subscription facilities are already reporting performance with the impact of such facilities, we do not anticipate that this requirement will entail substantial additional burdens for most advisers. For advisers who already both maintain the records needed to generate the required information and make the required disclosures, the costs will be even more limited. We anticipate this may be the case for many private fund advisers, as we believe many private fund advisers already maintain and disclose similar information to what is required by the rule.[1409] For example, given that the rule will not apply to advisers with respect to SAFs that they advise, there will be no costs for advisers in the case of SAFs.[1410]

However, we understand that some advisers may face costs of changing their performance tracking or reporting practices under the current rule. Some of these costs will be direct costs of the rule requirements. Costs of updating an adviser's internal controls or internal compliance system to verify the accuracy and completeness of the reported performance information will be indirect costs of the rule. We expect the bulk of the costs associated with complying with this aspect of the final rules will likely be most substantial initially rather than on an ongoing basis.[1411] The lack of legacy status for this rule provision means that these costs will be borne across all private funds and advisers.[1412]

Some of these costs of compliance may again be affected by the rule provision providing that, to the extent doing so would provide more meaningful information and not be misleading, advisers must consolidate the quarterly statement reporting to cover similar pools of assets. These costs of compliance will be reduced to the extent that advisers are able to avoid duplicative costs across multiple statements, but will be increased to the extent that advisers must undertake costs associated with calculating feeder fund proportionate interests in a master fund, to the extent advisers do not already do so. Commenters did not offer any opinion as to which of these two scenarios is generally more likely to be the case.

The required presentation of performance, and the resulting costs, will vary based on whether the fund is categorized as liquid or illiquid. In particular, for liquid funds, the cost is mitigated by the limited nature of the required disclosure, while the more detailed required disclosures for illiquid funds may require greater cost (yielding, as just discussed, greater benefit).[1413] For both categories of funds, because the set of factors we used to distinguish between liquid and illiquid funds is included in the current set of factors for determining how certain types of private funds should report performance under U.S. GAAP, market participants may be more familiar with these methods of presenting information, which may mitigate costs.

Under the final rule, these compliance costs may be borne by advisers and, where permissible, could be imposed on funds and therefore indirectly passed on to investors. For example, under current practice, advisers to private funds generally charge disclosure and reporting costs to the funds, so that those costs are ultimately paid by the fund investors. Similarly, to the extent advisers currently use service providers to assist with performance reporting (*e.g.,* administrators), those costs are often borne by the fund (and thus investors). We expect similar arrangements may be made going forward to comply with the final rule, with disclosure where required. Advisers may alternatively attempt to introduce substitute charges (for example, increased management fees) to cover the costs of compliance with the rule, but their ability to do so may depend on the willingness of investors to incur those substitute charges. Some commenters stated that they believed these costs could be substantial, and that they would be more than likely to be borne by investors, not advisers.[1414]

[1406] *See supra* section VI.C.3.

[1407] *Id.* As discussed above, because these problems are exacerbated when the fund primarily invests in illiquid assets, as separate from when the investors' interests in the fund are illiquid, there may be certain liquid funds under the final rules for whom IRR and MOIC performance would be more beneficial to investors but the advisers to those funds will not be required under the rules to report IRR and MOIC. *Id.* However, advisers to such funds may already provide IRR and MOIC in their performance reporting, and moreover under the final rules investors may be more able to negotiate for such enhanced performance reporting. *See supra* footnotes 201, 228, and 1360 and accompanying discussion.

[1408] *Id.*

[1409] *See supra* section VI.C.3.

[1410] *See supra* section II.A.

[1411] The quantification of the direct costs associated with completing performance disclosures is included in the analysis of costs associated with fee and expense disclosures above.

[1412] There do not exist reliable data for quantifying what percentage of private fund advisers today engage in this activity or the other restricted activities. For the purposes of quantifying costs, including aggregate costs, we have applied the estimated costs per adviser to all advisers in the scope of the rule, as detailed in section VII.

[1413] *See supra* sections II.B.2.a), II.B.2.b). For example, one commenter stated that in certain cases, the calculation of performance without the impact of subscription facilities could be challenging, particularly for historical periods. The commenter stated that advisers may not have identified the reasons for each capital call from investors, and may need to make assumptions about which historical capital calls would have been impacted. To the extent these assumptions by advisers result in difficult and costly calculations, these complications may result in further costs to advisers, which may be passed on to the fund and investors (and, as discussed above, benefits may be reduced). *See* CFA Comment Letter I.

[1414] AIC Comment Letter I; AIC Comment Letter II; CFA Comment Letter II; Ropes & Gray Comment Letter.

Another commenter also stated that it believed this would likely be the case with respect to required reporting of performance without the impact of subscription facilities.[1415]

Some commenters lastly expressed concerns that the rule posits a one-size-fits-all solution to performance reporting, and that with a required framework in place governing performance reporting, investors would face difficulties in negotiating for any reporting not specified in the final rules.[1416] While at the margin this may occur, we believe the final rules and this release appropriately leave investors and advisers free to negotiate any performance reporting terms not specified in the final rules (though that additional reporting must still comply with other regulations, such as the final marketing rule).[1417] As discussed above, we believe the final rules were designed to mitigate burden where possible and continue to facilitate competition and facilitate flexible negotiations between private fund parties.[1418]

Further, to the extent that the additional standardization and comparability of the information in the required disclosures make it easier for investors to compare and evaluate performance, the rule may prompt some investors to search for and seek higher performing investment opportunities. This could reduce the ability for advisers of low-performing funds to attract additional capital.

3. Restricted Activities

The final rules restrict a private fund adviser from engaging in five types of activities with respect to the private fund or any investor in that private fund, with certain exceptions for where the adviser makes required disclosures and, in some cases, also obtains required investor consent.[1419] These activities are:[1420]

(i) Charging fees or expenses associated with an examination or investigation of the adviser or its related persons;

(ii) Charging regulatory or compliance expenses or fees of the adviser or its related persons;

(iii) Reducing the amount of any adviser clawback by the amount of certain taxes;

(iv) Charging fees and expenses related to a portfolio investment on a non-pro rata basis;

(v) Borrowing money, securities, or other fund assets, or receiving an extension of credit, from a private fund client.[1421]

The non-pro rata restriction will be subject to an exception if the allocation approach is fair and equitable as well as a before-the-fact disclosure-based exception while the certain fees and expenses restrictions and the post-tax clawback restriction will be subject to after-the-fact disclosure-based exceptions only. The borrowing restriction and the investigation restriction will be subject to consent-based exceptions, which will require an adviser to receive advance consent from at least a majority in interest of a fund's investors that are not related persons of the adviser in order to engage in these activities. However, the exception to the investigation restriction will not apply if the investigation results or has resulted in in the governmental or regulatory authority, or a court of competent jurisdiction, sanctioning the adviser or its related persons for violating the Act or the rules thereunder.[1422]

These restrictions will apply to activities of the private fund advisers even if they are performed indirectly, for example, by an adviser's related persons, recognizing that the potential for harm to the fund and its investors arises independently of whether the adviser engages in the activity directly or indirectly.

We discuss the costs and benefits of each of the final rules below.[1423] The Commission notes, however, that several factors make the quantification of many of these economic effects of the final amendments and rules difficult. For example, there is a lack of data on the extent to which advisers engage in certain of the activities that will be restricted under the final rules, as well as their significance to the businesses of such advisers. It is, therefore, difficult to quantify how costly it will be to comply with the restrictions. Similarly, it is difficult to quantify the benefits of these restrictions, because there is a lack of data regarding how and to what extent the changed business practices of advisers will affect investors, and how advisers may change their behavior in response to these rules. As a result, parts of the discussion below are qualitative in nature.

Fees for Exams, Regulatory/Compliance Expenses, or Investigations

The final rules will restrict a private fund adviser from charging the fund for fees or expenses associated with an examination or investigation of the adviser or its related persons by any governmental or regulatory authority or for the regulatory and compliance fees and expenses of the adviser or its related persons.[1424] While our policy choices for these types of restricted activities vary between disclosure, consent, and prohibition, the effects remain substantially similar, and so we discuss them in tandem.

We stated in the Proposing Release that we believed that these charges, even when disclosed, may create adverse incentives for advisers to allocate expenses to the fund at a cost to the investor, and as such they represent a possible source of investor harm.[1425] For example, when these charges are in connection with an investigation of an adviser, it may not be in the fund's best interest to bear the cost of the investigation.[1426] We further stated that these fees may also, even when disclosed, incentivize advisers to engage in excessive risk-taking, as the adviser will no longer bear the cost of any ensuing government or regulatory examinations or investigations.[1427] We discussed that by restricting this activity, investors would benefit from the reduced risk of having to incur costs associated with the adviser's adverse incentives, such as allocating inappropriate expenses to the fund. We discussed that investors would also be able to search across fund advisers knowing that these charges would not be assessed on any fund, which may lead to a better match between investor choices of private funds and their preferences over private fund terms, investment strategies, and investment outcomes.

Some commenters agreed with these benefits, stating that advisers should not be charging examination, investigation, regulatory and compliance fees and

[1415] AIC Comment Letter I.

[1416] *See, e.g.,* AIC Comment Letter I; Schulte Comment Letter; NYC Bar Comment Letter II.

[1417] *See supra* section II.B.1.

[1418] *See supra* section VI.B.

[1419] *See supra* section II.E.

[1420] *See supra* sections II.E, II.F.

[1421] We are not adopting the remaining two prohibitions (fees for unperformed services and indemnification) and have instead stated our views on the application of existing law. *See supra* section II.E.

[1422] *See supra* section II.E.

[1423] Because the rule will not apply to advisers with respect to CLOs and other SAFs, there will be no benefits or costs for investors and advisers associated with those funds. *See supra* section II.A.

[1424] *See supra* section II.E.1.a), II.E.2.a).

[1425] Proposing Release, *supra* footnote 3, at 234.

[1426] *Id.*

[1427] Fund adviser fees can allow the adviser to obtain leverage, and thereby gain disproportionately from successes, encouraging advisers to take on additional risk. *See, e.g.,* Alon Brav, Wei Jiang & Rongchen Li, *Governance by Persuasion: Hedge Fund Activism and Market-Based Shareholder Influence,* Euro. Corp. Governance Inst. Fin., Working Paper No. 797/2021 (Dec. 10, 2021), *available at https://ssrn.com/abstract=3955116.*

expenses to the fund.[1428] Many commenters, however, disagreed, stating that a prohibition would have negative consequences and disagreeing that prohibitions would generate benefits.[1429] For example, one commenter in particular stated that, because compliance costs increase with diversification of an adviser's portfolio, requiring advisers to bear costs of compliance would therefore discourage portfolio diversification.[1430] The commenter further stated that, if investors bear those costs, they can decide for themselves whether they are willing to pay extra compliance costs to achieve better diversification.[1431]

We recognize commenters' concerns, and as stated above we believe that our policy choice has benefited from taking into consideration the market problem that the policy is designed to address.[1432] Under the final rules, investors will benefit both in the case where (1) the activity in question continues but with enhanced disclosure and, in some cases, with enhanced consent practices, and (2) the adviser ceases the activity. These benefits will be mitigated to the extent advisers today already do not pass through these types of expenses to funds, or already do so subject to what will be required disclosures and after obtaining what will be required consent. As discussed above, reputational effects for advisers who pass through these expenses may already discipline the prevalence of these activities, as an adviser who passes through these expenses without disclosure or, in some cases, without consent, may have difficulties attracting investors after having done so.[1433] These considerations may mitigate benefits of the final rules, but they will also reduce the costs.

As discussed above, we believe whether such arrangements risk distorting adviser incentives to pay attention to compliance and legal matters, including matters related to investigations of potential conflicts of interest, may vary from adviser to adviser and may vary according to the type of expense. For regulatory, compliance, and examination expenses, the risk may be comparatively low, and requiring investor consent or prohibiting the activity altogether may not be necessary. However, even when investors bear these costs, it is necessary for them to at minimum receive disclosures of these costs. By contrast, in the case of investors bearing the costs of investigations by government or regulatory authorities, the risk of distorted adviser incentives may be higher, motivating further protections from additional consent requirements. Lastly, we do not believe there are reasonable cases where incentives are appropriately aligned by investors bearing the costs of investigations by government or regulatory authorities that results in the governmental or regulatory authority, or a court of competent jurisdiction, sanctioning the adviser or its related persons for violating the Act or otherwise finding that the adviser or its related persons violated the Act. Thus, in response to commenters, the final rules provide an exception to the restriction on regulatory, compliance, and examination expenses where the adviser makes certain disclosures, and an exception to the restriction on investigation expenses where the adviser obtains investor consent, but with the investigation expense exception not applying if the investigation results in a sanctioning or a finding as described above.[1434]

We continue to believe that the pass-through of these types of expenses can be associated with risks of adverse incentives for the adviser, such as allocating inappropriate expenses to the fund, or risks of incentives for the adviser to engage in excessive risk-taking. Under the final rules, investors will benefit from greater transparency into the risks that they will have to incur costs associated with these problems. Investors will be able to search across fund advisers knowing more clearly whether these charges will be assessed on a fund, which may lead to a better match between investor choices of private funds and their preferences over private fund terms, investment strategies, and investment outcomes.

Investors will also benefit in cases where the adviser no longer charges the private fund clients for the restricted expenses, in particular with respect to costs of investigations that result in a sanctioning or a finding as described in the final rules. For the types of fees and expenses with a disclosure exception and, in some cases, a consent exception, investors may also benefit in cases where the adviser either opts to not make the required disclosure or obtain the required consent that would facilitate an exception, or may also occur in cases where the investors, having received disclosure of these expenses or when consent is sought, are able to negotiate for the adviser to bear the expense. We are providing legacy status for the aspects of the restricted activities rule that require investor consent, which include restricting an adviser from charging for certain investigation fees and expenses.[1435] This legacy status will mitigate the benefits to current funds that engage in pass-through of investigation expenses and the investors, but will also reduce costs for those advisers. We are also not applying legacy status to the aspects of the restricted activities rule with disclosure-based exceptions because transparency into these practices is important and will not harm investors in the private fund.[1436] That means that these benefits will accrue across all private funds and advisers who currently engage in pass-through of these expenses.

As discussed further below, we believe most advisers will pursue compliance via the required disclosures and, in some cases, by obtaining the required consent, where they are able.[1437] The disclosures and, in some cases, consent requirements may enhance investor negotiating positions because, as discussed above, many investors report that they accept poor terms because they do not know what is "market." [1438] Consistent with the Proposing Release, we believe investors in these cases will benefit from resolving any adverse incentives for the adviser created by passing-through the expenses at issue and any incentives for the adviser to engage in excessive risk-taking, which may lead to a better match between investor choices of private funds and their preferences over private fund terms, investment strategies, and investment outcomes. Investors will also benefit from their improved ability to determine the appropriate amount of fund attention directed towards regulatory and compliance matters.

In these cases, the magnitude of the benefit will to some extent depend on whether advisers can introduce

[1428] *See, e.g.,* AFREF Comment Letter I; OPERS Comment Letter; NY State Comptroller Comment Letter.

[1429] *See, e.g.,* Comment Letter of CSC Global Financial Markets (Apr. 25, 2022); NYC Bar Comment Letter II; ASA Comment Letter; Schulte Comment Letter; AIMA/ACC Comment Letter; SBAI Comment Letter.

[1430] *See, e.g.,* Weiss Comment Letter; Maskin Comment Letter.

[1431] *Id.*

[1432] *See supra* section VI.B.

[1433] *See supra* section VI.C.2.

[1434] *See supra* section II.E.

[1435] *See supra* section IV. For the avoidance of doubt, we have specified that the legacy status provision does not permit advisers to charge for fees and expenses related to an investigation that results or has resulted in a court or governmental authority imposing a sanction for a violation of the Act or the rules promulgated thereunder. *See supra* footnote 951.

[1436] *Id.*

[1437] *See infra* footnote 1458 and accompanying text.

[1438] *See supra* section VI.B.

substitute charges (for example, increased management fees), and the willingness of investors to incur those substitute charges, for the purpose of making up any revenue that would be lost to the adviser from the restriction. However, any such substitute charges will be more transparent to the investor and will not create the same adverse incentives as the restricted charges, and so investors would likely ultimately still benefit.

Because Form PF's recently adopted new reporting requirements for private equity fund advisers will already collect annual information on the occurrence of general partner and limited partner clawbacks from large private equity advisers,[1439] any investor protection benefits of the final rules may be mitigated to the extent that Form PF is already a sufficient tool for investor protection purposes.[1440] However, we do not believe the benefits will be meaningfully mitigated, because Form PF is not an investor-facing disclosure form. Information that private fund advisers report on Form PF is provided to regulators on a confidential basis and is nonpublic, and by contrast the advisers who come into compliance with the restricted activities rule via the required disclosures will need to make those disclosures to investors. Moreover, the recently adopted Form PF reporting requirements are only applicable to large private equity advisers as defined by Form PF, which are those with at least $2 billion in regulatory assets under management as of the last day of the adviser's most recently completed fiscal year,[1441] while the restricted activities rule will apply to all private fund advisers. While large private equity advisers cover approximately 73 percent of the private equity industry,[1442] and clawbacks are more common for private equity funds and other illiquid funds,[1443] there will still be benefits from consistently applying the restricted activities rule to all private fund advisers.

The restriction will impose direct costs on advisers from the need to update their charging and contracting practices to bring them into compliance with the new requirements, in particular by making certain new disclosures and, in some cases, obtaining the new required investor consent. As discussed further below, in the context of the rule's impact on competition, commenters generally stated that they believed the direct costs of the rule would be high, given the compliance requirements involved.[1444]

Under the final rules, advisers will face costs both in the case where (1) the activity in question continues but with costs for enhanced disclosure, and (2) the adviser ceases the activity, with costs related to restructuring fund documents, higher expenses, or new or additional fees. For the restriction on passing through of expenses related to investigations by government or regulatory authorities that result or have resulted in the governmental or regulatory authority, or a court of competent jurisdiction, sanctioning the adviser or its related persons for violating the Act or the rules thereunder, advisers and funds will have no exception from the rule regardless of disclosures made or consent obtained. Similar to benefits, the costs will be reduced to the extent advisers today already do not pass through these types of expenses to funds, or already do so subject to what will be required disclosures and after obtaining what will be required consent, for example as a result of reputational effects.[1445] Also similar to benefits, the legacy status for the aspects of the restricted activities rule that require investor consent, which restrict an adviser from charging for certain investigation fees and expenses, will reduce the costs of the final rules for advisers with respect to those rules.[1446] We are not applying legacy status to the disclosure-based portions of the restricted activities rules, or to the prohibition on fees and expenses related to an investigation that results or has resulted in a court or governmental authority imposing a sanction for a violation of the Act or the rules promulgated thereunder,[1447] which means that the costs of those rules will be borne across all private funds and advisers who currently engage in pass-through of these expenses. In the case where advisers comply with the final rule by making the required disclosures and, in some cases, by obtaining the required consent, costs are quantified by examination of the analysis in section VII. As discussed below, based on IARD data, as of December 31, 2022, there were 12,234 investment advisers (including both registered and unregistered advisers, but excluding advisers managing solely SAFs) providing advice to private funds, and we estimate that these advisers would, on average, each provide advice to 8 private funds (excluding SAFs).[1448] We estimate that each of these advisers would require internal time costs from compliance attorneys, accounting managers, and assistant general counsels, yielding total internal time costs per adviser of $29,344 across all restricted activities. We believe 75% of these advisers would also face total external costs of $25,424 across all restricted activities. This means that aggregate internal time costs across these advisers would total $358,994,496 across all of the restricted activities.[1449] We estimate that these advisers would also face aggregate external costs of $233,290,624 across all advisers, for a total aggregate cost of $592,285,120.[1450]

We assume that this time is inclusive of time needed for advisers to make the determination that the requisite disclosure and, in some cases, consent is the appropriate path to compliance for that adviser. These costs also include the costs of making the requisite distributions of required disclosures to investors. For many private fund advisers, these costs will be limited by the timeline provided in the final rule for the requisite disclosures, requiring distribution within 45 days after the end of the fiscal quarter in which the relevant activity occurs, or 90 days after the end of the fiscal year for the fourth quarterly report, allowing many advisers that are subject to the quarterly statement rule to include these disclosures in their quarterly reports.[1451] However, certain fund advisers, such as advisers to funds of funds, may not make quarterly reports within a 45 day time frame, and those advisers may face additional costs associated with distribution of the required disclosures.

However, advisers may instead face direct costs associated with the need to update their charging and contracting practices to bring them into compliance with the new requirements in the case where advisers cease the restricted expense pass-through instead of making the required disclosures or instead of obtaining the required investor consent. These costs will be separate from PRA costs, which are limited to the costs associated with coming into compliance with the rules on restricted activities through making the required disclosures and, in some cases, obtaining the required investor consent.

[1439] *See supra* footnote 1153.

[1440] *See supra* section II.E.1.b).

[1441] *See supra* footnote 1153.

[1442] Form PF Release, *supra* footnote 564.

[1443] *See supra* sections II.E.1.b), VI.C.2.

[1444] *See infra* section VI.E.2.

[1445] *See supra* section VI.C.2.

[1446] *See supra* section IV.

[1447] *Id.*

[1448] *See infra* section VII.D. IARD data indicate that registered investment advisers to private funds typically advise more private funds as compared to the full universe of investment advisers.

[1449] *Id.*

[1450] *Id.*

[1451] *See supra* section II.E.

As discussed in the Proposing Release, several factors make the quantification of these costs difficult, such as a lack of data on the extent to which advisers engage in the pass-through of expenses that will be restricted under the final rules.[1452] However, some commenters criticized the Commission for acknowledging these direct costs but failing to quantify them.[1453] In light of this, the Commission has further considered the requirement and additional work that would be required by various parties to comply. To that end, the Commission has estimated ranges of costs for compliance, depending on the amount of time each adviser will need to spend to comply. Some advisers may pass these direct costs on to their funds and thus investors, and other advisers may absorb these costs and bear the costs themselves.

Advisers are likely to vary in the complexity of their contracts and expense arrangements, because for example some advisers may not charge any expenses to a fund at all beyond management fees and carried interest. At minimum, we estimate that the additional work will require time from accounting managers ($337/hour), compliance managers ($360/hour), a chief compliance officer ($618/hour), attorneys ($484/hour), assistant general counsels ($543/hour), junior business analysts ($204/hour), financial reporting managers ($339), senior business analysts ($320/hour), paralegals ($253/hour), senior operations managers ($425/hour), operations specialists ($159/hour), compliance clerks ($82/hour), and general clerks ($73/hour).[1454] Certain advisers may need to hire additional personnel to meet these demands. We also include time needed for advisers to make the determination that ceasing the restricted activity instead of making a disclosure and, in some cases, obtaining consent is the appropriate path to compliance for that adviser, which we estimate will require time from senior portfolio managers ($383/hour) and senior management of the adviser ($4,770/hour).

To estimate monetized costs to advisers, we multiply the hourly rates above by estimated hours per professional. Based on staff experience, we estimate that on average, advisers will require at minimum 24 hours of time from each of the personnel identified above as an initial burden for each of the restricted activities.[1455] For example, at minimum, each adviser may require time from these personnel to at least evaluate whether any revisions to their contracts are warranted at all. Multiplying these minimum hours by the above hourly wages yields a minimum initial cost of $224,368.92 per adviser. These costs are likely to be higher initially than they are ongoing. Based on staff experience, we estimate minimum ongoing costs will likely be one third of the initial costs, or $74,789.64 per year.[1456]

However, many of these potential direct costs of updates may be higher for certain advisers. Larger advisers, with more complex contracts and expense arrangements that are more complex to update, may have greater costs. Advisers may also vary in which investors consent to pass-through of investigation expenses. These variations across advisers could impact how many hours are needed from personnel. While the factors that may increase these costs are difficult to fully quantify, we anticipate that very few advisers would face a burden that exceeds 10 times the minimum estimate.[1457] Multiplying minimum initial cost estimates by 10 yields a maximum initial cost of $2,243,689.20 per adviser. These costs are likely to be higher initially than they are ongoing. We estimate maximum ongoing costs will likely be one third of the initial costs, or $747,896.40 per year.

The aggregate costs to the industry will depend on the proportion of advisers who pursue compliance via the required disclosures and via the required consent and the proportion of advisers who pursue compliance by forgoing the restricted activities. We believe that, in general, the substantial majority of advisers will pursue compliance with the final rule via disclosures and via consent as opposed to by ceasing the required activities.[1458] We therefore believe that the aggregate compliance costs to the industry associated with this component of the final rule will likely be consistent with the aggregate costs to the industry as reflected in the PRA analysis. This is supported by the fact that the costs we estimate to each adviser of complying with the final rules by ceasing the restricted activity (in particular, potentially as high as $2,243,689.20 in initial costs) is much higher than the PRA cost per adviser across all restricted activities ($54,768). However, to the extent that more than a *de minimis* number of advisers pursue compliance through ceasing the restricted activity instead of via disclosures and via consent, aggregate costs may be higher.[1459]

Similar to the benefits, advisers may also incur costs related to this restriction in connection with not being able to charge private fund clients for the restricted expenses, in cases where the adviser opts to not make the required disclosure or, in some cases, obtain the required consent that would facilitate an exception. This may also occur in cases where the investors, having received disclosure of these expenses or when consent is sought, are able to negotiate for the adviser to bear the expense, for example by withholding consent. In addition, in these cases, advisers may incur indirect costs related to adapting their business models to identify and substitute non-restricted sources of revenue. For example, advisers may identify, negotiate, and implement methods of replacing the lost charges from the restricted practice with other charges to the fund, and so investors may bear such additional costs.[1460]

Further, as discussed above, we understand that certain private fund advisers, most notably advisers to hedge funds and other liquid funds,[1461] utilize a pass-through expense model where the private fund pays for most, if not all,

[1452] Proposing Release, *supra* footnote 3, at 233–234.

[1453] *See, e.g.,* Overdahl Comment Letter; LSTA Comment Letter, Exhibit C.

[1454] *See infra* section VII. One commenter stated that these wage rates may be underestimated. *See* AIC Comment Letter I, Appendix 1. But one commenter stated that these wage rates are conservatively high, and that commenter's quantification of total costs used lower wage rates from the Bureau of Labor Statistics. *See* LSTA Comment Letter, Exhibit C.

[1455] This yields a total of 360 hours of personnel time for each of the restricted activities. We believe this is a reasonably large minimum estimate, as it applies for each restricted activity in question. For certain of these categories of professionals, these hours may be imposed on two professionals of each, who would face one-time costs of 12 hours each. For some, such as the Chief Compliance Officer, these hours would come/originate from one staff member, who may require 24 hours of time associated with each restricted activity.

[1456] The proportion of initial costs that will persist as ongoing costs is difficult to quantify and may vary from adviser to adviser, and also varies across different types of funds. To the extent the proportion of initial costs that persist as ongoing costs is higher than one third, the ongoing costs would be proportionally higher than what is reflected here.

[1457] Based on staff experience, as advisers grow in size, efficiencies of scale may emerge that limit the upper range of compliance costs. For example, an adviser in a large complex may have many contracts to revise, but these contracts may be substantially similar across funds.

[1458] *See infra* section VII.D.

[1459] *See infra* footnote 1533.

[1460] However, any such costs of alternative charges would be mitigated by the adviser needing to negotiate and disclose such charges, for example in quarterly statements of fees and expenses. *See supra* section II.B.1.

[1461] *See, e.g.,* Eli Hoffmann, *Welcome To Hedge Funds' Stunning Pass-Through Fees,* Seeking Alpha (Jan. 24, 2017), *available at https://seekingalpha.com/article/4038915-welcome-to-hedge-funds-stunning-pass-through-fees.*

of the adviser's expenses in lieu of being charged a management fee. Commenters expressed substantial concerns with the notion that pass-through expense models, or portions of these models, would be prohibited or restricted by the rule, stating that pass-through expense models can be in the best interest of investors, and can in fact enhance fee and expense transparency.[1462]

The final rules substantially address these commenters' concerns, in that pass-through expense models would not have most aspects of their business model expressly prohibited by the final rules (except for the pass-through of expenses associated with investigations that result or have resulted in sanctioning the adviser for violating the Act or the rules thereunder as described in the final rules), as advisers to those fund models can comply with the restrictions in the rules via the required disclosures. The final rules will, however, likely impact certain aspects of pass-through expense models or other similar models in which advisers charge investors expenses associated with certain of the adviser's cost of being an investment adviser, because these business models may in general need to pursue the necessary disclosures to have an exception from the restriction, or otherwise undertake substantial costs to restructure their fund's business model to generate other sources of revenue, such as a new management fee,[1463] and will in general need to pay without passing through fees or expenses associated with a violation of the Act.[1464] For example, an adviser may have investors who have consented to investigation expenses, and for an ongoing investigation the adviser may be passing through those investigation expenses, but upon the occurrence of a finding that the adviser violated the Act the adviser will need to identify funding to reimburse the fund for previously passed-through expenses. In that case, advisers who are not already equipped to pay such expenses will need to identify other assets (*e.g.,* balance sheet capital), sources of revenue (*e.g.,* a new management fee or increased performance-based compensation), or access to capital (*e.g.,* loans) to pay any such fees or expenses.[1465]

There are two factors that mitigate these impacts for advisers to pass-through funds and their investors. First, as the Commission may already require advisers to pass-through funds to pay penalties associated with a violation the Act, we anticipate that this rule will not cause a significant disruption from current practice for advisers to pass-through funds.[1466] Second, more generally, we believe pass-through funds already provide ongoing, regular disclosure of the other fees and expenses that are being passed through to investors and these investors have consented to the pass-through of these expenses, and thus are most likely already well-positioned to come into compliance with the final rule through the necessary disclosures and consent requirements.[1467]

To the extent advisers to pass-through expense funds pursue such restructuring, the expenses that will no longer be passed through to the fund will require the adviser to negotiate a new fixed management fee to compensate for the new costs. In addition, any such fund restructurings that are undertaken will likely impose costs that will be borne by advisers. The costs may also be borne partially or entirely by the private funds, to the extent permissible or to the extent advisers are able to compensate for their costs with substitute charges (for example, increased management fees). To the extent that existing pass-through structures are more efficient than the resulting structures that may emerge, as some commenters have stated, that may represent an additional cost of the rule.[1468] As a related cost, fund advisers unable to fully compensate for formerly passed-through costs with new fees may reduce their costs, possibly with inefficiently low investment in compliance, and reduced investments in compliance may result in additional expenses for the fund or adviser in the future or reductions to activities designed to protect investors.[1469]

In addition, investors may incur costs from this restriction that take the form of lower returns from some fund investments, depending on the extent to which the restriction limits the adviser's efficiency or effectiveness in providing the services that generate returns from those investments. For example, in the case of pass-through expense models, fund advisers who would have to bear new costs of providing certain services under the restriction may reduce or eliminate those services to reduce costs, which may be to the detriment of the fund's performance or lead to an increase of compliance risk. The restriction in the final rules may also represent an incentive for advisers to take fewer risks, to reduce risks of examinations or investigations occurring in the first place, which may lower investor returns.

Moreover, to the extent that restructuring a pass-through expense model of a hedge fund under the final rule diverts the hedge fund adviser's resources away from the hedge fund's investment strategy, this could lead to a lower return to investors in hedge funds. The cost of lower returns would be mitigated to the extent that certain investors can distinguish and identify those funds that require restructuring as to how they collect revenue from investors and use this information to search for and identify substitute funds that have expense models that do not need to be restructured under the rule and that do not present the investor with reduced returns as a result of the rule.[1470] While some investors may face difficulty today in determining whether their next investment should be with the same or a different adviser,[1471] they may have an improved ability to do so as a result of the enhanced transparency under the final rules. Investors would also need to evaluate whether these substitute funds would be likely to present them with better performance than their current funds. Any such search costs would be a cost of the rule. As a result, the cost to investors may include a combination of the cost of lower returns and the cost of seeking to avoid or mitigate such reductions in returns.

Reducing Adviser Clawbacks for Taxes

The final rule will restrict certain uses of fund resources by the private fund adviser by restricting advisers from reducing the amount of their clawback obligation by actual, potential, or hypothetical taxes applicable to the adviser, its related persons, or their respective owners or interest holders, unless the adviser distributes a written

[1462] *See, e.g.,* MFA Comment Letter I, Appendix A; Overdahl Comment Letter.

[1463] However, any such costs of alternative charges would be mitigated by the adviser needing to negotiate and disclose such charges, for example in quarterly statements of fees and expenses. *See supra* section II.B.1.

[1464] *See supra* sections II.E.1.a), II.E.2.a).

[1465] *Id.*

[1466] *Id.*

[1467] *See supra* section II.E.1.a).

[1468] *See, e.g.,* Overdahl Comment Letter; AIC Comment Letter I, Appendix 1.

[1469] AIC Comment Letter I, Appendix 1.

[1470] To the extent that these substitute funds that do not need to be restructured under the rule have higher expenses than funds whose structures are impacted, but the compliance costs of the rule cause impacted funds to become the higher expense funds, than investors may still face higher expenses and reduced returns. For example, some commenters state that pass-through funds are lower expense funds than other types of private funds, and so to the extent higher compliance costs create higher expenses for pass-through funds, investors may face higher expenses and lower returns regardless of their ability to rotate to other fund types. *See, e.g.,* Overdahl Comment Letter; Sullivan & Cromwell Comment Letter.

[1471] *See supra* section VI.B.

notice to the investors of such private fund client that sets forth the aggregate dollar amounts of the adviser clawback before and after any reduction for actual, potential, or hypothetical taxes within 45 days after the end of the fiscal quarter in which the adviser clawback occurs.[1472]

Investors in funds with advisers who would have otherwise reduced clawbacks for taxes, but under the rule will make no such reduction, will benefit from this rule from increases to clawbacks (and thus investor returns) by actual, potential, or hypothetical tax rates. Investors in funds with advisers who will continue to reduce clawbacks for taxes but will make the required disclosure will benefit from their enhanced ability to monitor the adviser and prevent the adviser from putting its interests ahead of the funds' interests. Current investors in a fund who receive these disclosures, and who are contemplating investing in a follow-on fund with the same adviser, may also benefit from these disclosures through an enhanced ability to negotiate terms of the follow-on fund, for example by negotiating that the adviser to the follow-on fund will not reduce clawbacks for taxes in the follow-on fund. The disclosures may enhance investor negotiating positions because, as discussed above, many investors report that they accept poor terms because they do not know what is ''market.'' [1473] Such investors will benefit from effectively increased clawbacks in their follow-on funds.[1474] Many commenters agreed that investors could benefit from restricting the practice of reducing clawbacks for taxes.[1475] The lack of legacy status for this rule provision means that these benefits will accrue across all private funds and advisers who currently engage in clawbacks. Because clawbacks are more common for private equity funds and other illiquid funds,[1476] these benefits will generally be more applicable to advisers and investors in those funds.

Commenters who opposed a prohibition generally did not specify any objection to the purported benefits of the rule, and instead emphasized the indirect costs of the rule. Specifically, many commenters stated that the indirect costs of the rule, as proposed, would have been very high. As discussed above, commenters stated that indirect costs and unintended consequences could have included the reduction of advisers that choose to offer clawback mechanisms in their private funds, the restructurings of current performance-based compensation arrangements into arrangements that would be less favorable for investors, offsetting changes to other economic terms applicable to investors (*e.g.,* higher management fees), the distortion of timely portfolio management decisions to avoid potential clawback liabilities, and disproportionate burdens on smaller investment advisers that may be more reliant on the receipt of performance-based compensation on a deal-by-deal basis to remunerate their employees and fund their operations.[1477] We believe that the final rule substantially mitigates the risks of these unintended consequences and costs by allowing for advisers to still reduce clawbacks for taxes, in the event they make the required disclosures. As stated above, we also believe that our policy choice has benefited from taking into consideration the market problem that the policy is designed to address, and believe that the final rule with an exception for certain disclosures accomplishes this.[1478]

This restriction will still impose direct costs on advisers of either (i) updating their charging and contracting practices to bring them into compliance with the new requirements, or (ii) making the relevant disclosures. Advisers may also attempt to mitigate the greater costs of clawbacks under the restriction, including the costs of disclosures, by introducing some new fee, charge, or other contractual provision that would make up for the lost tax reduction on the clawback, and they will then incur costs of updating their contracting practices to introduce these new provisions.[1479] As discussed further below, in the context of the rule's impact on competition, commenters generally stated that they believed the direct costs of the rule would be high, given the compliance requirements involved.[1480] The lack of legacy status for this rule provision means that these costs will be borne across all private funds and advisers who currently engage in clawbacks. Because clawbacks are more common for private equity funds and other illiquid funds,[1481] these costs will generally be more applicable to advisers and investors in those funds.[1482]

Advisers who forgo reducing clawbacks for taxes because of the final rule, either voluntarily or in a follow-on fund where investors used the enhanced disclosure in the prior fund to negotiate such terms, may attempt to mitigate their increased costs associated with clawbacks by reducing the risk of a clawback occurring. For example, certain advisers may adopt new waterfall arrangements designed to delay carried interest payments until later in the life of a fund, to limit the possibility of a clawback or reduce the possible sizes of clawbacks. In this case, investors will benefit from earlier distributions of proceeds from the fund and reduced costs associated with monitoring their potential need for a clawback. However, some fund advisers are able to attract investors even though their fund terms do not provide for full or partial clawbacks. To the extent such advisers were able to update their business practices, for example by providing for an advance on tax payments with no option for a clawback, this will reduce the benefits of the rule, as investors would continue to receive the reduced clawback amounts and bear portions of the adviser's tax burden. In either case, advisers will also bear additional costs from the final rule of updating their business practices.

Advisers could, therefore, incur transitory costs related to adapting their business models to identify and substitute non-restricted sources of revenue. These direct costs may be particularly high in the short term to the

---

[1472] *See supra* section II.E.1.b).

[1473] *See supra* section VI.B.

[1474] Because commenters generally emphasized that clawbacks have developed through robust negotiations between advisers and their private fund clients, investors may generally be more likely to benefit from the enhanced information that they will receive under the final rule, instead of from advisers voluntarily forgoing the reduction of clawbacks for taxes.

[1475] *See, e.g.,* AFL–CIO Comment Letter; Albourne Comment Letter; Better Markets Comment Letter; Convergence Comment Letter; NASAA Comment Letter; NYC Comptroller Comment Letter; OPERS Comment Letter.

[1476] *See supra* sections II.E.1.b), VI.C.2.

[1477] *See supra* section VI.C.3; *see also, e.g.,* AIC Comment Letter I, Appendix I; Ropes & Gray Comment Letter.

[1478] *See supra* section VI.B.

[1479] Under the proposal, the Commission stated that some advisers may be unable to recoup the cost of the tax payments made in connection with the excess distributions and allocations affected by the proposal, and therefore would face greater costs when clawbacks do occur under the prohibition. Proposing Release, *supra* footnote 3, at 22. We believe we have removed that potential cost, as we expect any such advisers who would have been unable to recoup the cost of the tax payment under the proposal will instead under the final rule make the required disclosures.

[1480] *See infra* section VI.E.2.

[1481] *See supra* sections II.E.1.b), VI.C.2.

[1482] However, there do not exist reliable data for quantifying what percentage of private fund advisers today engage in this activity or the other restricted activities. For the purposes of quantifying costs, including aggregate costs, we have applied the estimated costs per adviser to all advisers in the scope of the rule, consistent with the approach taken in the PRA analysis. *See supra* section VII.

extent that advisers renegotiate, restructure, and/or revise certain existing deals or existing economic arrangements in response to this restriction.

In the case where advisers comply with the final rule by making the required disclosures, costs are quantified by examination of the analysis in section VII, which have been tallied along with all other disclosure costs of the restricted activities above and include time needed for advisers to make the determination that the requisite disclosure is the appropriate path to compliance for that adviser.[1483] These costs also include the costs of making the requisite distributions to investors. For many private fund advisers, these costs will be limited by the timeline providing in the final rule, requiring distribution within 45 days after the end of the fiscal quarter in which the relevant activity occurs, or 90 days after the end of the fiscal year for the fourth quarterly report, allowing many advisers that are subject to the quarterly statement rule to include these disclosures in their quarterly reports.[1484] However, certain fund advisers, such as advisers to funds of funds, may not make quarterly reports within a 45 day time frame, and those advisers may face additional costs associated with distribution of the required disclosures.

However, advisers may instead face direct costs associated with the need to update their charging and contracting practices to bring them into compliance with the new restriction, in particular in the case where advisers cease the restricted clawbacks instead of making the required disclosures. These costs will be separate from PRA costs, which are limited to the costs associated with coming into compliance with the rules on restricted activities through making the required disclosures, and include time needed for advisers to make the determination that the ceasing the restricted activity is the appropriate path to compliance for that adviser.

As discussed in the Proposing Release, several factors make the quantification of these costs difficult, such as a lack of data on the extent to which advisers engage in the reduction clawbacks for taxes that will restricted under the final rules.[1485] However, some commenters criticized the Commission for acknowledging these direct costs but failing to quantify them.[1486] In light of this, the Commission has further considered the requirement and additional work that would be required by various parties to comply. To that end, the Commission has estimated ranges of costs for compliance, depending on the amount of time each adviser will need to spend to comply. Some advisers may pass these direct costs on to their funds and thus investors, and other advisers may absorb these costs and bear the costs themselves.

Advisers are likely to vary in the complexity of their contracts and clawback arrangements, because for example some advisers may already refrain from reducing clawbacks for taxes. At minimum, we estimate that the additional work will require time from accounting managers ($337/hour), compliance managers ($360/hour), a chief compliance officer ($618/hour), attorneys ($484/hour), assistant general counsel ($543/hour), junior business analysts ($204/hour), financial reporting managers ($339), senior business analysts ($320/hour), paralegals ($253/hour), senior operations managers ($425/hour), operations specialists ($159/hour), compliance clerks ($82/hour), and general clerks ($73/hour).[1487] Certain advisers may need to hire additional personnel to meet these demands. We also include time needed for advisers to make the determination that ceasing the restricted activity instead of making a disclosure is the appropriate path to compliance for that adviser, which we estimate will require time from senior portfolio managers ($383/hour) and senior management of the adviser ($4,770/hour).

To estimate monetized costs to advisers, we multiply the hourly rates above by estimated hours per professional. Based on staff experience, we estimate that on average, advisers will require at minimum 24 hours of time from each of the personnel identified above as an initial burden.[1488] For example, at minimum, each adviser may require time from these personnel to at least evaluate whether any revisions to their contracts are warranted at all. Multiplying these minimum hours by the above hourly wages yields a minimum initial cost of $224,368.92 per adviser. These costs are likely to be higher initially than they are ongoing. We estimate minimum ongoing costs will likely be one third of the initial costs, or $74,789.64 per year.[1489]

However, many of these potential direct costs of updates may be higher for certain advisers. Larger advisers, with more complex contracts and expense arrangements that are more complex to update, may have greater costs. While the factors that may increase these costs are difficult to fully quantify, we anticipate that very few advisers would face a burden that exceeds 10 times the minimum estimate.[1490] Multiplying minimum initial cost estimates by 10 yields a maximum initial cost of $2,243,689.20 per adviser. These costs are likely to be higher initially than they are ongoing. We estimate maximum ongoing costs will likely be one third of the initial costs, or $747,896.40 per year.

The aggregate costs to the industry will depend on the proportion of advisers who pursue compliance via the required disclosures and the proportion of advisers who pursue compliance by forgoing the restricted activity. We believe that, in general, almost all advisers will pursue compliance with the final rule via disclosures as opposed to by ceasing the restricted activity.[1491] We therefore believe that the aggregate costs to the industry associated with this component of the final rule will likely be consistent with the aggregate costs to the industry as reflected in the PRA analysis. This is supported by the fact that the costs we estimate to each adviser of complying with the final rules by ceasing the restricted activity (in particular, potentially as high as $2,243,689.20 in initial costs) is much higher than the PRA cost per adviser across all restricted activities ($54,768). However, to the extent that more than a *de minimis* number of advisers pursue compliance through ceasing the restricted activity instead of via disclosures, aggregate costs may be higher.[1492]

Certain Non-Pro Rata Fee and Expense Allocations

The final rule will restrict a private fund adviser from charging certain fees and expenses related to a portfolio investment (or potential portfolio investment) on a non-pro rata basis when multiple private funds and other clients advised by the adviser or its

[1483] *See supra* footnote 1450 and accompanying text.

[1484] *See supra* section II.E.

[1485] Proposing Release, *supra* footnote 3, at 233–234.

[1486] *See, e.g.,* Overdahl Comment Letter; LSTA Comment Letter, Exhibit C.

[1487] *See infra* section VII.

[1488] As discussed above, this yields a total of 360 hours of personnel time for each of the restricted activities. *See supra* footnote 1455.

[1489] As discussed above, to the extent the proportion of initial costs that persist as ongoing costs is higher than one third, the ongoing costs will be proportionally higher than what is reflected here. *See supra* footnote 1456.

[1490] As discussed above, based on staff experience, as advisers grow in size, efficiencies of scale may emerge that limit the upper range of compliance costs. *See supra* footnote 1457.

[1491] *See infra* section VII.D.

[1492] *See infra* footnote 1533.

related persons have invested (or propose to invest) in the same portfolio investment unless the adviser satisfies a requirement that the allocation be fair and equitable and a requirement to, before charging or allocating such fees or expenses to a private fund client, distribute to each investor of the private fund a written notice of the non-pro rata charge or allocation and a description of how the allocation approach is fair and equitable under the circumstances.[1493]

The Proposing Release stated that these non-pro rata fee and expense allocations tend to adversely affect some investors who are placed at a disadvantage to other investors.[1494] We associated these practices and disadvantages with a tendency towards opportunistic hold-up of investors by advisers, involving exploitation of an informational or bargaining advantage.[1495] The disadvantaged investors currently pay greater than their pro rata shares of fees and expenses. The disparity may arise from differences in the bargaining power of different investors. For example, a fund adviser may have an incentive to assign lower than pro rata shares of fees and expenses to larger investors that bring repeat business to the adviser and correspondingly lower pro rata shares to the smaller investors paying greater than pro rata shares.

We continue to believe that this may generally be the case. Several commenters supported the proposed provision, agreeing that it may protect investors.[1496] However, many commenters argue that there are also many fair and equitable reasons for different investors to bear different portions of fees and expenses.[1497] As stated above, we believe that our policy choice has benefited from taking into consideration the market problem that the policy is designed to address, and believe that this is accomplished by the final rule with an exception for advisers who make certain advance disclosures.[1498] This is because under the final rule, investors will have an enhanced ability to monitor their funds' advisers for inappropriate opportunistic apportioning of fees and expenses, but advisers will still be able to apportion fees on a non-pro rata basis when it is fair and equitable to do so, as long as the required disclosures are made. Current investors in a fund who receive these disclosures, and who are contemplating investing in a follow-on fund with the same adviser, may also benefit from these disclosures through an enhanced ability to negotiate terms of the follow-on fund, for example by negotiating that the follow-on fund will not engage in any non-pro rata fee and expense allocations. The disclosures may enhance investor negotiating positions because, as discussed above, many investors report that they accept poor terms because they do not know what is ''market.''[1499]

Investors in funds with advisers who forgo non-pro rata fee and expense allocations because of the final rule, either voluntarily or in a follow-on fund where investors used the enhanced disclosure in the prior fund to negotiate such terms, may either benefit or face costs from the resulting revised apportionment of expenses. This will depend on whether their share of expenses is decreased or increased under the rule. Investing clients in these portfolio investments paying greater than pro rata shares of such fees and expenses will benefit as a result of lowered fees and expenses. However, to the extent that a client was previously able to obtain fee and expense allocations at rates less than a pro rata apportionment, the client could incur higher fee and expense costs in the future.

The enhanced disclosures will also benefit investors directly. Investors may not be aware of the extent to which fees and expenses are charged on a non-pro-rata basis. Even if an adviser discloses upfront that non-pro rata fee and expense allocations may occur throughout the life of the fund, the complexity of fee and expense arrangements may mean that these arrangements are hard to follow. Even larger or more sophisticated investors, with greater bargaining power, may be aware that they risk non-pro-rata fees, but nonetheless be harmed by the uncertainty from complex fee arrangements, and so even larger investors may benefit from this enhanced transparency.

The lack of legacy status for this rule provision means that these benefits will accrue across all private funds and advisers who currently engage in non pro-rata allocations of fees and expenses. Because such allocations are more common for private equity funds and other illiquid funds,[1500] these benefits will generally be more applicable to advisers and investors in those funds.

The final rule will impose direct costs on advisers who must either update their charging and contracting practices to bring them into compliance with the new requirements or provide the required disclosures. These compliance costs may be particularly high in the short term to the extent that advisers renegotiate, restructure, and/or revise certain existing deals or existing economic arrangements in response to this restriction. Advisers who forgo non-pro rata fee and expense allocations because of the final rule, either voluntarily or in a follow-on fund where investors used the enhanced disclosure in the prior fund to negotiate such terms, may face additional costs in the form of lower expenses and fees, to the extent that less flexible pro-rata fee and expense allocations result in lower average fees and expenses to the adviser or are more costly to administer and monitor. These effects may impact the use of co-investment vehicles: To the extent that advisers, in response to the final rule, increase the fees passed on to co-investment vehicles that absent the rule would have borne less than their pro-rata share of fees, the rule may reduce the attractiveness of co-investment vehicles to investors. This may reduce the liquidity available for certain illiquid funds that currently rely on co-investment vehicles for raising money for specific portfolio investments.

In the case where advisers comply with the final rule by making the required disclosures, costs are quantified by examination of the analysis in section VII, which have been tallied along with all other disclosure costs of the restricted activities above and include time needed for advisers to make the determination that the requisite disclosure is the appropriate path to compliance for that adviser.[1501] These costs also include the costs of making the requisite distributions to investors. For many private fund advisers, these costs will be limited by the timeline provided in the final rule, requiring distribution within 45 days after the end of the fiscal quarter in which the relevant activity occurs, or 90 days after the end of the fiscal year for the fourth quarterly report, allowing many advisers that are subject to the quarterly statement rule to include these disclosures in their quarterly

[1493] *See supra* section II.E.1.b).

[1494] Proposing Release, *supra* footnote 3, at 240.

[1495] *Id. See also infra* section VI.D.4 (discussing opportunism in the context of certain preferential treatment).

[1496] *See, e.g.,* NY State Comptroller Comment Letter; AFL–CIO Comment Letter; ILPA Comment Letter I; ICCR Comment Letter; IAA Comment Letter II.

[1497] *See, e.g.,* SBAI Comment Letter; IAA Comment Letter II; Ropes & Gray Comment Letter.

[1498] *See supra* section VI.B.

[1499] *See supra* section VI.B.

[1500] *See supra* sections II.E.1.c), VI.C.2.

[1501] *See supra* footnote 1450 and accompanying text.

reports.[1502] However, certain fund advisers, such as advisers to funds of funds, may not make quarterly reports within a 45 day time frame, and those advisers may face additional costs associated with distribution of the required disclosures.

However, advisers may instead face direct costs associated with the need to update their charging and contracting practices to bring them into compliance with the new requirements, in particular in the case where advisers cease non-pro rata allocations of fees and expenses instead of making the required disclosures. As discussed in the Proposing Release, several factors make the quantification of these costs difficult, such as a lack of data on the extent to which advisers engage in non-pro rata allocations of fees and expenses.[1503] However, some commenters criticized the Commission for acknowledging these direct costs but failing to quantify them.[1504] In light of this, the Commission has further considered the requirement and additional work that would be required by various parties to comply. To that end, the Commission has estimated ranges of costs for compliance, depending on the amount of time each adviser will need to spend to comply. Some advisers may pass these direct costs on to their funds and thus investors, and other advisers may absorb these costs and bear the costs themselves.

Advisers are likely to vary in the complexity of their contracts and fee and expense allocation arrangements, because for example some advisers may already refrain from ever implementing non-pro rata allocations of fees and expenses. At minimum, we estimate that the additional work will require time from accounting managers ($337/hour), compliance managers ($360/hour), a chief compliance officer ($618/hour), attorneys ($484/hour), assistant general counsel ($543/hour), junior business analysts ($204/hour), financial reporting managers ($339), senior business analysts ($320/hour), paralegals ($253/hour), senior operations managers ($425/hour), operations specialists ($159/hour), compliance clerks ($82/hour), and general clerks ($73/hour).[1505] Certain advisers may need to hire additional personnel to meet these demands. We also include time needed for advisers to make the determination that ceasing the restricted activity instead of making a disclosure is the appropriate path to compliance for that adviser, which we estimate will require time from senior portfolio managers ($383/hour) and senior management of the adviser ($4,770/hour).

To estimate monetized costs to advisers, we multiply the hourly rates above by estimated hours per professional. Based on staff experience, we estimate that on average, advisers will require at minimum 24 hours of time from each of the personnel identified above as an initial burden.[1506] For example, at minimum, each adviser may require time from these personnel to at least evaluate whether any revisions to their contracts are warranted at all. Multiplying these minimum hours by the above hourly wages yields a minimum initial cost of $224,368.92 per adviser. These costs are likely to be higher initially than they are ongoing. Based on staff experience, we estimate minimum ongoing costs will likely be one third of the initial costs, or $74,789.64 per year.[1507]

However, many of these potential direct costs of updates may be higher for certain advisers. Larger advisers, with more complex contracts and expense arrangements that are more complex to update, may have greater costs. While the factors that may increase these costs are difficult to fully quantify, we anticipate that very few advisers would face a burden that exceeds 10 times the minimum estimate.[1508] Multiplying minimum initial cost estimates by 10 yields a maximum initial cost of $2,243,689.20 per adviser. These costs are likely to be higher initially than they are ongoing. We estimate maximum ongoing costs will likely be one third of the initial costs, or $747,896.40 per year.

The aggregate costs to the industry will depend on the proportion of advisers who pursue compliance via the required disclosures and the proportion of advisers who pursue compliance by forgoing the restricted activity. We believe that, in general, almost all advisers will pursue compliance with the final rule via disclosures as opposed to by ceasing the restricted activity.[1509] We therefore believe that the aggregate costs to the industry associated with this component of the final rule will likely be consistent with the aggregate costs to the industry as reflected in the PRA analysis. This is supported by the fact that the costs we estimate to each adviser of complying with the final rules by ceasing the restricted activity (in particular, potentially as high as $2,243,689.20 in initial costs) is much higher than the PRA cost per adviser across all restricted activities ($54,768). However, to the extent that more than a *de minimis* number of advisers pursue compliance through ceasing the restricted activity instead of via disclosures, aggregate costs may be higher.[1510]

The lack of legacy status for this rule provision means that these costs will be borne across all private funds and advisers who currently engage in non pro-rata allocations of fees and expenses. Because such allocations are more common for private equity funds and other illiquid funds,[1511] these costs will generally be more applicable to advisers and investors in those funds.[1512]

Borrowing

The final rule restricts an adviser, directly or indirectly, from borrowing money, securities, or other fund assets, or receiving a loan or an extension of credit, from a private fund client, unless it satisfies certain disclosure requirements and consent requirements.[1513]

In the Proposing Release we stated that in cases where, as the Commission has observed, fund assets were used to address personal financial issues of one of the adviser's principals, used to pay for the advisory firm's expenses, or used in association with any other harmful conflict of interest, [1514] then a prohibition would increase the amount of fund resources available to further the fund's investment strategy.[1515] We stated further that investors would benefit from any resulting increased payout and that investors would benefit from the elimination or reduction of any need to engage in costly research or

[1502] *See supra* section II.E.

[1503] Proposing Release, *supra* footnote 3, at 233–234.

[1504] *See, e.g.,* Overdahl Comment Letter; LSTA Comment Letter, Exhibit C.

[1505] *See infra* section VII.

[1506] As discussed above, this yields a total of 360 hours of personnel time for each of the restricted activities. *See supra* footnote 1455.

[1507] As discussed above, to the extent the proportion of initial costs that persist as ongoing costs is higher than one third, the ongoing costs would be proportionally higher than what is reflected here. *See supra* footnote 1456.

[1508] As discussed above, based on staff experience, as advisers grow in size, efficiencies of scale may emerge that limit the upper range of compliance costs. *See supra* footnote 1457.

[1509] *See infra* section VII.D.

[1510] *See infra* footnote 1533.

[1511] *See supra* sections II.E.1.c), VI.C.2.

[1512] However, there do not exist reliable data for quantifying precisely what percentage of private fund advisers today engage in this activity or the other restricted activities. For the purposes of quantifying costs, including aggregate costs, we have applied the estimated costs per adviser to all advisers in the scope of the rule, consistent with the approach taken in the PRA analysis. *See supra* section VII.

[1513] *See supra* section II.E.2.b).

[1514] *Id.*

[1515] Proposing Release, *supra* footnote 3, at 241.

negotiations with the adviser to prevent the uses of fund resources by the adviser that would be prohibited.[1516] We lastly stated that a prohibition would potentially potential benefit investors by reducing moral hazard: if an adviser borrows from a private fund client and does not pay back the loan, it is the investors who bear the cost, providing the adviser with incentives to engage in potentially excessive borrowing.[1517]

Some commenters agreed that a prohibition would generate benefits,[1518] but other commenters opposed the proposal,[1519] and one stated that benefits from such a prohibition would be *de minimis* because advisers and their related persons rarely borrow from fund clients.[1520] Because we have revised the final rule to allow for an exception should the adviser satisfy certain disclosure requirements and consent requirements, we believe the final rule will primarily generate benefits by allowing investors to more easily monitor instances where the adviser does borrow from the fund. Investors will benefit from the reduced cost of monitoring adviser borrowing activity, and from reduced risk of harm from the potential conflicts of interest or other harms we have identified above. Further benefits may accrue to investors in the case of advisers who would have otherwise borrowed from the fund forgo doing so, either voluntarily to avoid the cost of disclosure and the cost of consent requirements or in a follow-on fund where investors used the enhanced disclosure and consent requirements in the prior fund to negotiate such terms. The disclosures and consent requirements may enhance investor negotiating positions because, as discussed above, many investors report that they accept poor terms because they do not know what is ''market.'' [1521] These additional benefits include increased fund resources available to further the fund's investment strategy, increased payouts, the elimination or reduction of any need to engage in costly research or negotiations with the adviser to prevent the uses of fund resources, and reducing moral hazard. We are providing legacy status for the restriction on adviser borrowing, as the restriction requires investor consent.[1522] This legacy status will mitigate the benefits to current funds and investors who borrow from their funds, but will also reduce costs for those advisers.[1523] However, as discussed above we understand this practice is generally rare.[1524]

Similar to the restricted activities rule for certain fees and expenses, we believe that the risks to investors where advisers borrow against the fund motivate greater investor protections than is provided for in the case of the final rule restricting certain fees and expenses and clawbacks (and, similarly, the other types of preferential terms that must be disclosed but are not prohibited). Because the adviser borrowing from the fund is at a greater risk of being explicitly in the adviser's interest at the expense of the fund's interest, investors will benefit from the adviser being required to satisfy the necessary consent requirements. Moreover, because the adviser borrowing from the fund is less associated with the adviser benefiting certain advantaged investors at the expense of disadvantaged investors, the benefits are preserved by only requiring at least a majority in interest of investors that are not related persons of the adviser. As a final matter, as discussed above there is a reduced risk of this conflict of interest distorting the terms, price, or interest rate of the fund's loan to the adviser, because the fund's investors can, if the borrow is disclosed and investor consent is sought, compare the terms of the loan to publicly available commercial rates to determine if the terms are appropriate given market conditions.[1525] As such the benefits are preserved without a need for a stricter policy choice than consent requirements.

Advisers who currently borrow from their funds will experience costs as a result of this rule from updating their practices to bring them into compliance with the new requirements, in particular by making the required new disclosures and by obtaining new consent. Advisers who cease borrowing from their funds, either voluntarily to avoid the cost of disclosure or in a follow-on fund where investors used the enhanced disclosure in the prior fund to negotiate such terms, may also face direct compliance costs associated with updating their business practices and fund documents to remove the ability of the adviser to borrow from the fund.

In the case where advisers comply with the final rule by making the required disclosures and by obtaining the required investor consent, costs are quantified by examination of the analysis in section VII, which have been tallied along with all other disclosure costs of the restricted activities above and include time needed for advisers to make the determination that the requisite disclosure is the appropriate path to compliance for that adviser.[1526]

However, advisers may instead face direct costs associated with the need to update their borrowing practices to bring them into compliance with the new requirements, in particular in the case where advisers cease borrowing from their funds instead of making the required disclosures and obtaining the required consent. As discussed in the Proposing Release, several factors make the quantification of these costs difficult, such as a lack of data on the extent to which advisers borrow from their funds today.[1527] However, one commenter criticized the Commission for acknowledging these direct costs but failing to quantify them.[1528] In light of this, the Commission has further considered the requirement and additional work that would be required by various parties to comply. To that end, the Commission has estimated ranges of costs for compliance, depending on the amount of time each adviser will need to spend to comply. Some advisers may pass these direct costs on to their funds and thus investors, and other advisers may absorb these costs and bear the costs themselves.

Advisers are likely to vary in the complexity of their contracts and borrowing practices, because for example some advisers may already refrain from ever borrowing from their funds. At minimum, we estimate that the additional work will require time from accounting managers ($337/hour), compliance managers ($360/hour), a chief compliance officer ($618/hour), attorneys ($484/hour), assistant general counsel ($543/hour), junior business analysts ($204/hour), financial reporting managers ($339), senior business analysts ($320/hour), paralegals ($253/hour), senior operations managers ($425/hour), operations specialists ($159/hour), compliance clerks ($82/

[1516] *Id.*

[1517] *Id.*

[1518] *See, e.g.,* OPERS Comment Letter; AFL–CIO Comment Letter; Convergence Comment Letter.

[1519] SIFMA–AMG Comment Letter I; NYC Bar Comment Letter II; IAA Comment Letter II.

[1520] NYC Bar Comment Letter II.

[1521] *See supra* section VI.B.

[1522] *See supra* section IV.

[1523] There do not exist reliable data for quantifying what percentage of private fund advisers today engage in this activity or the other restricted activities. For the purposes of quantifying costs, including aggregate costs, we have applied the estimated costs per adviser to all advisers in the scope of the rule, consistent with the approach taken in the PRA analysis. *See supra* section VII.

[1524] *See supra* section II.E.2.b).

[1525] *See supra* section VI.C.2.

[1526] *See supra* footnote 1450 and accompanying text.

[1527] Proposing Release, *supra* footnote 3, at 233–234.

[1528] Overdahl Comment Letter.

hour), and general clerks ($73/hour).[1529] Certain advisers may need to hire additional personnel to meet these demands. We also include time needed for advisers to make the determination that ceasing the restricted activity instead of making a disclosure and obtaining consent is the appropriate path to compliance for that adviser, which we estimate will require time from senior portfolio managers ($383/hour) and senior management of the adviser ($4,770/hour).

To estimate monetized costs to advisers, we multiply the hourly rates above by estimated hours per professional. Based on staff experience, we estimate that on average, advisers will require at minimum 24 hours of time from each of the personnel identified above as an initial burden.[1530] For example, at minimum, each adviser may require time from these personnel to at least evaluate whether any revisions to their contracts are warranted at all. Multiplying these minimum hours by the above hourly wages yields a minimum initial cost of $224,368.92 per adviser. These costs are likely to be higher initially than they are ongoing. We estimate minimum ongoing costs will likely be one third of the initial costs, or $74,789.64 per year.[1531]

However, many of these potential direct costs of updates may be higher for certain advisers. Larger advisers, with more complex contracts and borrowing arrangements that are more complex to update, may have greater costs. Advisers may also vary in which investors consent to advisers' borrowing activities. While the factors that may increase these costs are difficult to fully quantify, we anticipate that very few advisers would face a burden that exceeds 10 times the minimum estimate. Multiplying minimum initial cost estimates by 10 wages yields a maximum initial cost of $2,243,689.20 per adviser. These costs are likely to be higher initially than they are ongoing. We estimate maximum ongoing costs will likely be one third of the initial costs, or $747,896.40 per year.

The aggregate costs to the industry will depend on the proportion of advisers who pursue compliance via the required disclosures and the required consent and the proportion of advisers who pursue compliance by forgoing the restricted activities. We believe that, in general, almost all advisers will pursue compliance with the final rule via disclosures and consent as opposed to by ceasing the required activities.[1532] We therefore believe that the aggregate costs to the industry associated with this component of the final rule will likely be consistent with the aggregate costs to the industry as reflected in the PRA analysis. This is supported by the fact that the costs we estimate to each adviser of complying with the final rules by ceasing the restricted activity (in particular, potentially as high as $2,243,689.20 in initial costs) is much higher than the PRA cost per adviser across all restricted activities ($54,768).

However, to the extent that more than a *de minimis* number of advisers pursue compliance through ceasing the restricted activity instead of via disclosures and consent, aggregate costs may be higher. For example, suppose five percent of private fund advisers (excluding advisers to solely securitized asset funds, or 612 advisers, pursue compliance through ceasing the restricted activities. Then maximum aggregate ongoing annual costs will in that case be $2,234,128,277.2 as compared to aggregate PRA costs for restricted activities of $592,285,120.[1533]

Other commenters who discussed the costs of the proposed rule primarily stated that the costs of the rule would be indirect, in that the proposed rule would have prohibited activity that could benefit investors, such as tax advances, borrowing arrangements outside of the fund structure, an adviser purchasing securities from a client under section 206(3) of the Advisers Act, and the activity of large financial institutions that play many roles in a private fund complex.[1534] We believe the final rule substantially eliminates these indirect costs by providing for an exception for certain disclosures and consent, as advisers are still permitted to conduct activities that could benefit investors so long as the required disclosures are made and the required investor consent is obtained.[1535] However, to the extent advisers forgo these activities because of the costs of disclosure, that will be an indirect cost of the rule. Advisers who cease borrowing from their funds may also face costs related to any marginal increases in the cost of capital incurred from new sources of borrowing, as compared to what was being charged by the fund.

4. Preferential Treatment

Prohibition of Certain Preferential Terms

The final rules will, as proposed, prohibit a private fund adviser from providing certain preferential terms to some investors that the adviser reasonably expects to have a material negative effect on other investors in the private fund or in a similar pool of assets,[1536] but in response to commenters contains three modifications. First, we are modifying the proposed term ''substantially similar pool of assets'' as used throughout the preferential treatment rule and changing it to ''similar pool of assets.''[1537] Second, the rule will allow two exceptions from the prohibition of preferential redemption terms: one for redemptions that are required by applicable law and another if the adviser offers the same redemption ability to all existing and future investors in the same private fund or any similar pool of assets.[1538] Lastly, the rule will also allow an exception from the prohibition on preferential information where the adviser offers the information to all other existing investors in the private fund and any similar pool of assets at the same time or substantially the same time.[1539]

[1529] *See infra* section VII.

[1530] As discussed above, this yields a total of 360 hours of personnel time for each of the restricted activities. *See supra* footnote 1455.

[1531] As discussed above, to the extent the proportion of initial costs that persist as ongoing costs is higher than one third, the ongoing costs would be proportionally higher than what is reflected here. *See supra* footnote 1456.

[1532] *See infra* section VII.D.

[1533] We assume all 612 would be drawn from the pool of advisers who would have faced external PRA costs had they pursued compliance via the required disclosures and the required consent. Then 612 advisers will face ongoing costs of 4*($747,896.40). The PRA assumes that 75% of advisers will face internal costs only, and not require any external burden, yielding 9,176 advisers facing ongoing costs of $29,344. The PRA assumes 25% of advisers will face a further $25,424 in external costs, yielding 2,447 advisers facing ongoing costs of $54,768. *See infra* section VII.D.

[1534] *See supra* section II.E.2.b); *see also* SBAI Comment Letter; CFA Comment Letter I; AIC Comment Letter I; SIFMA–AMG Comment Letter I.

[1535] However, to the extent that a borrowing under the final rule also involves a purchase under section 206(3) of the Advisers Act, the requirements of that section will continue to apply to the adviser. The final rules may therefore result in additional direct costs as a result of requirements from both section 206(3) of the Advisers Act and the final restricted activities rule. *See supra* section II.E.2.b); SIFMA–AMG Comment Letter I.

[1536] *See supra* section II.F.

[1537] *Id.*

[1538] *Id.*

[1539] *Id.* Because the rule will not apply to advisers with respect to CLOs and other SAFs they advise, there will be no benefits or costs for investors and advisers associated with those funds. However, unlike investors in other private funds, the noteholders are similarly situated with all of the other noteholders in the same tranche and they cannot redeem or ''cash in'' their note ahead of other noteholders in the same tranche. As a result, in our experience, this structure has generally deterred investors from requesting, and SAF advisers from granting, preferential treatment, especially preferential treatment that would have a material, negative effect on other investors, such as early redemption rights. We therefore understand

the forgone benefits from this limitation in scope to be minimal. *See supra* section II.A.

Benefits may accrue from these prohibitions in two situations. First, we associate these practices with a tendency towards opportunistic hold-up of investors by advisers or the investors receiving the preferential treatment, involving the exploitation of an informational or bargaining advantage by the adviser or advantaged investor.[1540] The prohibitions may benefit the non-preferred investors in situations where advisers lack the ability to commit to avoid the opportunistic behavior after entering into the agreement (or relationship) with the investor. For example, similar to the case regarding non-pro rata fee and expense allocations, an adviser with repeat business from a large investor with early redemption rights and smaller investors with no early redemption rights may have adverse incentives to take on extra risk, as the adviser's preferred investor could exercise its early redemption rights to avoid the bulk of losses in the event an investment begins to fail. The adviser would then continue to receive repeat business with the investors with preferential terms, to the detriment of the investors with no preferential terms.

Investors who do receive preferential terms may also receive information over the course of a fund's life that the investors can use to their own gain but to the detriment of the fund and, by extension, the other investors. With respect to preferential redemption rights, if a fund was heavily invested in a particular sector and an investor with early redemption rights learned the sector was expected to suffer deterioration, that investor has a first-mover advantage and could submit a redemption request, securing its funds early but forcing the fund to sell assets in a declining market, harming the other investors in three possible ways. First, if the fund sells a portion of a profitable or valuable asset to satisfy the redemption, the remaining investors' interests in that valuable asset is diluted. Second, if the fund is forced to sell a portion of an illiquid asset in a declining market, the forced sale could further depress the value of the asset, reducing the remaining investors' interests in the asset. Third, the remaining investors may have an impaired ability to successfully redeem their own interests after the first mover's redemption. In these situations, the prohibitions would provide a solution to the hold-up problem that is not currently available. The rule will benefit the disadvantaged investors by prohibiting such a situation, and so the disadvantaged investors would be less susceptible to hold-up and experience either less dilution on their fund investments or potentially greater valuations on certain illiquid assets, and potentially enhanced abilities to redeem without impairment from the preferred investors' first-mover advantage, as benefits of the final rule.

With respect to preferential information rights, we believe a similar situation could occur. If a fund were heavily invested in a particular sector and an investor with any redemption rights at all received preferential information that the sector was expected to suffer deterioration, that investor could submit a redemption request, securing its funds early but forcing the fund to sell assets in a declining market, again harming the other investors similar to the above scenarios. In these situations, the prohibitions would provide a solution to the hold-up problem that is not currently available. The Commission has recognized these potential problems in past rulemakings.[1541] Specifically, the Commission has recognized that when selective disclosure leads to trading by the recipients of the disclosure the practice bears a close resemblance to ordinary insider trading.[1542] The economic effects of the two practices are essentially the same; in both cases, a few persons gain an informational edge—and use that edge to profit at the expense of the uninformed—from superior access to corporate insiders, not through skill or diligence.[1543] Thus, investors in many instances equate the practice of selective disclosure with insider trading. The Commission has also stated that the effect of selective disclosure is that individual investors lose confidence in the integrity of the markets because they perceive that certain market participants have an unfair advantage.[1544]

As discussed above, commenters argued that the use of preferential information to exercise redemption is an important element of determining whether providing information would have a material, negative effect on other investors and thus whether an adviser triggers the preferential information prohibition.[1545] We would generally not view preferential information rights provided to one or more investors in a closed-end/illiquid private fund as having a material, negative effect on other investors.[1546] However, there may be cases where preferential information may be reasonably expected to have a material, negative effect on other investors in the fund even when the preferred investor does not have the ability to redeem its interest in the fund, and so whether preferential information violates the final rule requires a facts and circumstances analyses.[1547] For example, a private fund may invest in an asset with certain trading restrictions, and then later receive notice that the investment is performing poorly. If the private fund gives that information to a preferred investor before others, the preferred investor could front-run other investors in taking a (possibly synthetic) short position against the asset, driving its price down and causing losses to other investors in the fund. An adviser could also operate multiple funds with overlapping investments but offer redemption rights only for one fund containing its preferred investors. An adviser granting preferential information to certain investors in its less liquid fund, which those preferred investors could use to redeem their interests in the more liquid fund, could harm the investors in the less liquid fund even though the preferred investors do not have redemption rights in the less liquid fund.[1548]

Second, in situations where investors face uncertainty as to whether the adviser engages in the prohibited practice, the benefit from the prohibition would be to eliminate the costs to investors of avoiding entering into agreements with advisers that engage in the practice and the costs to investors from inadvertently entering into such agreements.

Specifically, in this second case, the prohibited preferential terms would harm investors in private funds and cause investors to incur extra costs of researching fund investments to avoid fund investments in which the prospective fund adviser engages in

[1540] *See supra* section II.F.

[1541] *See supra* section II.G.2.

[1542] *See* Selective Disclosure and Insider Trading, Securities Act Release, *supra* footnote 842.

[1543] *Id.*

[1544] *Id. See also infra* section VI.E.

[1545] *See supra* section II.G. *See also, e.g.,* NY State Comptroller Comment Letter; Top Tier Comment Letter. We emphasize, however, that this potential for harm does not require the investor to have preferential redemption rights also. Preferential information combined with any redemption rights at all may result in harm to other investors.

[1546] *Id.*

[1547] *See supra* sections II.G, II.F.

[1548] For a similar scenario, *see, e.g.,* In the Matter of Alliance Capital Mgmt., L.P., Investment Advisers Act Release No. 2205 (Dec. 18, 2003) (settled order) (alleging Alliance Capital violated, among other things, Advisers Act rule against misuse of material non-public information by providing market timer with real-time non-public mutual fund portfolio information, enabling the timer to profit from synthetic short positions).

these practices (or costs of otherwise avoiding or mitigating the harm to those disadvantaged investors from the practice). The benefit of the prohibition to investors will be to eliminate such costs. It will prohibit disparities in treatment of different investors in similar pools of assets in the case where the disparity is due to the adviser placing their own interests ahead of the client's interests or due to behavior that may be deceptive. Investors will benefit from the costs savings of no longer needing to evaluate whether the adviser engages in such practices. Investors and advisers also may benefit from reduced cost of negotiating the terms of a fund investment. Investors who would have otherwise been harmed by the prohibited practices will benefit from the elimination of such harms through their prohibition. While many commenters from adviser groups and from large investors disputed these benefits,[1549] other commenters supported the view of these benefits.[1550]

These benefits, in particular the benefits from the prohibition on preferential redemption rights, may be mitigated by the two new exceptions to the rule allowed for in the final rule. Specifically, investors in private funds where other investors receive preferential redemption rights required by applicable law will not benefit from any prohibition. However, those investors will still benefit from enhanced disclosures of those preferential terms.[1551] We generally do not believe that benefits will be mitigated by the exception allowing for preferential redemption rights or preferential information granted to other investors so long as those rights and information are offered to all existing and future investors, because an adviser is prohibited from doing indirectly what it cannot do directly and an adviser must offer investors options with reasonably the same incentives.[1552] For example, an adviser could not avail itself of the exception by offering Class A (quarterly redemption, 1.5% management fee, 20% performance fee) and Class B (annual redemption, 1% management fee, 15% performance fee) while requiring Class B investors to also invest in another fund managed by the adviser.[1553] While we do not believe any such menus of share classes offered to all investors will generally result in the types of harm we have considered above, at the margin there may be cases in which investors do not realize the implications of the share classes being offered to them, and select differential redemption rights that lead to eventual harm. These cases, to the extent they occur, would reduce the benefits of the final rules.

The benefits of the prohibition on preferential redemption rights may generally be lessened for investors in funds managed by ERAs relying on the venture capital exemption, because such venture capital funds must prohibit investor redemptions except in extraordinary circumstances to qualify for the registration exemption.[1554] However, there may still be meaningful benefits from this prohibition for those investors to the extent that "extraordinary circumstances" are exactly the circumstances where preferential redemptions for certain investors are most likely to have a material, negative effect on other investors in the fund.

The cost of the prohibitions will depend on the extent to which investors would otherwise obtain such preferential terms in their agreements with advisers and the conditions under which they make use of the preferential treatment. Investors who would have obtained and made use of the preferential terms will incur a cost of losing the prohibited redemption and information rights. This will include any investors who might benefit from the ability to redeem based on negotiated exceptions to the private fund's stated redemption terms, in addition to the investors who might benefit from the hold-up problems discussed above.

Commenters also expressed concerns that both investors and advisers may face costs in the case of smaller funds who rely on offering preferential treatment to anchor or seed investors, including preferential redemption terms that will be prohibited under the final rules that prohibit preferential terms to some investors that the adviser reasonably expects to have a material negative effect on other investors in the private fund or in a similar pool of assets.[1555] However, because advisers are only prevented from offering anchor investors preferential redemption rights and preferential information that the adviser reasonably expects will have a material negative effect on other investors these potential harms to competition will be mitigated to the extent that smaller, emerging advisers do not need to be able to offer anchor investors preferential rights that the adviser reasonably expects to have a material negative effect on other investors to effectively compete, and to the extent that smaller emerging advisers are able to compete effectively by offering anchor investors other types of preferential terms that will not materially negatively affect other investors. However, some smaller or emerging advisers may find it more difficult to compete without offering preferential redemption rights or preferential information that will now be prohibited.

To the extent advisers respond to the prohibitions on certain preferential redemption rights and preferential information by developing new preferential terms and disclosing them to all investors, there may be new potential harms to investors who do not receive these new preferential terms. For example, advisers may offer greater fee breaks to anchor or seed investors instead of the prohibited terms and may accordingly charge higher fees to non-preferred investors.

In addition, advisers will incur direct costs of updating their processes for entering into agreements with investors, to accommodate what terms could be effectively offered to all investors once the option of preferential terms to certain investors has been removed. These direct costs may be particularly high in the short term to the extent that advisers renegotiate, restructure and/or revise certain existing deals or existing economic arrangements in response to this prohibition. However, because such deals will have legacy status under the rule and will therefore not require a restructuring under the rules,[1556] we expect that these renegotiations or restructurings will typically only occur to the extent that they represent a net positive benefit to investors who successfully renegotiate new terms by threatening to move their investments to new funds that do not offer any investors the prohibited preferential redemption rights or prohibited preferential information.

[1549] *See, e.g.,* SBAI Comment Letter; MFA Comment Letter I.

[1550] *See, e.g.,* ICCR Comment Letter; United for Respect Comment Letter I; Segal Marco Comment Letter.

[1551] *See supra* section II.F; *see also infra* section VI.D.4.

[1552] *See supra* section II.F; *see also* section 208(d) of the Advisers Act.

[1553] *Id.*

[1554] *See supra* section VI.C.1.

[1555] Commenters also state that smaller emerging advisers may close their funds in response to the final rules and their resulting restricted ability to offer certain preferential terms to anchor investors. We discuss these effects of the final rules on competition below. *See infra* section VI.E; *see also, e.g.,* Carta Comment Letter; Meketa Comment Letter; Lockstep Ventures Comment Letter; NY State Comptroller Comment Letter; Weiss Comment Letter; AIC Comment Letter I; AIC Comment Letter I, Appendix 2; MFA Comment Letter II.

[1556] *See supra* section IV.

The costs of the prohibition on preferential redemption rights are mitigated by the two exceptions adopted in the final rule: for redemption rights that are required by applicable law and redemption rights where the adviser offers the same redemption ability to all existing and future investors, there will be limited new compliance costs, and the investors who currently benefit from such terms will continue to do so, in a change from the proposal's costs.[1557]

As discussed in the Proposing Release, several factors make the quantification of these costs difficult, such as a lack of data on the extent to which advisers currently offer preferential terms that will be prohibited under the final rule.[1558] However, one commenter criticized the Commission for failing to quantify these costs.[1559] In light of this, the Commission has further considered the requirement and additional work that would be required by various parties to comply. To that end, the Commission has estimated ranges of costs for compliance, depending on the amount of time each adviser will need to spend to comply.

We estimate a range of costs because advisers are likely to vary in the complexity of their contractual arrangements, because for example some advisers may not offer any preferential terms today that will be prohibited. At minimum, we estimate that the additional work will require time from accounting managers ($337/hour), compliance managers ($360/hour), a chief compliance officer ($618/hour), attorneys ($484/hour), assistant general counsel ($543/hour), junior business analysts ($204/hour), financial reporting managers ($339), senior business analysts ($320/hour), paralegals ($253/hour), senior operations managers ($425/hour), operations specialists ($159/hour), compliance clerks ($82/hour), and general clerks ($73/hour).[1560] Certain advisers may need to hire additional personnel to meet these demands. Given the impact of preferential treatment decisions on fund capital and business outcomes, we also include time needed from senior portfolio managers ($383/hour) and senior management of the adviser ($4,770/hour).

To estimate monetized costs to advisers, we multiply the hourly rates above by estimated hours per professional. To estimate the minimum number of hours required, we consider the minimum amount of burden that may result from the prohibitions on certain preferential redemption rights and certain preferential information. We expect most advisers will also only face direct costs of updating their contracts for new funds, and therefore the minimum costs in the estimated range do not include direct costs for renegotiating or restructuring contracts for existing funds. Each adviser will also require a minimum amount of time from these personnel to at least evaluate whether any revisions to their contracts are warranted at all. Based on staff experience, we estimate that on average, advisers will require at minimum 72 hours of time from each of the personnel identified above as an initial burden. Multiplying these minimum hours by the above hourly wages yields a minimum initial cost of $673,106.76 per adviser. These costs are likely to be higher initially than they are ongoing. We estimate minimum ongoing costs will likely be one third of the initial costs, or $224,368.92 per year.[1561]

However, many of these potential direct costs of updates may be higher for certain advisers. Larger advisers, with more complex contractual arrangements that are more complex to update, may have greater costs. Some advisers may also need to restructure or renegotiate contracts for existing funds, in response to pressure from investors resulting from the final rules, despite the legacy status.[1562] While the factors that may increase these costs are difficult to fully quantify, we anticipate that very few advisers would face a burden that exceeds 10 times the minimum estimate.[1563] Multiplying minimum initial cost estimates by 10 yields a maximum initial cost of $6,731,067.60 per adviser. These costs are likely to be higher initially than they are ongoing. Based on staff experience, we estimate maximum ongoing costs will likely be one third of the initial costs, or $2,243,689.20 per year.

In addition to compliance costs, some commenters stated that the prohibition on preferential information may have an unintended chilling effect on ordinary investor communications and will impede the co-investment process.[1564] To the extent there are ordinary communications that are valued by investors that would have occurred absent this rule, and those communications do not occur under the rule, the loss of those valued communications represents a cost of the rule. This may include advisers interpreting the rule as prohibiting selective disclosure of portfolio information to investors in co-investment vehicles.[1565] Similarly, certain commenters expressed concerns at ambiguity around the meaning of ''material, negative effect.'' [1566] When industry participants view terms such as these as ambiguous, this increases the risk identified by commenters of some advisers evaluating their meaning broadly and providing less information to investors.

Certain elements of the prohibition may result in these types of costs. For example, the application of the prohibition to all forms of communication, both formal and informal, may drive certain advisers to conservatively evaluate what information can be provided on a preferential basis.[1567] However, we also believe that the scope of the prohibition is reasonably precisely defined, such that the risk of advisers conservatively evaluating the prohibition and denying ordinary investor communications may be low. The prohibition only applies in a narrow set of circumstances: when the adviser reasonably expects that providing information would have a material, negative effect on other investors in the private fund or similar pool of assets. We believe advisers will in general be able to form reasonable expectations around what types of information are likely to have a material, negative effect on other investors, for example by examining the effect of delivering comparable information to investors in the past, either in their own prior funds, other

[1557] *See supra* section II.F. The burden associated with the preparation, provision, and distribution of written notices for advisers who comply with the rule by (i) offering the same preferential redemption terms to all existing and future investors and (ii) offering the same preferential information to all other investors, in each case, in accordance with the exceptions to the prohibitions aspect of the final rule, is included in the PRA analysis. *See infra* section VII.

[1558] Proposing Release, *supra* footnote 3, at 233–234.

[1559] AIC Comment Letter I, Appendix 2.

[1560] *See infra* section VII.

[1561] As discussed above, to the extent the proportion of initial costs that persist as ongoing costs is higher than one third, the ongoing costs would be proportionally higher than what is reflected here. *See supra* footnote 1456.

[1562] *See supra* footnote 1556 and accompanying text.

[1563] As discussed above, based on staff experience, as advisers grow in size, efficiencies of scale may emerge that limit the upper range of compliance costs. *See supra* footnote 1457.

[1564] *See, e.g.,* MFA Comment Letter I; Haynes & Boone Comment Letter; Dechert Comment Letter; RFG Comment Letter II; AIMA/ACC Comment Letter; AIC Comment Letter I, Appendix 1; Segal Marco Comment Letter.

[1565] *See* AIC Comment Letter I; Segal Marco Comment Letter.

[1566] *See, e.g.,* ILPA Comment Letter I; RFG Comment Letter II; AIMA/ACC Comment Letter; Schulte Comment Letter; SFA Comment Letter II.

[1567] *See supra* section II.F.

funds in public press, or other funds in Commission enforcement actions.[1568] Moreover, once advisers begin disclosing what forms of preferential treatment they provide pursuant to the final preferential treatment rule, the reactions of other investors may give advisers a clearer, more comprehensive picture of when material, negative effects may result.[1569]

Any preferential information that does not meet the specified reasonable expectation of a material, negative effect criteria would only be subject to the disclosure portions of this rule.[1570] We believe this also mitigates the risk of any unintended chilling of communication.

Because fund agreements entered into before the compliance date will have legacy status, benefits to investors will generally not accrue for current funds unless they are able to negotiate revised terms to their existing contracts, but benefits to investors in future funds will benefit from advisers ceasing prohibited preferential treatment activity. This will also generally be the case for costs of the final rules prohibiting a private fund adviser from providing certain preferential terms to some investors that the adviser reasonably expects to have a material negative effect on other investors in the private fund or in a similar pool of assets. However, investors in liquid funds who have the ability to redeem may do so in response to the final rules, if they do not currently receive preferential terms, to reallocate their investments into new private funds that are subject to the rules and do not offer preferential terms reasonably expected to have a material, negative effect on other investors. Those investors may be able to benefit from the final rules, and advisers correspondingly may face costs associated with reduced compensation from losing the assets of those investors.

Prohibition of Other Preferential Treatment Without Disclosure

The final rule also will prohibit other preferential terms unless the adviser provides certain written disclosures to prospective and current investors, and these disclosures must contain information regarding all preferential treatment the adviser provides to other investors in the same fund.[1571] In response to commenters, we are also adopting the prohibition of other preferential treatment without disclosure in a modified form. We are limiting the advance written notice requirement to prospective investors to only apply to material economic terms, but we are still requiring advisers to provide to current investors comprehensive disclosure of all preferential treatment. The timing of when that disclosure is provided will depend on whether the fund is a liquid or illiquid fund. We are also adopting the annual written disclosure requirement as proposed.[1572]

This rule will reduce the risk of harm that some investors face from expected favoritism toward other investors, and help investors understand the scope of preferential terms granted to other investors, which could help investors shape the terms of their relationship with the adviser of the private fund. Because these disclosures would need to be provided to prospective investors prior to their investments and to current investors annually, these disclosures would help investors shape the terms of their relationship with the adviser of the private fund. This may lead the investor to request additional information on other benefits to be obtained, such as co-investment rights, and would allow an investor to understand better certain potential conflicts of interest and the risk of potential harms or other disadvantages.

Some commenters who supported the rule in general offered perspectives consistent with these benefits. In particular, as discussed above, many investors report that they accept poor legal terms in LPAs largely because they do not think that they have sufficient information on ''what's market'' to be included in LPA terms.[1573] Other commenters more specifically stated that with better transparency into preferential treatment, investors would be able to better protect themselves from risks to their investments.[1574] Another commenter stated that the proposed rule would generally assist investors in the negotiation process.[1575]

Disclosures of such preferential treatment would impose direct costs on advisers to update their contracting and disclosure practices to bring them into compliance with the new requirements, including by incurring costs for legal services. These direct costs may be particularly high in the short term to the extent that advisers renegotiate, restructure and/or revise certain existing deals or existing economic arrangements in response to this prohibition. However, these costs may also be reduced by an adviser's choice between not providing the preferential terms and continuing to provide the preferential terms with the required disclosures, as the costs to some advisers from not providing the preferential terms to investors may be lower than the costs from the disclosure. Both the costs and the benefits may be mitigated to the extent that advisers already make the required disclosures, for example in response to any relevant State laws.[1576]

As discussed below, for purposes of the PRA, we anticipate that the total costs of making the required disclosures pursuant to the rule prohibiting preferential treatment without disclosure will impose an aggregate annual internal cost of $364,386,264.48 and an aggregate annual external cost of $41,475,520 for a total cost of $405,861,784.48 annually.[1577] To the extent that advisers are not prohibited from categorizing all or a portion of these costs as expenses to be borne by the fund, then these costs may be borne indirectly by investors to the fund instead of advisers. We believe these costs are mitigated in part by the limiting of the final rules to only those terms that a prospective investor would find most important and that would significantly impact its bargaining position (*i.e.,* material economic terms, including but not limited to the cost of investing, liquidity rights, investor-specific fee breaks, and co-investment rights).

However, private fund advisers, in addition to having to undertake direct compliance costs associated with their disclosures, may ultimately face direct costs as described by commenters associated with revising their business practices, policies, and procedures to ensure successful fund closings that are in compliance with the final rules.[1578]

[1568] *Id.*

[1569] *Id.*

[1570] *See supra* section II.F; *see also* final rule 211(h)(2)–3(b).

[1571] *See supra* section II.F. Because the rule will not apply to advisers with respect to SAFs, there will be no benefits or costs for investors and advisers associated with those funds. *See supra* footnote 1539.

[1572] *Id.*

[1573] *See supra* section VI.B.

[1574] *See, e.g.,* Healthy Markets Comment Letter I; Trine Comment Letter; AFREF Comment Letter I; NEBF Comment Letter; NASAA Comment Letter; Segal Marco Comment Letter; Pathway Comment Letter.

[1575] RFG Comment Letter II.

[1576] *See supra* section VI.C.2.

[1577] We have also adjusted these estimates to reflect that the final rule will not apply to SAF advisers with respect to SAFs they advise. *See infra* section VII.F. As explained in that section, this estimated annual cost is the sum of the estimated recurring cost of the proposed rule in addition to the estimated initial cost annualized over the first three years. As discussed above, one commenter criticized the quantification methods underlying these estimates, and we have explained why we do not agree with that criticism. *See supra* footnote 1366. Nevertheless, to reflect the commenter's concerns, and recognizing certain changes from the proposal, we are revising the estimates upwards as reflected here and in section VII.B.

[1578] While commenters' concerns were primarily focused on fund closing processes, hedge funds and

As discussed in the Proposing Release, several factors make the quantification of costs difficult, such as a lack of data on the extent to which advisers currently offer preferential terms that will be prohibited under the final rule unless the adviser makes certain disclosures.[1579] However, some commenters criticized the Commission for failing to quantify these costs.[1580] In light of this, and in light of commenter concerns on other direct costs to advisers associated with having to revise their business practices above and beyond making disclosures, the Commission has further considered the requirement and additional work that would be required by various parties to comply. To that end, the Commission has estimated ranges of costs for compliance, depending on the amount of time each adviser will need to spend to comply.

Advisers are likely to vary in the complexity of their contractual arrangements, because for example some advisers may not offer any preferential terms today that will be prohibited. At minimum, we estimate that the additional work will require time from accounting managers ($337/hour), compliance managers ($360/hour), a chief compliance officer ($618/hour), attorneys ($484/hour), assistant general counsel ($543/hour), junior business analysts ($204/hour), financial reporting managers ($339), senior business analysts ($320/hour), paralegals ($253/hour), senior operations managers ($425/hour), operations specialists ($159/hour), compliance clerks ($82/hour), and general clerks ($73/hour).[1581] Certain advisers may need to hire additional personnel to meet these demands. Given the impact of preferential treatment decisions on fund capital and business outcomes, we also include time needed from senior portfolio managers ($383/hour) and senior management of the adviser ($4,770/hour).

To estimate monetized costs to advisers, we multiply the hourly rates above by estimated hours per professional. Based on staff experience, we estimate that on average, advisers will require at minimum 36 hours of time from each of the personnel identified above as an initial burden. For example, at minimum, each adviser may require time from these personnel to at least evaluate whether any revisions to their contracts are warranted at all. Multiplying these minimum hours by the above hourly wages yields a minimum initial cost of $336,553.38 per adviser. These costs are likely to be higher initially than they are ongoing. Based on staff experience, we estimate minimum ongoing costs will likely be one fifth of the initial costs, or $112,184.46 per year.[1582]

However, many of these potential direct costs of updates may be higher for certain advisers. Larger advisers, with more complex contracts and preferential treatment arrangements that are more complex to update, may have greater costs. While the factors that may increase these costs are difficult to fully quantify, we anticipate that very few advisers would face a burden that exceeds 10 times the minimum estimate.[1583] Multiplying minimum initial cost estimates by 10 yields a maximum initial cost of $3,365,533.80 per adviser. These costs are likely to be higher initially than they are ongoing. Based on staff experience, we estimate maximum ongoing costs will likely be one third of the initial costs, or $1,121,844.60 per year.

We believe the direct costs of the final rule will be equal to the sum of the PRA direct costs and non-PRA direct costs, as we believe the preferential treatment rule will in general require advisers to both undertake additional disclosures of preferential treatment offered to investors as well as revise their business practices, policies, and procedures. We do not believe that, in general, any advisers will come into compliance with the final rule by, for example, forgoing offering preferential treatment altogether, thereby avoiding all disclosures-based PRA costs.

In addition to these direct compliance costs, at the proposing stage, we stated that to the extent that these disclosures could discourage advisers from providing certain preferential terms in the interest of avoiding future negotiations with other investors on similar terms, this prohibition could ultimately decrease the likelihood that some investors are granted preferential terms.[1584] Commenters generally agreed, stating that these disclosures would discourage advisers from providing certain preferential terms in the interest of avoiding future negotiations with other investors on similar terms, or out of a conservative evaluation of their obligations under the rule and a resulting fear of non-compliance.[1585] As a result, some investors may find it harder to secure such terms.

Some commenters also stated that the prohibition on preferential treatment without disclosure would impede fund closing processes. Specifically, commenters stated that the Commission's proposal would disadvantage investors that participate in earlier closings, as the investors in later closings would have access to an even larger set of disclosed agreements. This dynamic would provide investors with an incentive to wait—it encourages investors to try to be the last investor to sign up for a fund—making fundraising even more difficult and time consuming.[1586] Some commenters stated that because of the dynamic nature of negotiations leading up to a closing (*i.e.,* advisers simultaneously negotiate with multiple investors), it would be impractical for an adviser to provide advance written notice to a prospective investor because doing so would result in a repeated cycle of disclosure, discussion, and potential renegotiation.[1587]

While commenters may be correct that, at the margin, there may be certain increased difficulties associated with the fund closing process under the new rule, we believe there are two key factors mitigating any concern that the final rule will create any meaningful fund closing problems.

First, as discussed in the economic baseline, there already exists today an incentive for investors to wait for their latest possible opportunity to close, freeriding on the due diligence and resulting negotiated terms conducted by earlier investors,[1588] and therefore have already developed two tools for overcoming this problem, and will continue to have those tools available to them, namely (i) offering earlier investors MFN provisions to convince them to commit to the fund early, and

other liquid funds that raise capital on an ongoing basis may face related additional costs associated with investors delaying investing in the fund in order to learn more about what terms are being received by other investors. However, for those funds, any incentive for investors to delay committing their capital will be at least partially offset by the fact that they will not earn the returns of the fund for the duration of their delay.

[1579] Proposing Release, *supra* footnote 3, at 233–234.

[1580] AIC Comment Letter I, Appendix 2; LSTA Comment Letter, Exhibit C.

[1581] *See infra* section VII.

[1582] As discussed above, to the extent the proportion of initial costs that persist as ongoing costs is higher than one third, the ongoing costs would be proportionally higher than what is reflected here. *See supra* footnote 1456.

[1583] As discussed above, based on staff experience, as advisers grow in size, efficiencies of scale may emerge that limit the upper range of compliance costs. *See supra* footnote 1457.

[1584] Proposing Release, *supra* footnote 3, at 249.

[1585] *See, e.g.,* AIMA/ACC Comment Letter; OPERS Comment Letter.

[1586] *See, e.g.,* AIC Comment Letter I.

[1587] MFA Comment Letter I; PIFF Comment Letter; Chamber of Commerce Comment Letter; AIMA/ACC Comment Letter; Correlation Ventures Comment Letter; SIFMA–AMG Comment Letter I; ATR Comment Letter.

[1588] *See supra* section VI.C.2.

(ii) an ability to cultivate a reputation that early investors will receive beneficial terms (such as reduced fees) that will not be granted to later investors.[1589] We believe both of these tools will continue to facilitate efficient fund closings under the final rule just as they do today.

Second, at least some portion of any increased difficulty in securing fund closings is likely to be because many advisers, having disclosed greater terms to prospective investors, now must compete more intensely to secure capital from those investors. In these cases, the increased operational difficulties for advisers are at least partially offset by the benefits of greater competition to investors.

The lack of legacy status for this rule provision means that these benefits will accrue across all private funds and advisers. This will also be the case for costs of the rule.

5. Mandatory Private Fund Adviser Audits

The final audit rule will require an investment adviser that is registered or required to be registered to cause each private fund that it advises, directly or indirectly, to undergo audits in accordance with the audit provision under the custody rule.[1590] These audits will need to be performed by an independent public accountant that meets certain standards of independence and is registered with and subject to regular inspection by the PCAOB, and the statements will need to be prepared in accordance with generally accepted accounting principles as currently required under the custody rule.[1591] In a change from the proposal, the rule will not require that auditors notify the Commission in any circumstances.[1592] The lack of legacy status for this rule provisions mean that the benefits and costs will apply across all investors in private funds and their advisers, not just new issuances.

We discuss the costs and benefits of this rule below. Several factors, however, make the quantification of many of the economic effects of the final amendments and rules difficult. For example, there is a lack of quantitative data on the extent to which auditors may raise their prices in response to new demand for audits. It would also be difficult to quantify how advisers may pass on any additional costs for audits in response to the final rule. As a result, parts of the discussion below are qualitative in nature.

Benefits

We recognize that many advisers already provide audited fund financial statements to fund investors in connection with the adviser's alternative compliance with the custody rule.[1593] However, to the extent that an adviser does not currently have its private fund client undergo a financial statement audit, investors would receive more reliable information from private fund advisers as a result of the final audit rule. The benefits to investors will therefore vary across fund sizes, as smaller and larger funds have different propensities to already pursue audits.[1594] However, of course, because larger funds have more assets, these larger funds still represent a large volume of unaudited assets. Funds of size 10 million have approximately $7.1 billion in assets not audited by a PCAOB-registered and -inspected independent auditor, while funds of size >$500 million have approximately $1.9 trillion in assets not audited by a PCAOB-registered and -inspected independent auditor.[1595]

Because advisers to funds that an adviser does not control and that are neither controlled by nor under common control with the adviser (*e.g.,* where an unaffiliated sub-adviser provides services to the fund) have only a requirement to take all reasonable steps to cause their fund to undergo an audit that meets these elements,[1596] investors in those funds may not benefit from the final rules as frequently, to the extent that those funds' advisers' reasonable steps fail to cause their funds to undergo an audit. Similarly, the final mandatory audit rule will not require advisers to obtain audits of SAFs, investors in SAFs will not benefit from the final rules.[1597] However, commenters have stated that in the case of CLOs and other SAFs, there would be minimal benefit to investors from an audit, consistent with the fact that very few advisers to CLOs and other SAFs cause their funds to undergo an audit today compared to audit rates for other types of private funds.[1598] For example, one commenter stated that GAAP's efforts to assign, through accruals, a period to a given expense or income may not be useful, and potentially confusing, for SAF investors because principal, interest, and expenses of administration of assets can only be paid from cash received.[1599]

We further understand that agreed-upon procedures are a more common practice for these funds, and such procedures often relate to the securitized asset fund's cash flows and the calculations relating to a securitized asset fund portfolio's compliance with the portfolio requirements and quality tests (such as overcollateralization, diversification, interest coverage, and other tests) set forth in the fund's securitization transaction agreements.[1600] To the extent advisers to CLOs and other SAFs continue to undertake existing agreed-upon procedures practices, the forgone benefits from not applying the final rules to advisers with respect to their SAFs may be mitigated. However, audits provide stronger protections to investors than agreed-upon procedures, and so to the extent audits would benefit investors to SAFs, then there will still be forgone benefits from not applying the final rules to advisers with respect to their SAFs.

The audit requirement will provide an important check on the adviser's valuation of private fund assets, which often has an impact on the calculation of the adviser's fees. It may thereby limit some opportunities for advisers to materially over-value investments. Audits provide substantial benefits to private funds and their investors because audits also test other assertions associated with the investment portfolio that are not captured by surprise examinations, which only test the existence of assets: *e.g.,* audits test all relevant assertions such as completeness, and rights and obligations. Audits may also provide a check against adviser misrepresentations of performance, fees, and other information about the fund, for example by detecting irregularities or errors, as well as an investment adviser's loss, misappropriation, or misuse of client investments. Enhanced and standardized regular auditing may therefore broadly improve the completeness and accuracy of fund performance reporting, to the extent these audits improve fund valuations of their investments. Investors who are not currently provided with audited fund financial statements that meet the requirements of the final rule may, as a

[1589] *Id.*

[1590] *See supra* section II.C.

[1591] *Id.*

[1592] *Id.*

[1593] *See supra* section VI.C.4.

[1594] *Id.*

[1595] *See supra* section VI.C.4.

[1596] *See supra* section II.C.

[1597] *See supra* section II.A.

[1598] *See supra* section VI.C.4. Approximately 10% of SAFs do get audits, from PCAOB-registered and -inspected independent auditors, of U.S. GAAP financial statements. *Id.* Advisers to these funds would not be prohibited from continuing to cause the fund to undergo such an audit of U.S. GAAP financial statements under the final rules.

[1599] *Id.*

[1600] *Id.*

result, have additional beneficial information regarding their investments and, in turn, the fees being paid to advisers.

However, audits do not perfectly prevent all forms of investor harm, and investor benefits can be mitigated to the extent that checks on valuation, even independent checks, are influenced by adviser behavior in a way that is not possible for audits to detect. For example, an adviser trading an illiquid asset between different funds owned by the adviser or the adviser's related entities may bias data reported by independent pricing services, to the extent that the asset's illiquidity causes the pricing service to overly weight the adviser's own transactions in publishing an independent estimate of the asset's price.[1601] These types of pricing distortions can be difficult for audits to detect and may therefore mitigate benefits of the final mandatory audit rule. To the extent investors over-assume the degree of protection offered by audits, and reduce their own monitoring or due diligence of adviser conduct, this may be a negative effect of the final audit rule.

As discussed above, currently not all financial statement audits of private funds are necessarily conducted by a PCAOB-registered independent public accountant that is subject to regular inspection.[1602] The requirement that the independent public accountant performing the audit be registered with, and subject to regular inspection by, the PCAOB, is likely to improve the audit and financial reporting quality of private funds.[1603] Higher quality audits generally have a greater likelihood of detecting material misstatements due to fraud or error, and we further believe that investors will benefit more from the higher quality of audits conducted by an independent public accountant registered with, and subject to regular inspection by, the PCAOB.[1604] The requirement to distribute the audited financial statements to current investors annually within 120 days of the private fund's fiscal year-end and promptly upon liquidation will allow investors to evaluate the audited financial information in a timely manner.

In a change from the proposal, investors will not receive potential benefits from any enhanced regulatory oversight that would have accrued as a result of the proposed requirement for the adviser to engage the auditor to notify the Commission under some conditions.[1605] While problems identified during a surprise examination must currently be reported to the Commission under the custody rule, problems identified during an audit, even if the audit is serving as the replacement for the surprise examination under the custody rule, will continue to not need to be reported to the Commission.[1606] Some commenters questioned the benefits of the notification provision,[1607] but other commenters supported the proposal,[1608] with one stating that the issuance of a modified opinion or the auditor's termination may be ''serious red flags that warrant early notice to regulators.'' [1609]

One commenter argued that audits do not provide benefits to private fund investors.[1610] That commenter cited two studies related to private equity and venture capital funds and argued that these studies show that there is only limited evidence that audits provide capital market benefits to funds and that audits do not improve fund's NAV estimates. We disagree with this commenter and continue to agree with the consensus view, established by the academic literature cited in the above discussion, that audits provide meaningful benefits to fund investors.

Moreover, a key focus on one study is estimating the impact of an audit on an adviser's ability to raise new funds.[1611] We do not believe that advisers to unaudited funds and advisers to audited funds having similar probabilities of raising new funds is necessarily in contrast to the value of audits. For example, oftentimes advisers raise new funds before exiting investments of prior funds. Fund exits require an actual transaction price which may differ from the adviser's fair value estimate. Part of the benefit of an audit is that asset valuation discrepancies may be more likely to be detected prior to an exit when the fund is audited, and therefore prior to when an adviser begins to raise a new fund. This author's results also do not engage with the market failures and economic rationale described above, such as investors having worse outside options to a given negotiation than the adviser, the investor's operational difficulties associated with switching advisers, or not having sufficient insight into market terms.[1612] Many investors may continue to invest with an adviser whose funds are unaudited because of their difficulties in identifying a new adviser who meets the investor's complex internal administrative and regulatory requirements.[1613] The studies cited lastly do not include hedge funds, real estate funds, liquidity funds, or any other category of private fund whose adviser will be subject to the rule.[1614]

As discussed above, another commenter cites an academic study as stating that investors can ''see through'' any potential valuation manipulation that would be uncovered by an audit.[1615] We do not believe this literature undermines the potential benefits of a mandatory audit. First, also as discussed above, the paper cited itself concedes that in its findings, unskilled investors may misallocate capital, and that it is only the more sophisticated investors who may prefer the status quo to a regime with more regulation.[1616] We believe the commenter's interpretation of this paper also ignores the costs that investors must currently undertake to ''see through'' manipulation, even on average.

Other commenters who questioned the benefits of a mandatory audit rule agreed that audits provide benefits but characterized the rule as unnecessary given current market practices around audits. For example, one commenter

[1601] *See, e.g.,* In the Matter of Chatham Asset Mgmt., Investment Advisers Act Release No. 6270 (Apr. 3, 2023).

[1602] *See supra* section VI.C.4.

[1603] *See, e.g.,* Daniel Aobdia, *The Impact of the PCAOB Individual Engagement Inspection Process—Preliminary Evidence,* 93 Acc. Rev. 53–80 (2018) (concluding that ''engagement-specific PCAOB inspections influence non-inspected engagements, with spillover effects detected at both partner and office levels'' and that ''the information communicated by the PCAOB to audit firms is applicable to non-inspected engagements''); Daniel Aobdia, *The Economic Consequences of Audit Firms' Quality Control System Deficiencies,* 66 Mgmt. Sci. (July 2020) (concluding that ''common issues identified in PCAOB inspections of individual engagements can be generalized to the entire firm, despite the PCAOB claiming that its engagement selection process targets higher-risk clients'' and that ''[PCAOB quality control] remediation also appears to positively influence audit quality''). *See also* Safeguarding Release, *supra* footnote 467.

[1604] *Id.*

[1605] *See supra* section II.C.

[1606] *See supra* section VI.C.4. Recently, the SEC has proposed to amend and redesignate the custody rule. *See supra* VI.C.4; *see also* Safeguarding Release, *supra* footnote 467. Advisers that currently obtain surprise exams will likely cease doing so, to the extent they are duplicative of the mandatory audits, which may result in a reduction of any reporting to the Commission under the custody rule.

[1607] NYC Bar Comment Letter II; BVCA Comment Letter; Invest Europe Comment Letter.

[1608] NASAA Comment Letter; RFG Comment Letter II.

[1609] NASAA Comment Letter.

[1610] Utke and Mason Comment Letter.

[1611] *Id.;* Jennifer J. Gaver, Paul Mason & Steven Utke, *Financial Reporting Choices of Private Funds and Their Implications for Capital Formation* (May 4, 2020), *available at https://ssrn.com/abstract=3092331*.

[1612] *See supra* section VI.B.

[1613] *Id.*

[1614] Utke and Mason Comment Letter.

[1615] *See supra* section VI.C.3; *see also* AIC Comment Letter I, Appendix 1; Brown et al., *supra* footnote 1226.

[1616] *Id.*

stated that the majority of funds today currently undergo an audit that meet the requirements of the final rule, consistent with the analysis above,[1617] and stated that this reflects the fact that current rules and market dynamics ''work'' and that ''there is no market problem to be solved by the proposed rule.'' [1618] Other commenters described the rule as duplicative.[1619] We disagree with commenters that there is no market problem to be solved by the rule. We again point to the market failures as characterized above.[1620] In particular, as discussed above, we believe that certain targeted further reforms, such as mandatory audits, are necessitated by several additional sources of asymmetric bargaining power, because we believe those imbalances are not fully resolved by enhanced disclosure and would not be resolved by consent requirements.[1621]

As discussed above, some commenters criticized the proposed rule for eliminating the surprise examination option under the custody rule without evidence that surprise examinations have not adequately protected private fund investors.[1622] However, we believe that, because surprise examinations only verify the existence of pooled investment vehicle investments, a surprise examination may not discover any misappropriation or misvaluation until the assets are gone. Surprise examinations more generally do not provide other benefits that the final mandatory audit rule will provide such as checks on valuation, completeness and accuracy of financial statements, disclosures such as those regarding related-party transactions, and others.[1623] If, in lieu of an audit, a private fund undergoes a surprise examination, an investor may not receive this additional important information.

The benefits from mandatory audits are particularly relevant for illiquid investments. Illiquid assets currently are where we believe it is most feasible for financial information to have material misstatements of investment values and where there is broadly a higher risk of investor harm from potential conflicts of interest or fraud. This is because currently, as discussed above, advisers may use a high level of discretion and subjectivity in valuing a private fund's illiquid investments, and the adviser further may have incentives to bias the fair value estimates of the investment upwards to generate larger fees.[1624] Because both liquid funds and illiquid funds may have illiquid investments, investors in both types of funds will benefit, though the benefits may be larger for investors in illiquid funds (as such funds may have more illiquid investments than liquid funds).

Costs

As discussed above, we recognize that many advisers already provide audited financial statements to fund investors in connection with the adviser's alternative compliance with the custody rule.[1625] To the extent that an adviser does not currently have its private fund client undergo the required financial statement audit, there will be direct costs of obtaining the auditor, providing the auditor with resources needed to conduct the audit, the audit fees, and distributing the audit results to current investors.[1626] Under current practice, the costs of undergoing a financial statement audit are often paid by the fund, and therefore, ultimately, by the fund investors, though in some cases the costs may be partially or fully paid by the adviser. We expect similar arrangements may be made going forward to comply with the final rule, with disclosure where required: in some instances, the fund will bear the audit expense, in others the adviser will bear it, and there also may be arrangements in which both the adviser and fund will share the expense. Advisers could alternatively attempt to introduce substitute charges (for example, increased management fees) to cover the costs of compliance with the rule, but their ability to do so may depend on the willingness of investors to incur those substitute charges.

As discussed below, based on IARD data, as of December 31, 2022, there were 5,248 registered advisers providing advice to private funds, excluding advisers managing solely SAFs, and we estimate that these advisers would, on average, each provide advice to 10 private funds, excluding SAFs.[1627] We further estimate that the audit fee for the required private fund audit will be $75,000 per fund on average, an estimate that has been revised upward from the Proposing Release in response to commenters.[1628] For purposes of the PRA, the estimated total auditing fees for all advisers to private funds will therefore be approximately $3,936,000,000 annually.[1629] We further anticipate that the audit requirement will impose on all advisers to private funds a cost of approximately $12,214,720 for internal time,[1630] yielding total costs of $3,948,214,720. Because the final mandatory audit rule will not require advisers to obtain audits of CLOs or other SAFs, no costs will be borne by advisers or investors in the case of their CLOs or other SAFs.[1631]

However, some advisers to funds would obtain the required financial statement audits even in the absence of the final rule. The cost of the final audit requirement will therefore depend on the extent to which advisers currently obtain audits and, if so, whether the auditors are registered with the PCAOB and independent. We therefore believe that the costs incurred will approximate 12% of these amounts, because across all types of advisers to private funds besides securitized asset funds, approximately 88% of funds are currently audited in connection with the fund adviser's alternative compliance under the custody rule.[1632] This yields actual economic costs of $473,785,766.40.

Moreover, even estimated costs of $474 million may be overstated, because we have not deducted costs of surprise exams from advisers who do not get an

[1617] *See supra* section VI.C.4.

[1618] PIFF Comment Letter.

[1619] BVCA Comment Letter; Invest Europe Comment Letter.

[1620] *See supra* section VI.B.

[1621] *Id.*

[1622] *Id. See also, e.g.,* AIMA/ACC Comment Letter.

[1623] *See supra* sections II.C, VI.D.5.

[1624] *See supra* section II.C.

[1625] *See supra* section VI.C.4.

[1626] The final audit rule's requirement to distribute audited financial statements within 120 days of the private fund's fiscal year-end and promptly upon liquidation may change the relevant compliance costs relative to the proposal, which required prompt distribution in all cases. The 120-day requirement may impose lower compliance costs relative to the proposal by providing more time for audits relative to the proposal, but a specific deadline requirement may also impose higher compliance costs relative to the flexible deadline approach of the proposal. The custody rule's requirement to distribute audited financial statements promptly upon liquidation generally aligns with the private fund audit requirements. *See supra* section II.C.

[1627] *See infra* section VII.C. IARD data indicate that registered investment advisers to private funds typically advise more private funds as compared to the full universe of investment advisers.

[1628] *Id.* The audit fee for an individual fund may be higher or lower than this estimate, with individual fund audit fees varying according to fund characteristics, such as the jurisdiction of the assets, complexity of the holdings, the firm providing the services, and economies of scales.

[1629] *Id.*

[1630] *Id.* As discussed above, one commenter criticized the quantification methods underlying these estimates, and we have explained why we do not agree with that criticism. *See supra* footnote 1366. Nevertheless, to reflect the commenter's concerns, and recognizing certain changes from the proposal, we are revising the estimates upwards as reflected here and in section VII.B.

[1631] *See supra* section II.A.

[1632] *See supra* section VI.C.4, Figure 4A. These costs may be overstated because some advisers are only required to take all reasonable steps to cause the fund to undergo an audit, instead of being required to obtain an audit. *See supra* sections II.C.7, VI.C.4.

audit today. Those advisers who are currently getting surprise exams instead of an audit will forgo the cost of the surprise exam once they are required to get an audit. However, we do not have reliable data on the typical cost of a surprise exam, and so we cannot quantify these potential cost savings. We also understand surprise exams to be substantially less expensive than audits, and so we do not believe we arrive at cost estimates that are excessively high by not deducting costs of surprise exams.[1633]

For funds that had received an audit by an auditor that is not registered with the PCAOB, the costs of audits will also be offset by a reduction in costs from no longer obtaining their previous audit, although we anticipate that the cost of the required audit will likely be greater because a PCAOB-registered and -inspected auditor who is independent may cost more than an auditor that is not subject to the same requirements. We requested comment on data that may facilitate quantification of these offsets,[1634] but no commenter offered any such data.

We also understand that the PCAOB registration and inspection requirement may limit the pool of auditors that are eligible to perform these services which could, in turn, increase costs, as a result of the potential for these auditors to charge higher prices for their services. The increase in demand for these services, however, may be limited in light of the high percentage of funds already being audited by such auditors.[1635] Several commenters emphasized these costs, stating that the proposed rule would substantially increase audit prices, for example because there may be an insufficient number of suitable auditors available.[1636]

We are not convinced that there may be an insufficient number of suitable auditors available. As shown in Figures 4 and 5 above, Form ADV shows growth in the number of audits by PCAOB-registered and -inspected independent private fund auditors of approximately 2,000 in 2020, approximately 3,000 in 2021, and approximately 6,000 in 2022.[1637] In 2022, there were only approximately 8,000 private funds that did not already undergo an audit from a PCAOB-registered and -inspected independent auditor. Moreover, the limitation of the final rules to not apply to advisers with respect to SAFs further alleviates commenters' concerns.[1638] Given that the rules will not apply to advisers with respect to SAFs, the final mandatory audit rule will only add approximately 5800 mandatory audits. These estimates are presented for comparison purposes in Figure 7.

[1633] In 2009, the Commission staff estimated fees associated with surprise exams and found that costs of surprise exams vary substantially across advisers, ranging as high as $125,000 annually, but that most advisers would face costs for surprise exams of between $10,000 and $20,000. *See* Custody Rule 2009 Adopting Release. However, we do not have reliable data on how those costs may have changed over time, including whether these costs have increased since 2009, or possibly decreased in the event that surprise examinations have gotten more efficient. We also do not have reliable data on how costs for surprise examinations for advisers of private funds may differ from the costs of surprise examinations for other investment advisers. Separately, the Commission staff recently estimated costs associated with advisers who would be subject to newly proposed surprise examination requirements. That analysis relied on the high end of the range of surprise examination costs, assuming costs of $162,000 annually. The Safeguarding Release also cited a 2013 Government Accountability Office (GAO) study, which examined 12 average-sized registered advisers, found that the cost of surprise examinations ranged from $3,500 to $31,000. The GAO noted that the costs of surprise examinations vary widely across advisers and are typically based on the amount of hours required to conduct the examinations, which is a function of a number of factors including the number of client accounts under custody. *See* Safeguarding Release, *supra* footnote 467. Given these wide ranges of potential surprise examination costs, to be reasonable, we have not deducted cost savings from forgone surprise examination costs from our estimates of the quantified costs associated with the final audit rule in this release.

[1634] Proposing Release, *supra* footnote 3, at 280–285.

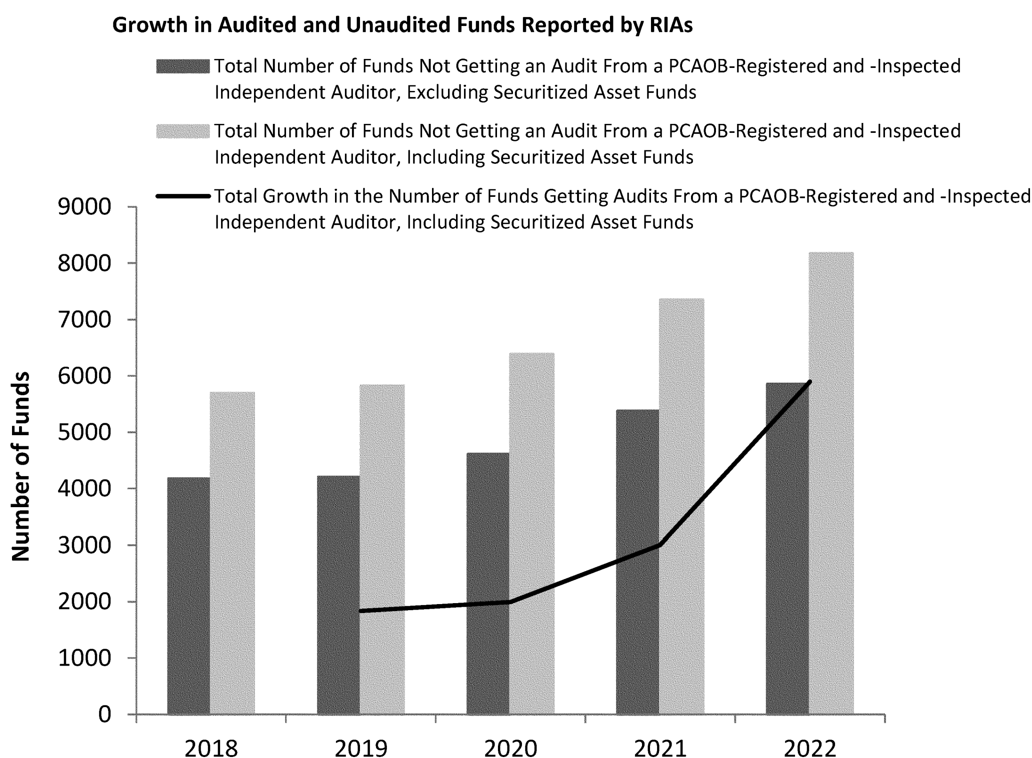
[1635] *Id.*

[1636] *See, e.g.,* AIC Comment Letter I; AIMA/ACC Comment Letter; CFA Comment Letter I; SBAI Comment Letter, LaSalle Comment Letter.

[1637] *See supra* section VI.C.4.

[1638] *See supra* section II.A.

Figure 7:



In other words, the audit industry has already organically, of its own accord, added a number of audits to its workload in the past year commensurate with the workload that will be added by the final rule. Moreover, the number of audits that will be added by the final rule is of the same order of magnitude as the number of audits added organically by the industry in each of the last several years. We believe this indicates that the audit industry is equipped to expand to meet the demand for additional audits without substantial additional costs, and so we do not believe that supply constraints on auditors because of the final rule will substantially increase the costs of private fund audits. This pattern and conclusion holds by type of private fund and by fund size.[1639] However, approximately 1,500 of these newly mandatory audits would be on funds of size $2 million and under. To the extent that limited supply of auditors does increase the cost of the rule, for example by resulting in increased prices of audits, these costs may be particularly borne by advisers and investors to these smaller funds.

Several commenters further specify that the concern over a lack of a sufficient number of suitable auditors will particularly apply to funds that rely on Big Four auditing firms for various non-audit services. Several commenters state that certain funds get an audit from a Big Four firm because of their investors' demands, but none of the Big Four firms meet the independence requirements associated with the current custody rule for the fund.[1640] As discussed above, less than one percent of all funds get an additional surprise exam in addition to an audit, which indicates that no more than one percent of funds are managed by advisers who may face difficulty in getting an audit by an independent firm.[1641] Figure 6 above also further shows that only a *de minimis* number of funds, namely 149 out of almost 50 thousand, excluding securitized asset funds, are managed by advisers who may face difficulty in securing a PCAOB-registered and -inspected auditor.[1642]

Because the case of funds that the adviser does not control and are neither controlled by nor under common control with the adviser (*e.g.,* where an unaffiliated sub-adviser provides services to the fund) only requires the adviser to take all reasonable steps to cause the fund undergo an audit that meets these elements,[1643] many investors in such funds will not bear any of the costs of the final rule.[1644] Similarly, because the final mandatory audit rule will not require advisers to obtain audits of CLOs and other SAFs, advisers to those funds will not face any costs under the rules with respect to those funds.[1645] Lastly, as noted above, we do not apply substantive provisions of the Advisers Act and its rules, including the mandatory audit requirement, with respect to non-U.S. clients (including private funds) of an SEC registered offshore investment adviser.[1646] We believe that this clarification will reduce many of the concerns expressed by commenters regarding the difficulty for non-U.S. private fund advisers finding an auditor in certain jurisdictions.

The proposed Commission notification requirement is not present in the final rule, and thus does not represent a new cost.[1647] While one

[1639] *Id.*

[1640] *Id. See also, e.g.,* LaSalle Comment Letter; PWC Comment Letter.

[1641] *Id.*

[1642] *Id.* Based on staff review of Form ADV data, these funds range across all fund sizes and are not disproportionately larger or disproportionately smaller funds.

[1643] *See supra* section II.C.

[1644] *See supra* sections II.C, VI.C.4.

[1645] *See supra* section II.C.

[1646] *See, e.g.,* Exemptions Adopting Release, *supra* footnote 9.

[1647] *See supra* VI.C.4.

commenter questioned the benefits of this notification requirement, commenters did not address the costs of this notification requirement in their comments.[1648]

Because the final rule aligns the private fund mandatory audit requirement with the custody rule audit requirement, advisers under the final rule will also face lower costs than under the proposal by avoiding any confusion associated with differences in the requirements of the two rules. Several commenters stated that differences between the two rules could create a risk of confusion.[1649]

The indirect costs of the audit requirement will depend on the quality of the financial statements of the funds newly subject to audits. These costs may be relatively higher for the funds with lower quality financial statements (*i.e.,* the funds with the greatest benefit from the audit requirement). The indirect costs from the independent audit requirement may include costs of changing the fund's internal financial reporting practices, such as improvements to internal controls over financial reporting, to avoid potential harm to investors from a misstatement. Further, because the requirement to have the auditor registered with, and subject to the regular inspection by, the PCAOB may limit the pool of accountants that are eligible to perform these services,[1650] the resulting competition for these services might generally lead to an increase in their costs, as an effect of the final rule. Commenters did not address these types of indirect costs in their comments.

6. Adviser-Led Secondaries

In addition, the final adviser-led secondaries rule will require advisers to obtain fairness opinions or valuation opinions from an independent opinion provider in connection with certain adviser-led secondary transactions with respect to a private fund. In connection with this opinion, the final rule also requires a summary of any material business relationships the adviser or any of its related persons has, or has had within the past two years, with the independent opinion provider. The final adviser-led secondaries rule differs from the proposal in that it allows a fund to obtain either a fairness opinion or a valuation opinion in connection with certain adviser-led secondary transactions instead of requiring a fairness opinion and specifies a timeline for the delivery of this opinion to investors.[1651]

This requirement will not apply to advisers that are not required to register as investment advisers with the Commission, such as State-registered advisers and exempt reporting advisers. This requirement will also not apply where the transaction is a tender offer instead of an adviser-led secondary transaction as defined in the rule, and so neither the benefits nor the costs will apply in the case of tender offers.[1652] This will be the case if an investor is not faced with the decision between (1) selling all or a portion of its interest and (2) converting or exchanging all or a portion of its interest.[1653] Generally, if an investor is allowed to retain its interest in the same fund with respect to the asset subject to the transaction on the same terms (*i.e.,* the investor is not required to either sell or convert/exchange), as many tender offers permit investors to do, then the transaction will not qualify as an adviser-led secondary transaction. We discuss the costs and benefits of this rule provisions below. Several factors, however, make the quantification of many of the economic effects of the final amendments and rules difficult. For example, there is a lack of quantitative data on the extent to which adviser-led secondaries with neither fairness opinions nor valuation opinions differ in fairness of price from adviser-led secondaries with either fairness opinions or valuation opinions attached. It would also be difficult to quantify how investors and advisers may change their preferences over secondary transactions once fairness opinions are required to be provided. As a result, parts of the discussion below are qualitative in nature.

Benefits

The final rule's requirement that an adviser distribute a fairness opinion or valuation opinion and summary of material business relationships with the opinion provider in connection with certain adviser-led secondary transactions may provide benefits to investors in the specific context of adviser-led secondary transactions similar to the effects of the mandatory audit rule.[1654] This requirement will provide an important check against an adviser's conflicts of interest in structuring and leading these transactions. Investors will have decreased risk of experiencing harm from mis-valuation of secondary-led transactions. Further, anticipating a lower risk of harm from mis-valuation when participating in such transactions, investors may be more likely to participate. The result may be a closer alignment between investor choices and investor preferences over private fund terms, investment strategies, and investment outcomes. These benefits will, however, be reduced to the extent that advisers are already obtaining fairness opinions or valuation opinions as a matter of best practice.

While the final rule, in a change from the proposal, will also allow for the use of a valuation opinion instead of a fairness opinion, we understand that a valuation opinion will still provide investors with a strong basis to make an informed decision.[1655] A valuation opinion is a written opinion stating the value (either as a single amount or a range) of any assets being sold as part of an adviser-led secondary transaction.[1656] By contrast, a fairness opinion addresses the fairness from a financial point of view to a party paying or receiving consideration in a transaction.[1657] One commenter stated that the financial analyses used to support a fairness opinion and valuation opinion are substantially similar.[1658] Both types of opinions generally yield implied or indicative valuation ranges.[1659]

Because the final rule differs from the proposal in that tender offers will not be captured by the definition in the rule when the investor is not faced with the decision between (1) selling all or a portion of its interest and (2) converting or exchanging all or a portion of its interest, advisers may have additional incentives to structure transactions as tender offers instead of as adviser-led secondary transactions.[1660] That is, advisers may have additional incentives to offer investors more choices than just a choice between selling all or a portion of their interests and converting or exchanging all or a portion of their interests. To the extent this occurs, investors may benefit from having greater flexibility in such transactions to, for example, continue to receive exposure to the assets that are at issue in the transaction by retaining its interest in the same fund on the same terms.[1661]

[1648] NYC Bar Comment Letter II.

[1649] *See, e.g.,* IAA Comment Letter II; NYC Bar Comment Letter II; AIC Comment Letter I.

[1650] *See supra* footnote 1640 and accompanying text.

[1651] *See supra* section II.C.8.

[1652] *Id.*

[1653] *Id.*

[1654] *See supra* section VI.D.5.

[1655] *See supra* sections II.D.2, VI.C.4; *see also* Houlihan Comment Letter.

[1656] Houlihan Comment Letter.

[1657] *See supra* sections II.D.2, VI.C.4

[1658] *See supra* sections II.D.2, VI.C.4

[1659] *Id.*

[1660] *See supra* section II.D.1.

[1661] *Id.*

Because the final rule specifies that the adviser-led secondaries rule will not apply to advisers in the case of SAFs,[1662] there will be no accrual of benefits to investors associated with transactions such as CLO re-issuances.[1663] However, we believe these forgone benefits are negligible, in particular because SAF re-issuances typically specify that outstanding debt tranches are fully repaid at par. The investor benefits from the adviser-led secondaries rule primarily accrue from the check provided to investors against an adviser's potential conflict of interest that could provide an incentive for an adviser to mis-value assets when the answer is on both sides of a transaction. Because investors are fully paid at par, there is no risk of harm from the adviser mis-valuing the assets.[1664]

Some commenters agreed with the stated benefits of the final rule as outlined in the Proposing Release, and generally supported it.[1665] Other commenters were skeptical of the stated benefits of acquiring a fairness opinion for all adviser-led secondary transactions as would have been required by the proposal.[1666] While acknowledging that fairness opinions can be a useful tool in mitigating information asymmetries between the adviser and their investors, these commenters stated that funds often will not seek such an opinion because it would provide little benefit to investors and would come at a high cost.[1667] The commenters argued further that in cases where funds did not obtain a fairness opinion, other practices were in place to guarantee investor protection consistent with the adviser's fiduciary duty, such as a competitive bidding process or recent arms-length transaction.[1668] We recognize that there will be transactions for which a fairness opinion or valuation opinion will provide less benefit to investors because of the existence of these other mechanisms for independent price valuation that may already be in place.

However, we continue to believe that this requirement will, in many cases, provide the above benefits to investors. Moreover, it is the staff's understanding that adviser-led secondaries also occur during times of stress, and may be associated with an adviser who needs to restructure a portfolio investment.[1669] In other instances, an adviser may use an adviser-led secondary transaction to extend an investment beyond the contractually agreed upon term of the fund that holds it.[1670] These may be particularly risky cases for investors as the risk of a conflict of interest may be high, and so fairness opinions or valuation opinions may provide particularly high benefits in those cases. Lastly, we also believe that ensuring that such opinions are delivered to investors in a time frame that would allow them to use that information in their decision-making process will increase the benefit of this rule to investors.

Similar to the final mandatory audit rule, the benefits from mandatory fairness opinions/valuation opinions are particularly relevant for illiquid investments. Illiquid assets currently are where we believe it is most feasible for adviser-led secondary transactions to occur at unfair prices, and where there is broadly a higher risk of investor harm from potential conflicts of interest or fraud and where there is the greatest risk of asymmetry of information between investors and the adviser. This is because currently, as discussed above, advisers may use a high level of discretion and subjectivity in valuing a private fund's illiquid investments, and the adviser further may have incentives to bias the fair value estimates of the investment to generate a more favorable price in the secondary transaction.[1671] Because both liquid funds and illiquid funds may have illiquid investments, investors in both types of funds will benefit, though the benefits may be larger for investors in illiquid funds (as such funds may have more illiquid investments than liquid funds and are more likely to have adviser-led secondary transactions).

Because Form PF's recently adopted new quarterly reporting requirements for private equity fund advisers will already collect quarterly information on the occurrence of adviser-led secondaries (after the effective date of the Form PF final amendments, albeit with a definition of ''adviser-led secondary'' that is not identical to the definition used for the adviser-led secondaries rule), any investor protection benefits of the final rules may be mitigated to the extent that Form PF is already a sufficient tool for investor protection purposes.[1672] However we do not believe the benefits will be substantially mitigated, because Form PF is not an investor-facing disclosure form. Information that private fund advisers report on Form PF is provided to regulators on a confidential basis and is nonpublic.[1673] The benefits from the final rules accrue substantially from fairness opinions and valuation opinions decreasing risks of investors experiencing harm from mis-valuation of secondary-led transactions. To the extent that advisers' incentives to independently pursue fairness opinions and valuation opinions are increased by Form PF's requirement (after the effective date of the new amendments) to report adviser-led secondaries to the Commission, that change in incentives from Form PF's amendments will reduce both the benefits and costs of the final rules (since the final result is, regardless, the adviser being incentivized to pursue a fairness opinion or valuation opinion, no matter which rule was the predominating factor in the adviser's decision).

Costs

Costs would also be incurred related to obtaining the required fairness opinion or valuation opinion and material business relationship summary in the case of an adviser-led secondary transaction. For purposes of the PRA, we estimate that 10% of advisers providing advice to private funds conduct an adviser-led secondary transaction each year and that the funds would pay external costs of $100,565 for each fairness opinion or valuation opinion and material business relationship summary.[1674] Because only approximately 10% of advisers conduct an adviser-led secondary transaction each year, the estimated total fees for all funds per year would therefore be approximately $52,796,625.[1675] Further,

[1662] *See supra* section II.A.

[1663] *See supra* section II.C.8.

[1664] *Id.* Equity investors in SAFs may face risks of harm from mis-valuations and may therefore have forgone benefits from not applying the rules to advisers with respect to SAFs. However, equity investors in SAFs are typically only a small portion of the fund, include the adviser and its related persons themselves as well as advisers to other large private funds, and do not typically include pension funds. *See supra* sections VI.C.1, VI.C.2. These factors mitigate the risks of any harm to the equity tranche, and so mitigate the forgone benefits from not applying the rules to advisers with respect to those funds.

[1665] *See, e.g.,* ILPA Comment Letter I; CFA Comment Letter I; Morningstar Comment Letter.

[1666] *See, e.g.,* PIFF Comment Letter; AIC Comment Letter II; Ropes & Gray Comment Letter.

[1667] *Id.*

[1668] *Id.*

[1669] *See supra* section VI.C.4.

[1670] *Id.*

[1671] *See supra* section II.C.8.

[1672] *See supra* section VI.C.4.

[1673] *See supra* section VI.C.3.

[1674] *See infra* section VII.D.

[1675] *Id.* One commenter's calculation of aggregate costs associated with the adviser-led secondaries rule yields substantially higher aggregate costs, but per-fund costs comparable to those reflected here. The commenter's aggregate cost result is driven by the commenter assuming that the adviser-led secondaries rule's costs would be borne over 4,533 fairness opinions instead of 504, as was assumed by the Proposing Release. *See* LSTA Comment Letter, Exhibit C. This assumption would require that approximately 90% of registered advisers undertake an adviser-led secondary each year, as Form ADV

as discussed in section VII.E below, we anticipate that the fairness opinion or valuation opinion and material business relationship summary requirements would impose a cost of approximately $2,800,507.50 for internal time annually.[1676] These costs will be borne primarily, though not exclusively, by closed-end illiquid funds,[1677] as these are the funds that most frequently have the adviser-led secondaries considered by the rule. Because the final adviser-led secondaries rule will not apply to advisers with respect to SAFs,[1678] there will be no accrual of costs to advisers associated with transactions such as CLO re-issuances.[1679]

To the extent that certain hedge fund or other open-end private fund transactions are captured by the rule, these funds and their investors would also face comparable fees and costs. The costs associated with obtaining fairness opinions or valuation opinions could dissuade some private fund advisers from leading these transactions, which could decrease liquidity opportunities for some private fund advisers and their investors. Under current practice, some investors bear the expense associated with obtaining a fairness opinion or valuation opinion if there is one. We expect similar arrangements may be made going forward to comply with the final rule, with disclosure where required. Advisers could alternatively attempt to introduce substitute charges (for example, increased management fees) to cover the costs of compliance with the rule, but their ability to do so may depend on the willingness of investors to incur those substitute charges. We do not believe that specifying a timeline for delivery of the opinion will significantly change the cost of compliance.

Conversely, to the extent that advisers restructure their transactions as tender offers to avoid being captured by the definition of adviser-led secondary, private fund advisers and their investors may be able to mitigate the costs of the final rule.[1680]

Some commenters highlighted the costs associated with obtaining a fairness opinion.[1681] These commenters also cited indirect consequences as a result of the high costs of fairness opinions. One commenter suggested that the time required to obtain and distribute a fairness opinion could create ''unnecessary delay, which can put transaction completion at risk.'' [1682] Another stated that for some transactions, a fairness opinion may not be available, which would effectively bar the transaction even if the benefits of the transaction to investors were large.[1683] Another noted that opinion providers may need to create or update a database of business relationships, and that this cost may ultimately be borne at least partially by investors.[1684] However, many of these commenters stated that a valuation opinion would be less costly in most circumstances.[1685] We believe that these commenters' concerns on costs are substantially mitigated by the option in the final rule for a valuation opinion instead of a fairness opinion, but at the margin these types of indirect consequences may still occur.

7. Written Documentation of All Advisers' Annual Review of Compliance Programs

Amendments to rule 206(4)–7 under the Advisers Act will require all advisers, not just those to private funds, to document the annual review of their compliance policies and procedures in writing. These requirements will apply to advisers with respect to their SAFs, and so the benefits and costs below will apply even in the case of SAFs. We discuss the costs and benefits of this amendment below. Several factors, however, make the quantification of many of the economic effects of the final amendments and rules difficult. As a result, parts of the discussion below are qualitative in nature.

Benefits

The rule amendment requiring all SEC-registered advisers to document the annual review of their compliance policies and procedures in writing will allow our staff to better determine whether an adviser has complied with the review requirement of the compliance rule, and will facilitate remediation of non-compliance. Because our staff's determination of whether the adviser has complied with the compliance rule will become more effective, the rule amendment may reduce the risk of non-compliance, as well as any risk to investors associated with non-compliance. Several commenters agreed with these benefits.[1686]

The commenters who disagreed with the rule amendment generally emphasized the costs of the change, instead of questioning the benefits, as discussed further below in this section. However, one commenter stated that the amendment would be unnecessarily burdensome and duplicative for asset managers that have multiple registered investment advisers operating under a common compliance program[1687] The commenter stated that, under the proposed amendment, RIAs in an advisory complex would be producing multiple duplicative reports with little variation, and where one or more of those advisers are advisers to RICs, the report would largely be overlapping with and duplicative of the 38a–1 compliance program written report.[1688] While the benefits of the produced reports may diminish with each marginal report produced with little variation, the costs will likely also decrease. We also do not believe that the marginal benefits of each report will be *de minimis:* For RIAs in an advisory complex with many advisers, producing each report may help advisers assess whether they have considered any compliance matters that arose during the previous year, changes in business activities, or changes to the Advisers Act or other rules and regulations that may impact that particular adviser. Even if, in certain cases, consideration of such issues produces a similar report to a previous one, there may be broader benefits across the industry from standardizing the practice of advisers making such assessments throughout their entire advisory complex. Another commenter compared the rule to Rule 38a–1 of the Investment Company Act, and stated such a written documentation requirement is only relevant for funds with retail investors. While we do not have the necessary data to determine whether the benefits of such requirements, or similar requirements, are higher for retail investors or other types of fund investors we continue to believe the

data indicate there are currently approximately 5,000 registered advisers to private funds. *See supra* VI.C.1. We do not believe this is a reasonable assumption and have continued to assume approximately 10% of advisers conduct an adviser-led secondary transaction each year.

[1676] *Id.* As discussed above, one commenter criticized the quantification methods underlying these estimates, and we have explained why we do not agree with that criticism. *See supra* footnote 1366. Nevertheless, to reflect commenters' concerns, and recognizing certain changes from the proposal, we are revising the estimates upwards as reflected here and in section VII.B.

[1677] *See supra* section II.C.8.

[1678] *See supra* section II.A.

[1679] *See supra* section II.C.8.

[1680] *See supra* section II.D.1.

[1681] MFA Comment Letter I; MFA Comment Letter I, Appendix A; Ropes & Gray Comment Letter.

[1682] AIC Comment Letter I.

[1683] PIFF Comment Letter.

[1684] AIC Comment Letter I, Appendix 1.

[1685] MFA Comment Letter I; MFA Comment Letter I, Appendix A; AIC Comment Letter I.

[1686] *See, e.g.,* CFA Comment Letter I; IAA Comment Letter II; Convergence Comment Letter; NRS Comment Letter.

[1687] SIFMA–AMG Comment Letter I.

[1688] *Id.*

above benefits will broadly accrue for investors to both types of funds.

The benefits from documentation of compliance programs will be relevant for all investors, as the rule applies to all advisers that are registered or required to register, not just private fund advisers. In addition, the lack of legacy status for this rule amendment mean that these benefits will accrue across all registered advisers.

Costs

Lastly, the required documentation of the annual review of the adviser's compliance program has direct costs that include the cost of legal services associated with the preparation of such documentation. As discussed below, for purposes of the PRA, we anticipate that the requirement for all SEC-registered advisers to document the annual review of their compliance policies and procedures in writing would, for all advisers, impose cost of approximately $40,890,982 for internal time, and approximately $3,525,579 for external costs.[1689] One commenter agreed that the rule would entail direct costs.[1690] Other commenters stated there would be indirect costs of the rule, such as chilled communications between an adviser and compliance consultants or outside counsel and less tailored compliance reviews.[1691] The lack of legacy status for this rule amendment mean that these costs will be borne across all SEC-registered advisers.[1692]

8. Recordkeeping

Finally, the amendment to the Advisers Act recordkeeping rule will require advisers who are registered or required to be registered to retain books and records related to the quarterly statement rule,[1693] to retain books and records related to the mandatory adviser audit rule,[1694] to support their compliance with the adviser-led secondaries rule,[1695] to support their compliance with the preferential treatment disclosure rule,[1696] and to support their compliance with the restricted activities rule.[1697] The benefit to investors will be to enable an examiner to verify more easily that a fund is in compliance with these rules and to facilitate the more timely detection and remediation of non-compliance. These requirements will also help facilitate the Commission's enforcement and examination capabilities. Also beneficial to investors, advisers may react to the enhanced ability of third parties to detect and impose sanctions against non-compliance due to the recordkeeping requirements by taking more care to comply with the substance of the rule. The lack of legacy status for this rule provision means that these benefits will accrue across all private funds and advisers.

These requirements will impose costs on advisers related to maintaining these records. Several commenters stated that the recordkeeping requirements would be burdensome.[1698] In addition to the compliance burden, commenters stated that the recordkeeping requirements posed a risk of having proprietary data exposed to hackers,[1699] or that requiring the adviser to retain records regarding prospective investors that do not ultimately invest in the fund may conflict with other legal obligations applicable to the adviser, resulting in additional legal costs.[1700] With respect to the written documentation of the adviser's annual reviews of its compliance programs, commenters stated that the requirement to disclose the review of the compliance program may have a chilling effect on outside compliance consultants' willingness to prepare compliance reviews for private fund advisers,[1701] or may cause compliance reviews to be less tailored to the adviser's specific risks.[1702]

While the final rules may result in some of these effects, we do not have a basis for quantifying the cost of these effects, and no basis was provided by the commenters. As discussed below, for purposes of the PRA, we anticipate that the additional recordkeeping obligations would impose, for all advisers, an annual cost of approximately $22,430,631.25.[1703] The lack of legacy status for this rule provision means that these costs will be borne across all private funds and advisers. Because the final rules with new recordkeeping components will not apply to advisers with respect to CLOs and other SAFs, they will not face any new recordkeeping requirements in the case of their CLOs and SAFs, and so there will be no benefits or costs for investors and advisers associated with those funds from the final recordkeeping rules.[1704]

E. Effects on Efficiency, Competition, and Capital Formation

1. Efficiency

The final rules will likely enhance economic efficiency by enabling investors more easily to identify funds that align with their preferences over private fund terms, investment strategies, and investment outcomes, and also by causing fund advisers to align their actions more closely with the interests of investors through the elimination of prohibited practices.

First, the final rules may increase the usefulness of the information that investors receive from private fund advisers regarding the fees, expenses, and performance of the fund, and regarding the preferential treatment of certain investors of the fund through the more detailed and standardized disclosures as well as consent requirements discussed above.[1705] These enhanced disclosures and consent requirements will provide more information to investors regarding the ability and potential fit of investment advisers, which may improve the quality of the matches that investors make with private funds and investment advisers in terms of fit with investor preferences over private fund terms, investment strategies, and investment outcomes. The enhanced disclosures may also reduce search costs, as investors may be better able to evaluate the funds of an investment adviser based on the information to be disclosed at the time of the investment and in the quarterly statement.

[1689] *See infra* section VII.G.

[1690] NYC Bar Comment Letter II.

[1691] Curtis Comment Letter; SBAI Comment Letter.

1 In connection with the written report required under rule 38a–1, the Compliance Rule Adopting Release stated that ''[a]ll reports required by our rules are meant to be made available to the Commission and the Commission staff and, thus, they are not subject to the attorney-client privilege, the work-product doctrine, or other similar protections.'' *See supra* footnote 905.

[1692] There do not exist reliable data for quantifying what percentage of private fund advisers today engage in this activity or the other restricted activities. For the purposes of quantifying costs, including aggregate costs, we have applied the estimated costs per adviser to all advisers in the scope of the rule, as detailed in section VII.

[1693] *See supra* section II.B.5.

[1694] *See supra* section II.C.8.

[1695] *See supra* section II.D.5.

[1696] *See supra* section II.G.6.

[1697] *See supra* section II.E.

[1698] *See, e.g.,* AIMA/ACC Comment Letter; ATR Comment Letter.

[1699] ATR Comment Letter.

[1700] AIMA/ACC Comment Letter.

[1701] Curtis Comment Letter.

[1702] SBAI Comment Letter.

[1703] We have adjusted these estimates to reflect that the final quarterly statement, audit, adviser-led secondaries, restricted activities, and preferential treatment rules will not apply to SAF advisers with respect to SAFs they advise as well. *See infra* section VII.H. As discussed above, one commenter criticized the quantification methods underlying these estimates, and we have explained why we do not agree with that criticism. *See supra* footnote 1366. Nevertheless, to reflect the commenter's concerns, and recognizing certain changes from the proposal, we are revising the estimates upwards as reflected here and in section VII.B.

[1704] *See supra* section II.A.

[1705] *See supra* sections VI.D.1, VI.D.3. *See also, e.g.,* Consumer Federation of America Comment Letter.

Regarding preferential treatment, the final rules further align fund adviser actions and investor interests by prohibiting certain preferential treatment practices altogether (instead of only requiring disclosure or consent), specifically prohibiting preferential terms regarding liquidity or transparency that have a material, negative impact on investors in the fund or a similar pool of assets.[1706] Prohibiting these activities, and prohibiting remaining preferential treatment activities unless certain disclosures are provided, may eliminate some of the complexity and uncertainty that investors face about the outcomes of their investment choices, further reducing costs investors must undertake to find appropriate matches between their choice of private fund and their preferences over private fund terms, investment strategies, and investment outcomes.

While many of the final disclosure and consent requirements involve making disclosures to and, in some cases, obtaining consent from only current investors, and not prospective investors, the rule's requirements may enhance efficiency through the tendency of some fund advisers to rely on investors in current funds to be prospective investors in their future funds. For example, when fund advisers raise multiple funds sequentially, current investors can base their decisions on whether to invest in subsequent funds based on the disclosures of the prior funds.[1707] As such, improved disclosures and consent requirements can improve the efficiency of investments without directly requiring disclosures to all prospective investors. Investors may therefore face a lower overall cost of searching for, and choosing among, alternative private fund investments.

Lastly, the rules prohibit certain activities that represent possible conflicting arrangements between investors and fund advisers, with certain exceptions where certain disclosures regarding those activities are made and, in some cases, where the required investor consent is also obtained. To the extent that investors currently bear costs of searching for fund advisers who do not engage in these arrangements, or bear costs associated with monitoring fund adviser conduct to avoid harm, then prohibiting these activities may lower investors' overall costs of searching for, monitoring, and choosing among alternative private fund investments. This may particularly be the case for smaller investors who are currently more frequently harmed by the activities being considered. The same effect may occur in the case of the final rules' requirements for advisers to obtain audits of fund financial statements. To the extent that investors currently bear costs of searching for fund advisers who do have their funds undergo audits, or bear costs associated with monitoring fund adviser conduct to avoid harm when the adviser does not have the fund undergo an audit, the final mandatory audit rule will enhance investor protection and thereby improve the efficiency of the investment adviser search process.

The above pro-efficiency effects may also be strengthened by the reduced risks of non-compliance and increased efficiency of the Commission's enforcement and examination of non-compliance resulting from the final amendments to the compliance rule for a written documentation requirement and the amendments to the books and records rule.[1708]

There may be losses of efficiency from the rules prohibiting various activities, and from any changes in fund practices in response to the rules, to the extent that investors currently benefit from those activities or incur costs from those changes. For example, investors who currently receive preferential terms that will be prohibited under the final rules may have only invested with their current adviser because they were able to secure preferential terms. With those preferential terms removed, those investors may choose to reevaluate the match between their choice of adviser and their overall preferences over private fund terms, investment strategy, and investment outcomes. Depending on the results of this reevaluation, those investors may choose to incur costs of searching for new fund advisers or alternative investments.

Other risks to efficiency may arise from the scope of the final rules, for example the private fund adviser rules not applying to advisers with respect to their CLOs and other SAFs. Because advisers to SAFs will face no costs under the private fund adviser rules with respect to their SAFs, more advisers may choose to structure their funds as an SAF so as to avoid the costs of the rules. To the extent this choice by advisers only occurs because advisers are incentivized to reduce their compliance costs, but those advisers would have greater skill or comparative advantage in advising other types of private funds, the effect the final rules have on adviser choice of fund structure may reduce efficiency.[1709] Similarly, advisers restructuring their funds to meet the definition of SAF may be viewed as a potentially costly form of regulatory arbitrage. We believe these effects will be mitigated by (1) the definition of SAFs that includes the fund primarily issuing debt, which is a structure we believe advisers who normally issue equity will not want to use just to lower their compliance costs and avoid the restrictions and prohibitions in the private fund adviser rules, and (2) the fact that any advisers considering restructuring their funds to be SAFs will need to be confident that they are able to compete existing SAFs to attract SAF investors. However, at the margin, these risks of reduced efficiency may occur.

The limited scope regarding SAF advisers may also result in a rule with lower efficiency gains relative to a rule with no such limitation. This is because the efficiency gains from the rule accrue, in part, from the enhanced comparability and transparency across private funds, and comparability effects are strongest when a rule is applied across all types of funds. The limitation may make SAFs less comparable to other types of funds, which may yield lower efficiency benefits when investors search across fund types for an adviser. However, we believe that the distinct features that we understand CLOs and other SAFs already have today likely result in investors already viewing CLOs and other SAFs as distinct types of investments and not comparable to an equity interest in other funds.[1710] To the extent that few, or no, investors would compare SAFs and other types of private funds on the basis of the required reporting elements of the private fund adviser rules, then the loss of any efficiency benefits from reduced comparability is minimal. Moreover, many advisers to SAFs, in particular advisers to CLOs, typically provide extensive reporting and transparency already, such as regular reporting of every asset in the fund's portfolio and their current market valuation. This furthers the likelihood that the loss of efficiency gains from forgoing the final

[1706] *See supra* section II.F.

[1707] *See supra* section VI.C.3.

[1708] *See supra* sections VI.D.7, VI.D.8.

[1709] A policy in which advisers are incentivized only to pursue fund structures that align with their individual desires (*e.g.,* their comparative advantage, or the needs of their investors), is described in economics as "incentive compatible." The risk to efficiency from distorting adviser incentives may be viewed as a risk of reducing the incentive compatibility of the final rules. *See, e.g.,* Andreu Mas-Colell, et al., Chapter 13, Microeconomic Theory (Oxford Univ. Press, 1995), for a discussion of incentive compatibility.

[1710] *See supra* sections II.A, VI.C.2, VI.C.3.

rules' transparency benefits with respect to advisers to SAFs will be minimal.[1711]

There may also be a risk of the transparency benefits of the rule getting reduced by advisers restructuring their funds to be SAFs to meet the exclusion under the final rules. Any adviser restructuring their fund into a SAF to reduce their compliance costs or avoid the restrictions and prohibitions in the private fund adviser rules would result in a fund less comparable to other types of private funds. However, these risks are also likely to be mitigated by the fact that any such adviser would need to compete with the existing CLO and broader SAF landscape. In particular, any such adviser seeking to attract investors to a new SAF would likely need to arrange for or issue independent collateral administrator reports that, like existing CLOs and other SAFs, detail all cash flows associated with the assets in their fund portfolio and list all market values of the assets in their fund portfolio.[1712] An adviser who restructures a fund into a SAF but meets the same typical transparency practices as existing CLOs and other SAFs would not result in any substantial loss of transparency benefits associated with the final rule.

Many commenters emphasized the risks to potential losses of efficiency and questioned the possible benefits to efficiency.[1713] Some commenters emphasized particular provisions of the rule as bearing substantial risks to efficiency, such as the proposed prohibition on pass-through of certain fees and expenses.[1714] Other commenters raised broad concerns that the entire regime would reduce efficiency by restricting the ability of market participants to freely negotiate contractual terms among themselves.[1715] Other commenters stated broadly that the Proposing Release economic analysis had failed to consider important ways in which the proposed rules may affect efficiency.[1716] We believe many of commenters' concerns are mitigated by the revisions to the final rules as compared to the proposed rules, such as the provision of certain exceptions for many of the proposed activities where certain disclosures are made and, in some cases, where the required investor consent is also obtained. However, at the margin there may still be risks of reduced efficiency.

2. Competition

The final rules may also affect competition in the market for private fund investing.

First, to the extent that the enhanced transparency of certain fees, expenses, and performance of private funds under the final rules may reduce the cost to some investors of comparing private fund investments, then current investors evaluating whether to continue investing in subsequent funds with their current adviser may be more likely to reject future funds raised by their current adviser in favor of the terms of competing funds offered by competing advisers, including new funds that advisers may offer as alternatives that they would not have offered absent the increased transparency, or competing advisers whom the investor would not have considered absent the increased transparency, including newer or smaller advisers. For example, we understand that subscription facilities can distort fund performance rankings and distort future fundraising outcomes,[1717] and so the enhanced disclosures around the impact of subscription facilities on performance may change how investors compare prospective funds in the future. To the extent that this heightened transparency encourages advisers to make more substantial disclosures to prospective investors, investors may also be able to obtain more detailed fee and expense and performance data for other prospective fund investments, strengthening the effect of the rules on competition.[1718] Advisers may therefore update the terms that they offer to investors, or investors may shift their assets to different funds.

Second, because enhanced transparency of preferential treatment will be provided to both current and prospective investors, there may be reduced search costs to all investors seeking to compare funds on the basis of which investors receive preferential treatment. For example, some advisers may lose investors from their future funds if those investors only participated in that adviser's prior funds because of the preferential terms they received. We anticipate that investors withdrawing from a fund because of a loss of preferential treatment would redeploy their capital elsewhere, and so new advisers would have a new pool of investment capital to pursue.

These pro-competitive effects of the rule will directly benefit private funds with advisers within the scope of the final rules and investors in those funds.[1719] Investors in funds whose advisers are outside the scope of the final rules, and those funds' advisers, may also benefit, to the extent private fund advisers outside the scope of the rule revise their terms to compete with private fund advisers inside the scope of the rules. As discussed above, private fund adviser fees may currently total in the hundreds of billions of dollars per year.[1720] These two sources of enhanced competition from additional transparency may lead to lower fees or may direct investor assets to different funds, fund advisers, or other investments.

The above pro-competitive effects may also be strengthened by the reduced risks of non-compliance and increased efficiency of the Commission's enforcement and examination of non-compliance resulting from the final amendments to the compliance rule for a written documentation requirement and the amendments to the books and records rule.[1721]

However, certain commenters expressed concerns that there may be negative effects on competition as well. Commenters stated that various individual components of the rule could reduce competition, such as the prohibition on reducing clawbacks for taxes (by delaying performance-based compensation that may increase employee turnover)[1722] and the adviser-led secondary rule to the extent that advisers forgo conducting adviser-led secondaries instead of undertaking the cost of a fairness opinion.[1723] We believe that many of these commenters' concerns have been mitigated by the revisions to the final rules relative to the proposal, such as the exceptions for reducing clawbacks for taxes when certain disclosures are made and the allowance for a valuation opinion instead of a fairness opinion for adviser-led secondaries.

Some commenters also stated restrictions on preferential treatment

[1711] *See supra* section VI.C.3.

[1712] *See supra* section VI.C.3.

[1713] *See, e.g.,* AIMA/ACC Comment Letter; AIC Comment Letter I, Appendix 1; AIC Comment Letter I, Appendix 2; PIFF Comment Letter.

[1714] *See, e.g.,* AIC Comment Letter I, Appendix 1.

[1715] AIC Comment Letter I, Appendix 2.

[1716] *See, e.g.,* AIC Comment Letter I, Appendix 2.

[1717] *See supra* sections VI.C.3, VI.D.2; *see also, e.g.,* Schillinger et al., *supra* footnote 1213; Enhancing Transparency Around Subscription Lines of Credit, *supra* footnote 1001.

[1718] *See supra* section VI.D.1.

[1719] *See supra* sections VI.B, VI.D.1.

[1720] *See supra* section VI.C.3.

[1721] *See supra* sections VI.D.7, VI.D.8.

[1722] AIMA/ACC Comment Letter.

[1723] Comment Letter of the California Alternative Investments Association, Connecticut Hedge Fund Association, New York Alternative Investment Roundtable Inc., Palm Beach Hedge Fund Association, and Southeastern Alternative Funds Association (Apr. 25, 2022) (''CAIA Comment Letter'').

may reduce co-investment activity,[1724] or may hinder smaller advisers' abilities to secure initial seed or anchor investors.[1725] Commenters argued that smaller, emerging advisers often need to provide anchor investors significant preferential rights.[1726] Other commenters stated broadly that the Proposing Release economic analysis had failed to consider important ways in which the proposed rules may affect competition.[1727]

We believe that the concerns with respect to preferential treatment for smaller advisers will be mitigated in part by the fact that smaller advisers are only prevented from offering anchor investors preferential redemption rights and preferential information that the advisers reasonably expects to have a material negative effect on other investors. Therefore, these potential harms to competition will be mitigated to the extent that smaller, emerging advisers do not need to be able to offer anchor investors preferential rights that have a material negative effect on other investors to effectively compete, and to the extent that smaller emerging advisers are able to compete effectively by offering anchor investors other types of preferential terms. We have also provided certain legacy status, namely regarding contractual agreements that govern a private fund and that were entered into prior to the compliance date if the rule would require the parties to amend such an agreement, for all advisers under the prohibitions aspect of the preferential treatment rule and all aspects of the restricted activities rule requiring investor consent.[1728] We have lastly included several exceptions from the final rules on preferential treatment, such as an exception from the prohibition on providing certain preferential redemption terms when those terms are offered to all investors.[1729] At the margin, however, some advisers, particularly smaller or emerging advisers, may find it more difficult to compete without offering preferential redemption rights or preferential information that will now be prohibited.

Commenters also stated more generally that increased compliance costs on advisers may reduce competition by causing advisers to close their funds and reducing the choices investors have among competing advisers and funds.[1730] To the extent heightened compliance costs cause certain advisers to exit, or forgo entry, competition may be reduced. This may particularly occur through the compliance costs associated with mandatory audits, as those costs are likely to fall disproportionately and have a disproportionate impact on funds managed by smaller advisers, and funds advised by smaller advisers facing new increased compliance costs may be among those most likely to exit the market in response to the final rules.[1731] As discussed above, approximately 25% of funds with less than $2 million in assets under management that are advised by RIAs and will have to undergo an audit as a result of the final rule.[1732]

However, the effects on the smallest advisers will be mitigated where those advisers do not meet the minimum assets under management required to register with the SEC.[1733] Some registered advisers may therefore have the option of reducing their assets under management to forgo registration, thereby avoiding the costs of the final rule that only apply to registered advisers, such as the mandatory audit rule. While advisers responding in this way may negatively affect capital formation,[1734] the option for advisers to respond to the rule in this way may mitigate negative competitive effects, as advisers reducing their size to forgo registration will still leave them as a partial potential competitive alternative to larger advisers (albeit a less effective competitive alternative than they represented as registered advisers).

As discussed above, some commenters also expressed concerns that the loss of smaller advisers would result in reduced diversity of investment advisers, based on an assertion that most women- and minority-owned advisers are smaller and associated with first time funds.[1735] These commenters' concerns are consistent with industry literature, which finds that, for example, while 7.2% of U.S. private equity firms are women-owned, those firms manage only 1.6% of U.S. private equity assets, indicating that women-owned private equity firms are disproportionately smaller entities.[1736] Similar patterns hold for minority-owned firms and for other types of private funds.[1737] To the extent compliance costs or other effects of the rules cause certain smaller advisers to exit, the rules may result in reduced diversity of investment advisers. The potential reduced diversity of investment advisers may also have downstream effects on entrepreneurial diversity, as minority-owned venture capital and buyout funds are three-to-four times more likely to fund minority entrepreneurs in their portfolio companies.[1738] However, because these effects are strongest for venture capital, these effects may be mitigated wherever an adviser's funds are sufficiently concentrated in venture capital that they may forgo SEC registration and thus forgo many of the costs of the final rules.

As stated above, some commenters stated that the proposed private fund adviser rules and other recently proposed or adopted rules would have interacting effects, and that the effects should not be analyzed independently.[1739] These commenters stated in particular that the combined costs of multiple ongoing rulemakings would harm investors by making it cost-prohibitive for many advisers to stay in business or for new advisers to start a business, and that this effect would further harm competition by creating new barriers to entry.[1740] As stated above, Commission acknowledges that the effects of any final rule may be impacted by recently adopted rules that

[1724] Ropes & Gray Comment Letter.

[1725] *See, e.g.,* Carta Comment Letter; Meketa Comment Letter; Lockstep Ventures Comment Letter; NY State Comptroller Comment Letter.

[1726] *Id.*

[1727] *See, e.g.,* AIC Comment Letter I, Appendix 2; PIFF Comment Letter.

[1728] *See supra* section IV.

[1729] *See supra* section II.G.

[1730] *See, e.g.,* Weiss Comment Letter; AIC Comment Letter I; AIC Comment Letter I, Appendix 1; AIC Comment Letter I, Appendix 2; MFA Comment Letter II. Some commenters cite to the 2023 Consolidated Appropriations Act, citing, *e.g.,* "an important provision urging the SEC to redo its economic analysis of the Private Fund Adviser proposal to 'ensure the analysis adequately considers the disparate impact on emerging minority and women-owned asset management firms, minority and women-owned businesses, and historically underinvested communities.' " *See, e.g.,* Comment Letter of Steven Horsford (May 3, 2023); CCMR Comment Letter IV. *See also, e.g., supra* footnotes 1358, 1477, 1555 and accompanying text, and section VI.D.5.

[1731] *See supra* section VI.D.5.

[1732] *See supra* sections VI.C.4, VI.D.5. Figure 4 illustrates that approximately 4,800 out of almost 6,400 funds of size between $0 and $2 million already undergo an audit that will be required by the final rule, leaving approximately 25% of funds of that size that will have to undergo an audit as a result of final rule.

[1733] *See supra* section II.C.

[1734] *See infra* section VI.E.3.

[1735] *See supra* section VI.B; *see also, e.g.,* AIC Comment Letter I, Appendix 1; AIC Comment Letter I, Appendix 2; NAIC Comment Letter.

[1736] *See, e.g.,* Knight Foundation, Knight Diversity of Asset Managers Research Series: Industry (Dec. 7, 2021), *available at https://knightfoundation.org/reports/knight-diversity-of-asset-managers-research-series-industry/.*

[1737] *Id.*

[1738] Johan Cassel, Josh Lerner & Emmanuel Yimfor, *Racial Diversity in Private Capital Fundraising* (Sept. 18, 2022), *available at https://ssrn.com/abstract=4222385.*

[1739] *See supra* section VI.D.1.

[1740] *See, e.g.,* MFA Comment Letter II; MFA Comment Letter III; AIC Comment Letter IV.

precede it.[1741] With respect to competitive effects, the Commission acknowledges that there are incremental effects of new compliance costs on advisers that may vary depending on the total amount of compliance costs already facing advisers and acknowledges costs from overlapping transition periods for recently adopted rules and the final private fund adviser rules.[1742] In particular, the Commission acknowledges these sources of heightened costs from the recent adoption of amendments to Form PF.

To the extent advisers respond to these costs by exiting the market, or by forgoing entry, competition may be negatively affected. In particular, competition may be negatively affected because smaller advisers may be more likely than larger advisers to respond to new compliance costs by exiting or by forgoing entry. To the extent smaller or newer advisers attempt to respond to new compliance costs by passing them on to their funds, this may hinder their ability to compete, as larger advisers may be more able to lower their own profit margins instead of passing some or all of their new costs on to funds and investors.

We have also responded to commenter concerns by providing for a longer transition period for smaller advisers. The costs of having multiple ongoing rulemakings primarily accrue during transition periods, when advisers may have to revise processes, procedures, or fund documents with multiple new rulemakings in mind. In consideration of those costs, we are providing that advisers with less than $1.5 billion in assets under management will have 18 months to comply with the adviser-led secondaries, preferential treatment, and restricted activities rules, compared to the 12 months for larger advisers.[1743] Since smaller advisers are those most likely to either exit the market (or fail to enter) in response to high compliance costs, we believe staggered transition periods that reduce the costs of coming into compliance for advisers reduce the risks of multiple concurrent rulemakings negatively impacting competition. In particular, since the effective date for the new Form PF current reporting is December 11, 2023, the 18-month compliance period means smaller advisers will have over a year after the effective date of Form PF current reporting to come into compliance with the final private fund adviser rules. The legacy status discussed above,[1744] namely regarding contractual agreements that govern a private fund and that were entered into prior to the compliance date if the rule would require the parties to amend such an agreement, for all advisers under the prohibitions aspect of the preferential treatment rule and all aspects of the restricted activities rule requiring investor consent,[1745] is also responsive to commenter concerns on compliance costs. We have lastly responded to commenter concerns on compliance costs by offering certain disclosure-based exceptions and, in some cases, certain consent-based exceptions rather than outright prohibitions.[1746]

To the extent these effects occur, competition may be reduced, but these potential negative effects on competition must be evaluated in light of (1) the other pro-competitive aspects of the final rules, in particular the pro-competitive effects from enhancing transparency, which are likely to help smaller advisers effectively compete and may therefore benefit those advisers,[1747] and (2) the other benefits of the final rules.

3. Capital Formation

Commenters emphasized the risks that the rules may reduce capital formation through several different types of arguments. Several commenters made general statements that the high compliance costs of the rule may negatively affect capital formation.[1748] Many of these commenters further specified that the harms to smaller advisers would reduce capital formation.[1749] Some commenters stated that particular aspects of the rule risk reduced capital formation, such as the mandatory audit rule, the charging of regulatory/compliance expenses rule, and the prohibition on limitation of liability rule.[1750] Other commenters stated broadly that the Proposing Release economic analysis had failed to consider important ways in which the proposed rules may affect capital formation.[1751]

While we believe we have resolved certain of these concerns in the final rules, in particular by revising the restricted activities in the final rules relative to the proposal, the final rules still carry a risk that capital formation may be negatively affected. The Proposing Release stated that there may be reduced capital formation associated with the final rules to prohibit various activities, to the extent that investors currently benefit from those activities.[1752] For example, investors who currently receive preferential terms that will be prohibited under the final rue may withdraw their capital from their existing fund advisers. Those investors may have less total capital to deploy after bearing costs of searching for new investment opportunities, or they may redeploy their capital away from private funds more broadly and into investments with less effective capital formation.

In further response to commenter concerns, we have also reexamined the risks of reduced capital formation in two ways related to the scope of the final rule. In particular, we have examined in two ways how the adviser incentives induced by the boundaries of the scope of the rules may carry unintended consequences of changes to adviser behavior that could risk reducing capital formation.

First, as discussed above, all of the elements of the final rule will in general not apply with respect to non-U.S. private funds managed by an offshore investment adviser, regardless of whether that adviser is registered.[1753] This aspect of the scope of the rule may increase incentives for advisers to move offshore and to limit their activity to non-U.S. private funds. Doing so may reduce U.S. capital formation, to the extent it is more difficult for certain domestic investors, especially more vulnerable investors, to deploy capital to such funds.

Second, the quarterly statements, mandatory audit, and adviser-led secondaries rules will not apply to ERAs.[1754] This aspect of the scope of the rule may increase incentives for advisers to limit their activity in such a way that allows them to forgo registration. In particular, advisers may

[1741] *See supra* section VI.D.1.

[1742] *Id.*

[1743] *See supra* section IV.

[1744] *See supra* footnote 1728 and accompanying text.

[1745] *See supra* section IV.

[1746] *See supra* section II.E.

[1747] To the extent that smaller or newer advisers benefit from these pro-competitive effects, because smaller or newer advisers are disproportionately women-owned and minority-owned, these benefits will therefore disproportionately accrue to women- and minority-owned advisers. *See supra* footnote 1736 and accompanying text.

[1748] *See, e.g.,* AIMA/ACC Comment Letter; Thin Line Comment Letter; ICM Comment Letter; Ropes & Gray Comment Letter; SBAI Comment Letter; AIC Comment Letter I; AIC Comment Letter I, Appendix 2; CAIA Comment Letter; NYPPEX Comment Letter.

[1749] *See, e.g.,* Thin Line Capital Comment Letter; ICM Comment Letter; Ropes & Gray Comment Letter; SBAI Comment Letter.

[1750] Utke and Mason Comment Letter; Convergence Comment Letter; Comment Letter of True Venture (June 14, 2022); Andreessen Comment Letter.

[1751] *See, e.g.,* AIC Comment Letter I, Appendix 2; NYPPEX Comment Letter.

[1752] Proposing Release, *supra* footnote 3, at 265–266.

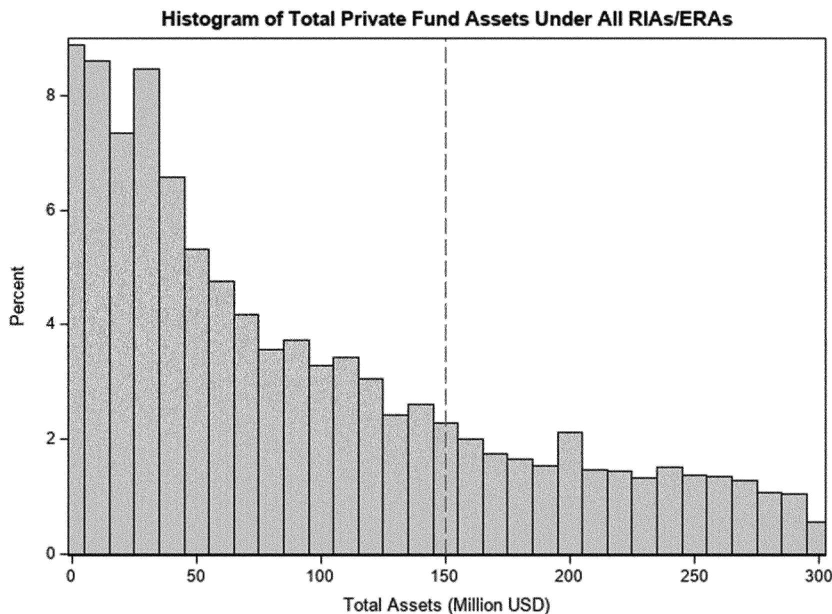
[1753] *See supra* section II.

[1754] *Id.*

seek to keep their total RAUM under $150 million or may devote more of their capital to venture fund activity.

As part of our analysis in response to commenter concerns on risks of reduced capital formation, we have investigated the potential likelihood of advisers responding to differences in RIA and ERA requirements under the final rules by examining how advisers respond to differences in RIA and ERA requirements today. In particular, if there is evidence today that certain private fund advisers respond to different requirements for RIAs and ERAs by avoiding crossing the threshold of $150 million in private fund assets, we may expect that the increasing differential for RIAs and ERAs under the final rules will, at the margin, impede capital formation by inducing advisers to keep their assets under $150 million. Figure 8 examines the joint distribution of assets under management by (1) RIAs and (2) ERAs relying on the size exemption for advisers with only private funds and less than $150 million in RAUM. The figure does not demonstrate any evidence of disproportionately fewer advisers just above the $150 million threshold compared to the proportion of advisers with less than $150 million in assets.[1755] This may indicate that it is unlikely that some advisers who would otherwise have had assets between $150 million and $200 million will instead seek to stay under the $150 million threshold. However, because the rule will strengthen the difference in compliance requirements for RIAs and ERAs, the final rule may strengthen this incentive for advisers to keep assets under $150 million, which may negatively affect capital formation. Any such impact of this mechanism may also be limited by the fact that there are differences in RIA and ERA requirements only for the quarterly statements, mandatory audit, and adviser-led secondaries rules, because the restricted activities rules and preferential treatment rules apply to both RIAs and ERAs.

Figure 8:



Source: Form ADV submissions filed between Oct. 1, 2021, and Sept. 30, 2022.

In addition, as discussed above, some advisers to venture capital funds have recently registered as RIAs to be able to have their portfolio allocations outside of direct equity stakes in private companies exceed 20%.[1756] These types of advisers may in the future limit their portfolio allocations outside of direct equity stakes in private companies to forgo registration. Again, the impact of this differential in RIA and ERA requirements may be limited, as it is only driven by the quarterly statements, mandatory audit, and adviser-led secondaries rules, because the restricted activities rules and preferential treatment rules apply to both RIAs and ERAs.

Lastly, certain elements of the rules provide for certain relief to funds of funds. For example, the quarterly statement rule requires advisers to private funds that are not funds of funds to distribute statements within 45 days after the first three fiscal quarter ends of each fiscal year (and 90 days after the end of each fiscal year), but advisers to funds of funds are allowed 75 days after the first three quarter ends of each fiscal year (and 120 days after fiscal year end).[1757]

However, we also continue to believe the final rules will facilitate capital formation by causing advisers to manage private fund clients more efficiently, by restricting or prohibiting activities that may currently deter investors from private fund investing because they represent possible conflicting arrangements, and by enabling investors to choose more efficiently among funds and fund advisers.[1758]

[1755] Rather, the figure demonstrates an approximately continuous downward trend in the proportion of advisers as size increases.

[1756] *See supra* section VI.C.1.

[1757] *See supra* section II.B.3.

[1758] These and other pro-capital formation effects of the rule may also be strengthened by the reduced

Continued

This may reduce the cost of intermediation between investors and portfolio investments. To the extent this occurs, this may lead to enhanced capital formation in the real economy, as portfolio companies will have greater access to the supply of financing from private fund investors. This may contribute to greater capital formation through greater investment into those portfolio companies.

The final rules may also enhance capital formation through their competitive effects by inducing new fund advisers to enter private fund markets.[1759] To the extent that existing fund advisers reduce their fees to compete more effectively with new entrants, or to the extent that existing pools of capital are redirected to new fund advisers, or fund advisers who have reduced fees to compete, and the advisers receiving redirected capital generate enhanced returns for their investors (for example, advisers who generate larger returns, less correlated returns across different investment strategies, or returns with more favorable risk profiles), the competitive effects of the final rules may provide new opportunities for capital allocation and potentially spur new investments.

Similarly, the final rules may enhance capital formation by inducing new investors to enter private fund markets. Restricting activities that represent conflicting arrangements, requiring mandatory audits and mandatory fairness or valuation opinions for adviser-led secondaries, and heightened transparency around fee/expense/performance information may increase investor confidence in the safety of their investments.[1760] To the extent investor confidence is heightened, especially for smaller or more vulnerable investors, those investors may increase their willingness to invest their capital. With respect to the final rules on prohibitions for certain preferential information, the Commission has recognized these effects in prior rulemakings. As discussed above, specifically, the Commission has stated that investors in many instances equate the practice of selective disclosure with insider trading, and that the inevitable effect of selective disclosure is that individual investors lose confidence in the integrity of the markets because they perceive that certain market participants have an unfair advantage.[1761] More generally, as discussed above, one academic study found that the passing of regulation requiring advisers to hedge funds to register with the SEC reduced hedge fund misreporting of results to investors, hedge fund misreporting increased on the overturn of that legislation, and that the passing of the Dodd-Frank Act (which removed an exemption from registration on which advisers to hedge funds and other private funds had relied), resulted in higher inflows of capital to hedge funds, indicating that hedge fund investors view regulatory oversight as protecting their interests and that regulatory oversight increases investor confidence and willingness to invest in hedge funds.[1762]

Similarly, and in addition to lower costs of intermediation between investors and portfolio investments, the final rules may directly lower the costs charged by fund advisers to investors by improving transparency over fees and expenses. The final rules may also enhance overall investor returns (for example, as above, larger returns, less correlated returns across different investment strategies, or returns with more favorable risk profiles) by improving transparency over performance information, restricting or prohibiting conflicting arrangements, and requiring external financial statement audits and fairness opinions. To the extent these increased investor funds from lower expenses and enhanced returns are redeployed to new investments, there may be further benefits to capital formation.

F. Alternatives Considered

Several commenters stated their view that the Commission had not considered sufficient alternatives in its proposal.[1763] We believe we have considered many potential alternatives to the final rules. Several of the alternatives considered at proposal, or recommended by commenters, have been implemented as part of the final rules. We have further considered below several alternatives identified by commenters.

1. Alternatives to the Requirement for Private Fund Advisers To Obtain an Annual Audit

First, the Commission could have broadened the application of this rule to, for example, apply to all advisers to private funds, rather than to only advisers to private funds that are registered or required to be registered. Extending the application of the final audit rule to all advisers and in the context of these pooled investment vehicles would increase the benefits of helping investors receive more reliable information from private fund advisers subject to the rule. Investors would, as a result, have greater assurance in both the valuation of fund assets and, because these valuations often serve as the basis for the calculation of the adviser's fees, the fees charged by advisers. However, an extension of the rule to apply to all advisers would likely impose the costs of obtaining audits on smaller funds advised by unregistered advisers. For these types of funds, the cost of obtaining such an audit may be large compared to the value of fund assets and fees and the related value to investors of the required audit, and so this alternative could inhibit entry of new funds, potentially constraining the growth of the private fund market.

Second, instead of broadening the audit rule, we considered narrowing the rule by providing further full or partial exemptions. For example, we could have exempted advisers from obtaining audits for smaller funds or we could exempt an adviser from compliance with the rule where an adviser receives little or no compensation for its services or receives no compensation based on the value of the fund's assets. We could also have exempted advisers to hedge funds and other liquid funds or funds of funds. Further, we could have provided an exemption to advisers from obtaining audits for private funds below a certain asset threshold, for funds that have only related person investors, or for funds

risks of non-compliance and increased efficiency of the Commission's enforcement and examination of non-compliance resulting from the final amendments to the compliance rule for a written documentation requirement and the amendments to the books and records rule. *See supra* sections VI.D.7, VI.D.8.

[1759] *See supra* section VI.E.2.

[1760] *See supra* sections VI.D.2, VI.D.3, VI.D.4, VI.D.5.

[1761] *See supra* section VI.D.4.

[1762] *See supra* section VI.B; *see also* Stephen G. Dimmock & William Christopher Gerken, *Regulatory Oversight and Return Misreporting by Hedge Funds* (May 7, 2015), *available at https://ssrn.com/abstract=2260058.*

[1763] Citadel Comment Letter; AIMA/ACC Comment Letter; AIC Comment Letter I, Appendix 2. One commenter cites three broad alternatives and criticizes the Proposing Release for not considering them: A ''Null Alternative,'' a ''CLO Exemption Alternative,'' and a ''Qualified Investor Alternative.''1 LSTA Comment Letter, Exhibit C. We disagree with the commenter that the Proposing Release did not consider the Null Alternative, as the Commission's economic analysis compares costs and benefits relative to the economic baseline, and the economic baseline captures a Null Alternative. *See supra* sections VI.C, VI.D. We also disagree with the commenter that a Qualified Investor Alternative would be a reasonable alternative to consider, as not applying the rule to advisers with respect to funds that can only be accessed by certain investors would have substantial negative consequences such as incentivizing advisers to restrict access to their funds. Moreover, the final rules are designed to protect even sophisticated investors. We have considered the commenter's CLO Exemption Alternative, and are not applying the five private fund rules to SAF advisers with respect to SAFs they advise. *See supra* section II.

that are below a minimum asset value or have a limited number of investors. Several commenters provided arguments for such exemptions.[1764] Another commenter argued more generally that the entirety of the private fund rulemaking should narrowly focus on private funds with more vulnerable or smaller investors, implicitly arguing for a narrowing of all components of the rule, including the audit rule.[1765]

These exemptions could also have been applied in tandem, for example by exempting only advisers to hedge funds and other liquid funds below a certain asset threshold. For each of these categories, we considered partial instead of full exemptions, for example by requiring an audit only every two (or more) years instead of not requiring any annual audits at all. Further, the benefits of the rule may not be substantial for funds below a minimum asset value, where the cost of obtaining such an audit would be relatively large compared to the value of fund assets and fees that the rule is intended to provide a check on.

We believe, however, that this narrower alternative with the above exemptions to the final audit rule would likely not provide the same investor protection benefits. Many of the investor protection benefits discussed above are specifically associated with the general applicability of the audit rule.[1766] One commenter stated that the time and expense of an audit should be commensurate with the scale of the fund, removing the rationale for exempting smaller advisers.[1767] We also believe that new rules with exemptions for certain types of funds and advisers, in general, distort incentives faced by advisers when determining their desired business model. Exemptions for hedge funds or funds of funds would, at the margin, induce certain advisers contemplating launching a private equity fund to instead launch a hedge fund or fund of funds, and we factor in such distortions of incentives into considerations of exemptions for final rules.

Moreover, we have already recognized that some advisers may not have requisite control over a private fund client to cause its financial statements to undergo an audit in a manner that satisfies the mandatory private fund adviser audit rule.[1768] Those advisers will be required under the final rule to take all reasonable steps to cause their private fund clients to undergo an audit. As a final matter, the rule already is only applicable to RIAs and does not apply to ERAs, including those ERAs with less than $150 million in assets under management in the U.S.[1769]

As a last alternative, instead of requiring an audit as described in the audit rule, we considered requiring that advisers provide other means of checking the adviser's valuation of private fund assets. For example, we considered requiring that an adviser subject to the audit rule provide information to substantiate the adviser's evaluation to its LPAC or, if the fund has no LPAC, then to all, or only significant investors in the fund. We believe that such methods for checking an adviser's methods of valuation would be substantially less expensive to obtain, which could reduce the cost burdens associated with an audit.

However, we believe that these alternatives would likely not accomplish the same investor protection benefits as the audit rule as adopted. As an immediate matter, limiting the requirement in this way would undermine the broader goal of the rule to protect investors against misappropriation of fund assets and providing an important check on the adviser's valuation of private fund assets. We believe, more generally, that these checks would not provide the same level of assurance over valuation and, by extension, fees, to fund investors as an audit. As discussed above, we have historically relied on financial statement audits to verify the existence of pooled investment vehicle investments.[1770] Commenters did not address these alternatives, either by expressing support for them or criticizing them, and generally focused their suggestions on either (1) abandoning the audit rule entirely, or (2) narrowing it by providing exemptions.

2. Alternatives to the Requirement To Distribute a Quarterly Statement to Investors Disclosing Certain Information Regarding Costs and Performance

The Commission also considered requiring additional and more granular information to be provided in the quarterly statements that registered investment advisers will be required to provide to investors in private funds. For example, we could have required that these statements include investor-level capital account information, which would provide each investor with means of monitoring capital account levels at regular intervals throughout the year. Because this more specific information would show exactly how fees, expenses, and performance have affected the investor, it could, effectively, further reduce the cost to an investor of monitoring the value of the services the adviser provides to the investor. We believe, however, that requiring capital account information for each investor would substantially increase costs for funds associated with the preparation of these quarterly statements. We do not believe that the policy goals of the rule would be achieved by further increasing the costs of the rule, including potential harms to competition and capital formation.[1771]

We could also, for example, have required disclosure of performance information for each portfolio investment. For illiquid funds in particular, we could have required advisers to report the IRR for portfolio investments, assuming no leverage, as well as the cash flows for each portfolio investment.[1772] Given the cash flows, end investors could compute other performance metrics, such as PME, for themselves. In addition, this information would give investors means of checking the more general performance information provided in a quarterly statement, and would, further, allow investors to track and evaluate the portfolio investments chosen by an adviser over time. Cash flow disclosures for each portfolio investment would enable an investor to construct measures of performance that address the MOIC's inability to capture the timing of cash flows, avoid the IRR's assumptions on reinvestment rates of early cash flow distributions, and avoid the IRR's sensitivity to cash flows early in the life of the pool.[1773] Investors would also be

[1764] *See, e.g.,* PIFF Comment Letter; ILPA Comment Letter I; Ropes & Gray Comment Letter.

[1765] AIC Comment Letter I, Appendix 2.

[1766] *See supra* section VI.D.5.

[1767] *See* Healthy Markets Comment Letter I.

[1768] *See supra* section II.C.7.

[1769] *See supra* section II.C, VI.D.5.

[1770] *See supra* section II.C.

[1771] *See supra* sections VI.D.2, VI.E.

[1772] For liquid funds, disclosure of performance information for each portfolio investment may be of comparatively lower incremental benefit to investors, because such funds typically have a much larger number of investments. However, investors may have preferences among different liquid funds that depend on more fund outcomes than their total return on their aggregate capital contributions. For example, investors could have a preference for fund advisers whose portfolio investments have returns that are not correlated with each other (meaning portfolio investments with returns that are not disproportionately likely to be similar in magnitude or disproportionately likely to be similar in whether they are positive or negative). A portfolio with correlated returns across investments may, for example, represent lower diversification and greater risk than a portfolio with uncorrelated returns across investments. For investors with such preferences, this alternative could provide similar additional benefits.

[1773] *See supra* section VI.C.3; *see, e.g.,* Harris et al., *supra* footnote 1221; Schoar et al., *supra* footnote 1221.

able to compare performance of individual portfolio investments against the compensation and other data that advisers would be required to disclose for each portfolio investment.[1774]

While we believe that advisers would have cash flow data for each portfolio investment available in connection with the preparation of the standardized fund performance information required to be reported pursuant to the quarterly statement rule, calculating performance information for each portfolio investment could add significant operational burdens and costs. Because these costs would vary based on the number of portfolio investments held by a private fund, such a rule would distort adviser incentives by incentivizing them to take on fewer portfolio investments. The operational burden and cost would also depend on whether the alternative rule required both gross and net performance information for each portfolio investment, which would determine whether the information reflected the impact of fund-level fees and expenses on the performance of each portfolio investment. Requiring both gross and net performance information for each portfolio investment would be of greater use to investors, but would come at a higher operational burden and cost, as providing net performance information would require more complex calculations to allocate fund fees and expenses across portfolio investments. Lastly, to the extent that advisers were required to disclose cash flows for each portfolio investment with and without the impact of fund-level subscription facilities, this calculation may be more burdensome than the single calculation required to make the required fund-level performance information disclosures with and without the impact of fund-level subscription facilities.

As a final granular addition to performance disclosures, the Commission could have required the reporting of a wider variety of performance metrics for hedge funds and other liquid funds, similar to the detailed disclosure requirements for illiquid funds. These could have included requirements for liquid funds to report estimates of fund-level alphas, betas, Sharpe ratios, or other performance metrics. We believe that for investors in liquid funds, absolute returns are of highest priority, and furthermore investors may calculate many of these additional performance metrics themselves by combining fund annual total returns with publicly available data. Commenter concerns also indicate that further standardized required reporting would continue to raise costs,[1775] but may only provide diminishing marginal benefit. Therefore, we believe these additional reporting requirements would impose additional costs with comparatively little benefit.

As discussed above, one commenter suggested requiring DPI and RVPI instead of MOIC for realized and unrealized investments.[1776] As an initial matter, since the final rules require calculation of unrealized and realized IRR,[1777] we do not believe that DPI and RVPI calculations will be any less incrementally costly than unrealized and realized MOIC, because unrealized and realized MOIC uses the same denominators as unrealized and realized IRR. Moreover, we have discussed above that these metrics may be potentially less effective at highlighting overly optimistic valuations of unrealized investments. This is because the denominator of RVPI includes all paid-in capital, not just capital contributed in respect of unrealized investments, and so the comparatively large denominator in RVPI may dwarf the effect of overvaluations of unrealized investments, while unrealized MOIC may highlight those overvaluations.[1778]

Further, the Commission also considered requiring less information be provided to investors in these quarterly statements. For example, instead of requiring the disclosure of comprehensive fee and expense information, we could have required that advisers disclose only a subset of these, including investments fees and expenses paid by a portfolio company to the adviser. These fees in particular may currently present the biggest burden on investors to track, and requiring the disclosure of only these fees could reduce some costs associated with the effort of compiling, on a quarterly basis, information regarding management fees more generally. While we believe some commenters would support such an alternative, based on the lower cost,[1779] we believe if we did not require comprehensive information, investors would not derive the same utility in monitoring fund performance.

We also considered requiring that comprehensive information regarding fees and performance be reported on Form ADV, instead of being disclosed to investors individually. Reporting publicly on Form ADV would continue to allow investors to monitor performance, while also allowing public review of important information about an adviser. One commenter suggested that advisers should be required to report information about borrowing from the fund on Form ADV and Form PF,[1780] and certain other commenters generally supported requiring advisers to make data collected under the rule publicly available.[1781] Disclosure to the Commission, either on Form ADV or Form PF, would provide the Commission with information that would enable the Commission to assess whether there are risks to investors, including risks of misappropriation from a fund. However, because the information required under the rule is tailored to what we believe would serve existing investors in a fund, we believe that direct delivery to investors would better reduce monitoring costs for investors. Further, as discussed above, prospective investors have separate protections, including against misleading, deceptive, and confusing information in advertisements as set forth in the recently adopted marketing rule.[1782]

Instead of requiring disclosure of comprehensive fee and expense information to investors, we considered prohibiting certain fee and expense practices. For example, we could have prohibited charging fees at the fund level in excess of a certain maximum amount that we could determine to be what investors could reasonably anticipate being charged by an adviser. This could, effectively, protect investors from unanticipated charges, and reduce monitoring costs to investors. Further, we could have prohibited certain compensation arrangements, such as the ''2 and 20'' model or compensation from portfolio investments, to the extent the adviser also receives management fees from the fund. Prohibition of the ''2 and 20'' model might cause advisers to consider and adopt more efficient models for private fund investing in which the adviser gets a smaller fee and the investor gets a larger share of the gross fund returns, and in which investors are generally better off.[1783] We also considered restricting management fee practices, for example by imposing limitations on sizes of management fees, or requiring management fees to be based on invested capital or net asset

[1774] *See supra* section II.B.1.b).

[1775] *See supra* section VI.D.2.

[1776] *See supra* sections II.B.2, VI.D.2.

[1777] *Id.*

[1778] *Id.*

[1779] *See supra* section VI.D.2.

[1780] Convergence Comment Letter.

[1781] *See, e.g.,* AFSCME Comment Letter; Comment Letter of National Employment Law Project (Apr. 25, 2022).

[1782] *See supra* section II.B.2.

[1783] For example, the compensation model for hedge funds can provide fund advisers with embedded leverage, encouraging greater risk-taking. *See, e.g.,* Brav, et al., *supra* footnote 1427.

value rather than on committed capital. However, the benefits of prohibiting certain fee and expense practices outright would need to be balanced against the costs associated with limiting an adviser and investor's flexibility in designing fee and expense arrangements tailored to their preferences. There are benefits to flexible negotiations between advisers and investors, and that the final rule should not endeavor to create a rigid private fund contract that governs all possible outcomes of an investment.[1784] We also believe that our policy choice has benefited from taking into consideration the market problem that the policy is designed to address.[1785] We believe that such further prohibitions would too severely restrict the flexibility of negotiations between advisers and investors, and also that such prohibitions would not be tailored to the market problems that this final rule is designed to address.

Similarly, instead of requiring disclosure of comprehensive performance information to investors, we considered prohibiting certain performance disclosure practices. For example, instead of requiring disclosure of performance with and without the effect of fund-level subscription facilities, we considered prohibiting advisers from presenting performance with the effect of such facilities unless they also presented performance without the effect of such facilities. Similarly, we considered prohibiting advisers from presenting combined performance information for multiple funds, such as a main fund and a co-investment fund that pays lower or no fees. Commenters did not generally either support or criticize this alternative. However, while we believe that the required disclosures present the correct standardized, detailed information for investors to be able to evaluate performance, we do not believe there are harms from advisers electing to disclose additional information, and we again believe investors and advisers should have the flexibility to negotiate for that additional information if they believe it would be valuable. As such, we think the benefits of prohibiting any performance disclosure practices would likely be negligible, while there could be substantial costs to investors who value the information that would be prohibited under this alternative.

Finally, the Commission considered broadening the application of this rule to, for example, apply to all advisers to private funds, rather than to only private fund advisers that are registered or required to be registered. Extending the application of the final rule to all advisers would increase the benefits of helping investors receive more detailed and standardized information regarding fees, expenses, and performance. Investors would, as a result, have better information with which to evaluate the services of these advisers. However, the extension of the final rule to apply to all advisers would likely impose the costs of compiling, preparing, and distributing quarterly statements on smaller funds advised by unregistered advisers. For these types of funds and advisers, these quarterly statement costs may be large compared to the value of fund assets and fees and the related value to investors of the required audit, and thus extending the rule to those advisers would further increase the costs of the rule, potentially increasing any potential harms to competition or capital formation.

3. Alternative to the Required Manner of Preparing and Distributing Quarterly Statements and Audited Financial Statements

The final rules will require private fund advisers to ''distribute'' quarterly statements and audited annual financial statements to investors in the private fund, and this requirement could be satisfied through either paper or electronic means.[1786] The Commission considered requiring private fund advisers to prepare and distribute the required disclosures electronically using a structured data language, such as the Inline eXtensible Business Reporting Language (''Inline XBRL'').

An Inline XBRL requirement for the disclosures could benefit private fund investors with access to XBRL analysis software by enabling them to more efficiently access, compile, and analyze the disclosures in quarterly statements and audited annual financial statements, facilitating calculations and comparisons of the disclosed information across different time periods or across different portfolio investments within the same time period. For any such private fund investors who receive disclosures from multiple private funds, an Inline XBRL requirement could also facilitate comparisons of the disclosed information across those funds.

An Inline XBRL requirement for the final disclosures would diverge from the Commission's other Inline XBRL requirements, which apply to disclosures that are made available to the public and the Commission, thus allowing for the realization of informational benefits (such as increased market efficiency and decreased information asymmetry) through the processing of Inline XBRL disclosures by information intermediaries such as analysts and researchers.[1787] Under the final rules, the required disclosures will not be provided to the public or the Commission for processing and analysis.[1788] Thus, the magnitude of benefit resulting from an Inline XBRL alternative for the disclosure requirements in the final rule may be lower than for other rules with Inline XBRL requirements.[1789]

Compared to the final rule, an Inline XBRL requirement would result in additional compliance costs for private funds and advisers, as a result of the requirement to select, apply, and review the appropriate XBRL U.S. GAAP taxonomy element tags for the required disclosures (or pay a third-party service provider to do so on their behalf). In addition, private fund advisers may not have prior experience with preparing Inline XBRL documents, as neither Form PF nor Form ADV is filed using Inline XBRL. Thus, under this alternative, private funds may incur the initial Inline XBRL implementation costs that are often associated with being subject to an Inline XBRL requirement for the first time (including, as applicable, the cost of training in-house staff to prepare filings in Inline XBRL and the cost to license Inline XBRL filing preparation software from vendors). Accordingly, the magnitude of compliance costs resulting from an

[1784] *See supra* section VI.B, VI.D.1; *see also, e.g.,* AIC Comment Letter I, Appendix 1.

[1785] *See supra* section VI.B; *see also, e.g.,* Clayton Comment Letter II.

[1786] *See supra* sections II.B.3, II.C.3.

[1787] *See, e.g.,* Y. Cong, J. Hao & L. Zou, *The Impact of XBRL Reporting on Market Efficiency,* 28 J. Info. Sys. 181 (2014) (finding support for the hypothesis that ''XBRL reporting facilitates the generation and infusion of idiosyncratic information into the market and thus improves market efficiency''); Y. Huang, J.T. Parwada, Y.G. Shan & J. Yang, *Insider Profitability and Public Information: Evidence From the XBRL Mandate,* Working Paper (2019) (finding XBRL adoption levels the informational playing field between insiders and non-insiders).

[1788] *See supra* section II.C.6.

[1789] *See, e.g.,* Updated Disclosure Requirements and Summary Prospectus for Variable Annuity and Variable Life Insurance Contracts, Investment Company Act Release No. 33814 (Mar. 11, 2020) [85 FR 25964, at 26041 (June 10, 2020)] (stating that an Inline XBRL requirement for certain variable contract prospectus disclosures, which are publicly available, would include informational benefits stemming from use of the Inline XBRL data by parties other than investors, including financial analysts, data aggregators, and Commission staff). While the required disclosures in the final rules would not be provided to the public or the Commission, such benefits would not accrue from an Inline XBRL requirement for the required disclosures.

Inline XBRL requirement under this final rule may be higher than for other rules with Inline XBRL requirements.

4. Alternatives to the Restrictions From Engaging in Certain Sales Practices, Conflicts of Interest, and Compensation Schemes

The Commission also considered restricting other activities, in addition to those currently restricted in the final rule. For example, we could have restricted advisers from charging private funds for expenses generally understood to be adviser expenses, such as those incurred in connection with the maintenance and operation of the adviser's business. To the extent that the performance of these activities is outsourced to a consultant, for example, and the fund is charged for that service, advisers may be effectively shifting expenses that would be generally recognized as adviser expenses to instead be fund expenses. The restriction of such charges and the enhancement of disclosures or consent practices around those costs could reduce investor monitoring costs. We believe, however, that identifying the types of charges associated with activities that should never be charged to the fund would likely be difficult. As a result, any such restriction could risk effectively limiting an adviser's ability to outsource certain activities that could be better performed by a consultant, because under the restriction the adviser would not be able to pass those costs on to the fund.

Further, the Commission considered providing an exemption for funds utilizing a pass-through expense model from the restriction on charging fees or expenses associated with certain examinations, investigations, and regulatory and compliance fees and expenses. This would allow advisers to avoid the costs associated with restructuring any arrangements not compliant with the restriction, including the costs associated with having to make enhanced disclosures of those expenses.[1790] We believe, however, that any exemption would need to be carefully balanced against the risk that it would continue to subject the fund to an adviser's incentive to shift its fees and expenses to the fund to reduce its costs without disclosure to investors.

The Commission also considered requiring consent for all of the restricted activities instead of just investigation expenses and borrowing.[1791] However, we believe there are economic reasons for each of the other restricted activities to not pursue these additional requirements. As discussed above, we believe whether expense pass-through arrangements risk distorting adviser incentives to pay attention to compliance and legal matters may vary from adviser to adviser and may vary according to the type of expense.[1792] For regulatory, compliance, and examination expenses, the risk may be comparatively low, and requiring investor consent or prohibiting the activity altogether may not be necessary. With respect to clawbacks, as many commenters stated, because this practice is widely implemented and negotiated, we do not believe there is a risk of investors being unable, today, to refuse to consent to this practice and being harmed as a result of being unable to consent to this practice.[1793] With respect to non-pro rata allocations of expenses, commenters stated that investors may also often benefit from these co-investment opportunities, or that expenses may be generated disproportionately by one fund investing in a portfolio company.[1794] Because these valid reasons for non-pro rata allocations of expenses may occur, a further restriction on non-pro rata allocations of expenses may have substantial unintended negative effects in terms of limiting these valid occurrences of non-pro rata allocations, even when a non-pro rata allocation would be fair and equitable. For example, in the case of an expense generated disproportionately by one fund in a portfolio company, that fund could refuse to consent to being charged greater than a pro rata share of expenses when it could be charged a pro rata share of expenses. In that instance, the consent requirement could result in other funds in the portfolio investment being overcharged.

We lastly considered prohibiting all of the activities outright instead of providing for certain exceptions for when advisers make certain disclosures and, in some cases, also obtain the required investor consent. However, as discussed above, we are convinced by commenters that our concerns with certain of these activities will be substantially alleviated, so long as advisers satisfy the disclosure requirements and, in some cases, consent requirements provided for in the final rules.[1795] We are also convinced by commenters that outright prohibitions would involve substantial indirect costs via unintended consequences of the rules. For example, we are convinced that an outright prohibition of reducing adviser clawbacks for taxes carries a risk of advisers forgoing offering adviser clawbacks altogether, including in circumstances that benefit investors.[1796] We are similarly convinced by comments that the restricted activities can provide bona fide benefits for investors that would be lost under an outright prohibition. For example, we are convinced that non-pro rata allocations of fees and expenses in certain cases can still be fair and equitable, if disclosed and if consent is obtained,[1797] and that many advisers borrow from funds to finance activities that are to the benefit of investors.[1798]

5. Alternatives to the Requirement That an Adviser To Obtain a Fairness Opinion or Valuation Opinion in Connection With Certain Adviser-Led Secondary Transactions

The Commission also considered changing the scope of the requirement for advisers to obtain a fairness opinion or valuation opinion in connection with adviser-led secondary transactions.

For example, we considered broadening the application of this rule to, for example, apply to all advisers, including advisers that are not required to register as investment advisers with the Commission, such as State-registered advisers and exempt reporting advisers. Under that alternative, investors would receive the assurance of the fairness of more adviser-led secondary transactions. An extension of the final rule to apply to all advisers would, however, likely impose the costs of obtaining fairness opinions or valuation opinions on smaller funds advised by unregistered advisers, and for these types of funds, the cost of obtaining such opinions would likely be relatively large compared to the value of fund assets and fees that the rule is intended to provide a check on. This could discourage those advisers from undertaking these transactions. This could ultimately reduce liquidity opportunities for fund investors.

We also considered consent requirements for the rule, where instead of requiring advisers to obtain a fairness opinion or valuation opinion, advisers would have been required to obtain investor consent prior to implementing an adviser-led secondary transaction. We considered this alternative because the market friction in these transactions bears certain similarities to the case

[1790] *See supra* section II.E.

[1791] *Id.*

[1792] *See supra* sections VI.C.2, VI.D.3.

[1793] *See supra* sections VI.C.2, II.E.1.b).

[1794] *See supra* section VI.C.2.

[1795] *See supra* section II.E.

[1796] *See supra* sections II.E.1.b), VI.D.3.

[1797] *See supra* section II.E.1.b).

[1798] *See supra* section II.E.2.b).

when advisers borrow from funds, where we are requiring consent: in both cases, the conflict of interest arises because the adviser is on both sides of a transaction.[1799]

However, as discussed in the baseline, unlike the case of adviser borrowing, there is a heightened risk of this conflict of interest distorting the terms or price of the transaction, and it may be difficult for disclosure practices or consent practices alone to resolve these conflicts.[1800] This is because in an adviser-led secondary there may be limited market-driven price discovery processes available to investors. For example, we considered the case where, if a recent sale improperly valued an asset, an adviser could be incentivized to initiate a transaction with the same valuation, which, depending on the terms of the transaction, may benefit the adviser at the expense of the investors. Because of cases like this, and the other cases we have discussed above, we do not consider consent requirements to be a necessary policy choice given the market failure at issue.[1801]

We also considered providing exemptions from the rule. An exemption could be provided where the adviser undertakes a competitive sale process for the assets being sold or for certain advisers to hedge funds or other liquid funds for whom the concerns regarding pricing of illiquid assets may be less relevant. Several commenters requested such exemptions.[1802] These exemptions would reduce the costs on advisers associated with obtaining the fairness opinion or valuation opinion, which could ultimately reduce costs for investors. However, while this alternative would reduce costs, we believe that any such exemptions could reduce the benefits of the final rule associated with providing greater assurance to investors of the fairness of the transaction. We believe that, even under circumstances where the adviser has conducted a competitive sales process, the effective check on this process provided by the fairness opinion or valuation opinion would benefit investors. Further, even for advisers to hedge funds or other liquid funds who are advising funds with predominantly highly liquid securities, we believe that a fairness opinion or valuation opinion would be beneficial to investors because the conflicts of interest inherent in structuring and leading a transaction may, despite the nature of the assets in the fund, harm investors.[1803]

Some commenters suggested that we expand the final rule to offer additional protections to investors, such as requiring advisers to use reasonable efforts to allow investors to remain invested on their original terms without carry crystallization.[1804] While we agree such an alternative could offer additional protection benefits to investors, those additional protections would continue to increase the costs of the final rule by further requiring advisers to revise their business practices, renegotiate contracts, and undertake additional costly changes to their operations. We believe those costs would not be warranted by the potential benefits.

6. Alternatives to the Prohibition From Providing Certain Preferential Terms and Requirement To Disclose All Preferential Treatment

Instead of requiring that private fund advisers provide investors and prospective investors with written disclosures regarding all preferential treatment the adviser or its related persons provided to other investors in the same fund, the Commission considered prohibiting all such terms. This could provide investors in private funds with increased confidence that the adviser's negotiations with other investors would not affect their investment in the private fund. We preliminarily believe, however, that an outright prohibition of all preferential terms may not provide significant additional benefits beyond prohibitions on providing certain preferential terms regarding redemption or information about portfolio holdings or exposures that would have a material negative effect on other investors. As discussed above, we believe that certain types of preferential terms raise relatively few concerns, if disclosed.[1805] Further, an outright prohibition of all preferential terms may limit the adviser's ability to respond to an individual investor's concerns during the course of attracting capital investments to private funds. Many commenters also expressed, and we agree, that anchor or seed investors may be provided with preferential terms for good reasons.[1806]

Further, we considered prohibiting *all* preferential terms regarding redemption or information about portfolio holdings or exposures, rather than just those that the adviser reasonably expects to have a material, negative effect on other investors in that fund or in a similar pool of assets. This could increase the investor protections associated with the rule, by eliminating the risk that a term not reasonably expected to have a material negative effect on investors could, ultimately, harm investors. We believe, however, that this alternative would likely provide more limited benefits and would increase costs associated with the rule similar to the above alternatives, for example by limiting the adviser's ability to respond to an individual investor's concerns during the course of attracting capital investments to private funds.

In addition, for preferential terms not regarding redemption or information about portfolio holdings or exposures, we considered requiring advisers to private funds to provide disclosure only when the term has a material negative effect on other fund investors. This could reduce the compliance burden on advisers associated with the costs of disclosure. We believe, however, that limiting disclosure to only those terms that an adviser determines to have a material negative effect could reduce an investor's ability to recognize the potential for harm from unforeseen favoritism toward other investors, relative to a requirement to disclose all preferential treatment.

We lastly considered implementing consent requirements, both as an alternative to the prohibition from providing certain preferential terms and as an alternative to the requirement to disclose all preferential treatment. With respect to the prohibition, as we have

[1799] *See supra* section VI.C.4.

[1800] *Id.*

[1801] *Id.*

[1802] *See, e.g.,* Cravath Comment Letter; Carta Comment Letter; ILPA Comment Letter I; IAA Comment Letter II; AIC Comment Letter I.

[1803] Moreover, the costs to liquid fund advisers are more likely to be limited, as many secondary transactions by liquid funds are not adviser-led (meaning that many such transactions do not involve investors converting or exchanging their interests for new interests in another vehicle advised by the adviser or any of its related persons) and so would not necessitate a fairness opinion.

[1804] *See, e.g.,* RFG Comment Letter II; OPERS Comment Letter.

[1805] *See supra* section II.F.

[1806] *See, e.g.,* AIC Comment Letter I; NY State Comptroller Comment Letter; Lockstep Ventures Comment Letter. One commenter also expressed concerns that the limited prohibitions on preferential treatment in the final rules may already impede co-investment activity, and these concerns would be exacerbated by this alternative. *See* AIC Comment Letter I, Appendix 1.

discussed above, the specific problems we have analyzed may be difficult, or unable, to be addressed via enhanced disclosures or even consent requirements alone. For example, investors facing a collective action problem today, in which they are unable to coordinate their negotiations, would still be unable to coordinate their negotiations even if consent was sought from each individual investor for a particular adviser practice.[1807] With respect to disclosures, in this case we are primarily concerned with how a lack of transparency can prevent investors from understanding the scope or magnitude of preferential terms granted, and as a result, may prevent such investors from requesting additional information on these terms or other benefits that certain investors, receive. In this case, these investors may simply be unaware of the types of contractual terms that could be negotiated and may not face any limitations over their ability to properly consent to these terms or their ability to properly negotiate these terms once the terms are sufficiently disclosed.[1808]

VII. Paperwork Reduction Act

A. Introduction

Certain provisions of our new rules will result in new ''collection of information'' requirements within the meaning of the PRA.[1809] The rule amendments will also have an impact on the current collection of information burdens of rules 206(4)–7 and 204–2 under the Advisers Act. The title of the new collection of information requirements we are adopting are ''Rule 211(h)(1)–2 under the Advisers Act,'' ''Rule 206(4)–10 under the Advisers Act,'' ''Rule 211(h)(2)–2 under the Advisers Act,'' and ''Rule 211(h)(2)–3 under the Advisers Act.'' The Office of Management and Budget (''OMB'') assigned the following control numbers for these new collections of information: Rule 206(4)–10 (OMB control number 3235–0795); Rule 211(h)(1)–2 (OMB control number 3235–0796); Rule 211(h)(2)–2 (OMB control number 3235–0797); Rule 211(h)(2)–3 (OMB control number 3235–0798). The titles for the existing collections of information that we are amending are: (i) ''Rule 206(4)–7 under the Advisers Act (17 CFR 275.206(4)–7)'' (OMB control number 3235–0585) and (ii) ''Rule 204–2 under the Advisers Act (17 CFR 275.204–2)'' (OMB control number 3235–0278). The Commission is submitting these collections of information to OMB for review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

In addition, the title of the new collection of information requirement we are proposing is ''Rule 211(h)(2)–1 under the Advisers Act.'' In the Proposing Release, we did not submit a PRA analysis for rule 211(h)(2)–1 because the proposed rule flatly prohibited certain conduct and, accordingly, did not contain a ''collection of information'' requirement within the meaning of the PRA. However, final rule 211(h)(2)–1 prohibits an adviser from engaging in certain activities, unless the adviser provides certain disclosure to investors, as discussed in greater detail below. In the Proposing Release, we solicited comment on whether rule 211(h)(2)–1 should include disclosure requirements. In response to comments received, we have decided to adopt such a requirement. Accordingly, we are requesting comment on this collection of information requirement, and intend to submit these requirements to the OMB for review under the PRA. Responses to the information collection will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

We published notice soliciting comments on the collection of information requirements in the Proposing Release for the other rules and submitted the proposed collections of information to OMB for review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. We received general comments to our time and cost burdens stating that we underestimated the burdens.[1810] We also received comments on aspects of the economic analysis that implicated estimates we used to calculate the collection of information burdens.[1811] We discuss these comments below. We are revising our total burden estimates to reflect the final amendments, updated data, new methodology for certain estimates, and comments we received to our estimates, including comments received to the economic analysis which implicate our estimates.

As discussed above, we are not applying certain of these rules to advisers regarding SAFs they advise.[1812] Thus, for purposes of the PRA analysis, we do not believe that there will be any additional collection of information burden on advisers regarding SAFs.[1813] We have adjusted the estimates from the proposal to reflect that the five private fund rules will not apply to SAF advisers regarding SAFs they advise.

We discuss below the new collection of information burdens associated with final rules 211(h)(1)–2, 206(4)–10, 211(h)(2)–1, 211(h)(2)–2, and 211(h)(2)–3 as well as the revised existing collection of information burdens associated with the amendments to rules 206(4)–7 and 204–2. Responses provided to the Commission in the context of amendments to rules 206(4)–7 and 204–2 will be kept confidential subject to the provisions of applicable law. Because the information collected pursuant to final rules 211(h)(1)–2, 211(h)(2)–1, 211(h)(2)–2, 206(4)–10, and 211(h)(2)–3 requires disclosures to existing investors and in some cases potential investors, these disclosures will not be kept confidential.

B. Quarterly Statements

Final rule 211(h)(1)–2 requires an investment adviser registered or required to be registered with the Commission to prepare a quarterly statement that includes certain standardized disclosures regarding the cost of investing in the private fund and the private fund's performance for any private fund that it advises, directly or indirectly, that has at least two full fiscal quarters of operating results, and distribute the quarterly statement to the

[1807] We also discussed above the example that, in cases where certain preferred investors with sufficient bargaining power to secure preferential terms over disadvantaged investors, majority consent by investor interest requirements may have minimal ability to protect the disadvantaged investors, as we would expect the larger, preferred investors to outvote the disadvantaged investors. *See supra* sections VI.B, VI.C.2.

[1808] *Id.*

[1809] 44 U.S.C. 3501 *et seq.*

[1810] *See, e.g.,* CCMR Comment Letter II (stating that the Proposing Release fails to consider how the proposed rules would interact with certain structural factors inherent in the private funds market to produce additional costs for market participants); IAA Comment Letter II (stating that the Commission underestimated the impact of the proposal on investors, advisers, and private funds).

[1811] *See, e.g.,* Comment Letter of Senator Tim Scott and Senator Bill Hagerty (Dec. 14, 2022) (stating that economic analysis of the financial impact on the private funds market grossly underestimates the costs that market participants will incur in order to comply with the Proposal); SIFMA–AMG Comment Letter I.

[1812] *See supra* section II.A (Scope) for additional information. The Commission is not applying all five private fund adviser rules to SAFs advised by SAF advisers.

[1813] Similarly, because we are not applying requirements of these rules to advisers with respect to SAFs they advise, we do not expect that there will be any additional burden on smaller advisers for purposes of the Final Regulatory Flexibility Analysis.

private fund's investors, unless such a quarterly statement is prepared and distributed by another person.[1814] If the private fund is not a fund of funds, then the quarterly statement must be distributed within 45 days after the end of each of the first three fiscal quarters of each fiscal year and 90 days after the end of each fiscal year. If the private fund is a fund of funds, then a quarterly statement must be distributed within 75 days after the first, second, and third fiscal quarter ends and 120 days after the end of the fiscal year of the private fund. The quarterly statement will provide investors with fee and expense disclosure for the prior quarterly period or, in the case of a newly formed private fund initial account statement, its first two full fiscal quarters of operating results. It will also provide investors with certain performance information depending on whether the fund is categorized as a liquid fund or an illiquid fund.[1815]

The collection of information is necessary to provide private fund investors with information about their private fund investments. The quarterly statement is designed to allow a private fund investor to compare standardized cost and performance information across its private fund investments. We believe this information will help inform investment decisions, including whether to remain invested in certain private funds or to invest in other private funds managed by the adviser or its related persons. More broadly, this disclosure will help inform investors about the cost and performance dynamics of this marketplace and potentially improve efficiency for future investments.

Each requirement to disclose information, offer to provide information, or adopt policies and procedures constitutes a ''collection of information'' requirement under the PRA. This collection of information is found at 17 CFR 275.211(h)(1)–2 and is mandatory. The respondents to these collections of information requirements will be investment advisers that are registered or required to be registered with the Commission that advise one or more private funds.

Based on Investment Adviser Registration Depository (IARD) data, as of December 31, 2022, there were 15,361 investment advisers registered with the Commission.[1816] According to this data, 5,248 registered advisers provide advice to private funds.[1817] We estimate that these advisers, on average, each provide advice to 10 private funds.[1818] We further estimate that these private funds, on average, each have a total of 80 investors.[1819] As a result, an average private fund adviser has, on average, a total of 800 investors across all private funds it advises. As noted above, because the information collected pursuant to final rule 211(h)(1)–2 requires disclosures to private fund investors, these disclosures will not be kept confidential.

Some commenters highlighted the potential costs of the required quarterly statements.[1820] One commenter generally criticized the hours estimates underlying cost estimates in the Proposing Release as unsupported, arbitrary, and possibly underestimated.[1821] One commenter stated that the introduction of the new regulatory terms that will only be used for complying with the performance reporting requirements under the quarterly statement rule would likely lead to additional compliance burdens and costs for private fund advisers, and that adopting new terms would require private funds to conduct an additional analysis and categorization of their private funds, which would need to be reviewed and potentially reevaluated from time to time.[1822] This commenter also stated that gathering information regarding covered portfolio investments would materially increase compliance burdens and costs to produce such information in adherence with the proposed timing and content requirements.[1823] Another commenter asserted that the Proposing Release failed to take account of the full extent of the likely costs associated with its disclosure requirements.[1824] Specifically, this commenter argued that there could be other costs beyond simply complying with the administrative aspects of the quarterly statement rule and that the Proposing Release fails to consider the operational burden imposed by the frequency and timing of the required reports.[1825]

We were persuaded by commenters who asserted that the proposed burdens underestimated the time and expense associated with the proposed quarterly statement rule. We believe that it will take more time than initially contemplated in the proposal to collect the applicable data, perform and review calculations, prepare the quarterly statements, and distribute them to investors. To address commenters' concerns, and recognizing the changes from the proposal discussed above in Section II.B (Quarterly Statements), we are revising the estimates upwards as reflected in the chart below. For instance, to address one commenter's contention that we underestimated the burdens generally, and recognizing the changes from the proposal, we are revising the internal initial burden for the preparation of the quarterly statement estimate upwards to 12 hours. We believe this is appropriate because advisers will likely need to develop, or work with service providers to develop, new systems to collect and prepare the statements. We have also adjusted these estimates to reflect that the final rule will not apply to SAF advisers with respect to SAFs they advise.

We have made certain estimates of this data solely for this PRA analysis. The table below summarizes the initial and ongoing annual burden estimates associated with the final quarterly statement rule.

[1814] *See* final rule 211(h)(1)–2.

[1815] *See* final rule 211(h)(1)–2(d).

[1816] Excluding advisers that provide advice solely to SAFs, there were 15,288 investment advisers registered with the Commission.

[1817] *See* Form ADV, Part 1A, Schedule D, Section 7.B.(1). The final rule will not apply to SAF advisers with respect to SAFs they advise. These figures do not include SAF advisers that manage only SAFs.

[1818] *See* Form ADV, Part 1A, Schedule D, Section 7.B.(1). The final rule will not apply to SAFs. These figures do not include SAFs.

[1819] *See* Form ADV, Part 1A, Schedule D, Section 7.B.(1).A., #13.

[1820] *See, e.g.,* Alumni Ventures Comment Letter; Segal Marco Comment Letter; Roubaix Comment Letter; ATR Comment Letter; AIC Comment Letter I.

[1821] *See* AIC Comment Letter I, Appendix I (stating that the Commission's wage rates used to quantify costs may be underestimated); *But see* LSTA Comment Letter, Exhibit C (stating that the Commission's wage rates are conservatively high and the commenter used a lower wage rate provided by the Bureau of Labor Statistics in its analysis). *See also supra* section VI.D.2 (discussing the Commission's attempts to quantify costs accurately).

[1822] *See* SIFMA–AMG Comment Letter I.

[1823] *Id.*

[1824] *See* CCMR Comment Letter I.

[1825] *Id.*

TABLE 1—RULE 211(H)(1)–2 PRA ESTIMATES

	Internal initial burden hours	Internal annual burden hours	Wage rate [1]	Internal time cost	Annual external cost burden
Estimates					
Preparation of account statements.	12 hours	14 hours [2] (See FN for calculation).	$436 (blended rate for compliance attorney ($425), assistant general counsel ($543), and financial reporting manager ($339)).	$6,104 (Internal annual burden times blended wage rate).	$4,590 [3] (See FN for calculation).
Distribution of account statements to existing investors.	3 hours	5 hours [4] (See FN for calculation).	$73 (rate for general clerk).	$365 (Internal annual burden times wage rate).	$1,059 [5] (See FN for calculation).
Total new annual burden per private fund.		19 hours		$6,469	$5,649.
Avg. number of private funds per adviser.		10 private funds		10 private funds	10 private funds.
Number of PF advisers		5,248 advisers		5,248 advisers	2,624.[6]
Total new annual burden		997,120 hours		$339,493,120	$148,229,760.

Notes:

[1] The hourly wage rates in these estimates are based on (1) SIFMA's *Management & Professional Earnings in the Securities Industry 2013,* modified by SEC staff to account for an 1,800-hour work-year and inflation, and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead; and (2) SIFMA's *Office Salaries in the Securities Industry 2013,* modified by SEC staff to account for an 1,800-hour work-year and inflation, and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead. The final estimates are based on the preceding SIFMA data sets, which SEC staff have updated since the Proposing Release to account for current inflation rates.

[2] This includes the internal initial burden estimate annualized over a three-year period, plus 10 hours of ongoing annual burden hours and takes into account that there will be four statements prepared each year. The estimate of 14 hours is based on the following calculation: ((12 initial hours/3 years) + 10 hours of additional ongoing burden hours) = 14 hours.

[3] This estimated burden is based on the sum of the estimated wage rate of $565/hour, for 5 hours, ($2,825) for outside legal services and the estimated wage rate of $353/hour, for 5 hours, ($1,765) for outside accountant assistance, and it assumes that there will be four statements prepared each year. The Commission's estimates of the relevant wage rates for external time costs, such as outside legal services, take into account staff experience, a variety of sources including general information websites, and adjustments for inflation.

[4] This includes the internal initial burden estimate annualized over a three-year period, plus 4 hours of ongoing annual burden hours that takes into account that there will be four statements prepared each year. The estimate of 5 hours is based on the following calculation: ((3 initial hours/3 years) + 4 hours of additional ongoing burden hours) = 5 hours.

[5] This estimated burden is based on the estimated wage rate of $353/hour, for 3 hours, for outside accounting services, and it assumes that there will be four statements distributed each year. *See supra* endnote 1 (regarding wage rates with respect to external cost estimates).

[6] We estimate that 50% of advisers will use outside legal and accounting services for these collections of information. This estimate takes into account that advisers may elect to use these outside services (along with in-house counsel), based on factors such as adviser budget and the adviser's standard practices for using such outside services, as well as personnel availability and expertise.

C. Mandatory Private Fund Adviser Audits

Final rule 206(4)–10 will require investment advisers that are registered or required to be registered to cause each private fund they advise, directly or indirectly, to undergo a financial statement audit in accordance with the audit provision (and related requirements for delivery of audited financial statements) under the custody rule.[1826] We believe that final rule 206(4)–10 will protect the fund and its investors against the misappropriation of fund assets and that an audit performed by an independent public accountant will provide an important check on the adviser's valuation of private fund assets, which generally serve as the basis for the calculation of the adviser's fees. The collection of information is necessary to provide private fund investors with information about their private fund investments.

Each requirement to disclose information, offer to provide information, or adopt policies and procedures constitutes a ''collection of information'' requirement under the PRA. This collection of information is found at 17 CFR 275.206(4)–10 and is mandatory to the extent the adviser provides investment advice to a private fund. The respondents to these collections of information requirements will be investment advisers that are registered or required to be registered with the Commission that advise one or more private funds. All responses required by the audit rule would be mandatory. One response type (the audited financial statements) would be distributed only to investors in the private fund and would not be confidential.

Based on IARD data, as of December 31, 2022, there were 15,361 investment advisers registered with the Commission.[1827] According to this data, 5,248 registered advisers, excluding advisers managing solely SAFs, provide advice to private funds.[1828] We estimate that these advisers, on average, each provide advice to 10 private funds, excluding SAFs.[1829] We further estimate that these private funds, excluding SAFs, each have a total of 80 investors, on average.[1830] As a result, an average private fund adviser would have, on average, a total of 800 investors across all private funds it advises.

One commenter generally criticized the hours estimates underlying the cost estimates in the Proposing Release as unsupported, arbitrary, and possibly underestimated.[1831] Several commenters highlighted the costs associated with the audit rule, stating that it would substantially increase audit prices because, for example, there may be an insufficient number of suitable auditors available.[1832] One commenter asserted that the Commission failed to provide an adequate justification or backup in its analysis.[1833] This commenter argued that the cost estimate is underestimated by at least 100 percent.

We have made certain estimates of this data, as discussed below, solely for

[1826] *See* final rule 206(4)–10. The rule also requires an adviser to *take all reasonable steps* to cause its private fund client to undergo an audit that satisfies the rule when the adviser does not control the private fund and is neither controlled by nor under common control with the fund.

[1827] Excluding advisers that provide advice solely to SAFs, there were 15,288 investment advisers registered with the Commission.

[1828] *See* Form ADV, Part 1A, Schedule D, Section 7.B.(1).

[1829] *See* Form ADV, Part 1A, Schedule D, Section 7.B.(1).

[1830] *See* Form ADV, Part 1A, Schedule D, Section 7.B.(1).A., #13.

[1831] *See* AIC Comment Letter I.

[1832] *See, e.g.,* AIC Comment Letter I; AIMA/ACC Comment Letter; SBAI Comment Letter.

[1833] *See, e.g.,* LSTA Comment Letter.

this PRA analysis. The table below summarizes the initial and ongoing annual burden estimates associated with the proposed rule's reporting requirement. We have adjusted this estimate upwards from the proposal to reflect the final rule, updated data, new methodology for certain estimates, and comments we received to our estimates asserting that we underestimated these figures in the proposal. We have further adjusted these estimates to reflect that the final rule will not apply to SAF advisers with respect to SAFs they advise.

TABLE 2—RULE 206(4)–10 PRA ESTIMATES

	Internal initial burden hours	Internal annual burden hours	Wage rate [1]	Internal time cost	Annual external cost burden
Estimates					
Distribution of audited financial statements [2].	0 hours	1.33 hours [3]	$175 (blended rate for intermediate accountant ($200), general accounting supervisor ($252), and general clerk ($73)).	$232.75	$75,000.[4]
Total new annual burden per private fund.		1.33 hours		$232.75	$75,000.[5]
Avg. number of private funds per adviser.		10 private funds		10 private funds	10 private funds.
Number of advisers		5,248 advisers		5,248 advisers	5,248 advisers.
Total new annual burden		69,798.4 [6] hours		$12,214,720 [6]	$3,936,000,000.[6]

Notes:

[1] *See* SIFMA data sets *supra* Note 1 to Table 1 Rule 211(h)(1)–2 PRA Estimates.

[2] The audit provision will require an adviser to obtain an audit at least annually and upon an entity's liquidation. To the extent not prohibited, we anticipate that, in some cases, the fund will bear the audit expense, in other cases the adviser will bear it, and in other instances both the adviser and fund will share the expense. The liquidation audit would serve as the annual audit for the fiscal year in which it occurs. *See* rule 206(4)–10.

[3] This estimate takes into account that the financial statements must be distributed once annually under the audit rule and that a liquidation audit would replace a final audit in a year. Based on our experience under the custody rule, we estimate the hour burden imposed on the adviser relating to the distribution of the audited financial statements with respect to the investors in each fund should be minimal, approximately one minute per investor. *See* 2009 Custody Rule Release, *supra* footnote 510, at 63.

[4] Based on our experience, we estimate that the party (or parties) that bears the audit expense would pay an average audit fee of $75,000 per fund. We estimate that individual fund audit fees would tend to vary over an estimated range from $15,000 to $300,000, and that some fund audit fees would be higher or lower than this range. We understand that the price of the audit has many variables, such as whether it is a liquid fund or illiquid fund, the number of its holdings, availability of a PCAOB registered and inspected auditor, economies of scale, and the location and size of the auditor.

[5] We assume the same frequency of these cost estimates as for the internal annual burden hours estimate.

[6] Based on Form ADV data, apart from SAFs approximately 88% of private fund advisers already cause their private funds to undergo a financial statement audit. *See* Section VI (Economic Analysis—Economic Baseline—Fund Audits). Accordingly, we expect the incremental burdens associated with the rule to be substantially lower than the figures reflected herein.

D. Restricted Activities

Final rule 211(h)(2)–1 prohibits all private fund advisers from, directly or indirectly, engaging in the following activities, unless they provide written disclosure to investors and, in some cases, obtain investor consent regarding such activities: charging the private fund for fees or expenses associated with an investigation of the adviser or its related persons by any governmental or regulatory authority (other than fees and expenses related to an investigation that results or has resulted in a court or governmental authority imposing a sanction for a violation of the Investment Advisers Act of 1940 or the rules promulgated thereunder); charging the private fund for any regulatory or compliance fees or expenses, or fees or expenses associated with an examination, of the adviser or its related persons; reducing the amount of any adviser clawback by actual, potential, or hypothetical taxes applicable to the adviser, its related persons, or their respective owners or interest holders; charging or allocating fees and expenses related to a portfolio investment on a non-pro rata basis when more than one private fund or other client advised by the adviser or its related persons have invested in the same portfolio company; and borrowing money, securities, or other private fund assets, or receiving a loan or extension of credit, from a private fund client.

As noted above, in the Proposing Release we did not submit a PRA analysis for rule 211(h)(2)–1 because the proposed rule flatly prohibited certain conduct and, accordingly, proposed rule 211(h)(2)–1 did not contain a ''collection of information'' requirement within the meaning of the PRA. However, final rule 211(h)(2)–1 prohibits an adviser from engaging in certain activity, unless the adviser provides certain disclosure to investors. Accordingly, we are requesting comment on this collection of information requirement in this release and intend to submit these requirements to the OMB for review under the PRA.

The collection of information is necessary to provide private fund investors with information about their private fund investments. We believe that many advisers fail to provide disclosure of the activities covered by the restrictions or, when disclosure is provided, it is often insufficient.

Each requirement to disclose information, offer to provide information, or adopt policies and procedures constitutes a ''collection of information'' requirement under the PRA. This collection of information is found at 17 CFR 275.211(h)(2)–1 and is mandatory if the adviser engages in the restricted activity. The respondents to these collections of information requirements would be all investment advisers that advise one or more private funds. Based on IARD data, as of December 31, 2022, there were 12,234 investment advisers (including both registered and unregistered advisers, but excluding advisers managing solely SAFs) that provide advice to private funds.[1834] We estimate that these

[1834] The following types of private fund advisers (excluding advisers managing solely SAFs), among others, would be subject to the rule: unregistered advisers (*i.e.,* advisers that may be prohibited from registering with us), foreign private advisers, and advisers that rely on the intrastate exemption from SEC registration and/or the *de minimis* exemption from SEC registration. However, we are unable to estimate the number of advisers in certain of these categories because these advisers do not file reports or other information with the SEC and we are unable to find reliable, public information. As a result, the above estimate is based on information from SEC-registered advisers to private funds, exempt reporting advisers (at the State and Federal levels), and State-registered advisers to private funds, in each instance excluding advisers that manage solely SAFs. These figures are approximate, exclude in each instance advisers that manage solely SAFs, and assume that all exempt reporting advisers are advisers to private funds. The breakdown is as follows: 5,248 SEC-registered advisers to private funds; 5,234 exempt reporting

Continued

advisers, on average, each provide advice to 8 private funds (excluding SAFs). We further estimate that these private funds would, on average, each have a total of 63 investors. As a result, an average private fund adviser would have a total of 504 investors across all private funds it advises. As noted above, because the information collected pursuant to final rule 211(h)(2)–1 requires disclosures to private fund investors, these disclosures would not be kept confidential.

We have made certain estimates of this data solely for this PRA analysis. The table below summarizes the initial and ongoing annual burden estimates associated with the rule. We request comment on whether the estimates associated with the new collection of information requirements in ''Rule 211(h)(2)–1 under the Advisers Act'' are reasonable in Section VII.I below.

TABLE 3—RULE 211(h)(2)–1 PRA ESTIMATES

	Internal initial burden hours	Internal annual burden hours	Wage rate [1]	Internal time cost	Annual external cost burden
Proposed Estimates					
Preparation of written notices and consents.	12 hours	8 hours [2]	$422 (blended rate for compliance attorney ($425), accounting manager ($337), senior portfolio manager ($383) and assistant general counsel ($543)).	$3,376	$3,178.[3]
Provision, distribution, collection, retention, and tracking of written notices and consents.	6 hours	4 hours [4]	$73 (rate for general clerk)	$292.	
Total new annual burden per private fund.		12 hours		$3,668	$3,178.
Avg. number of private funds per adviser.		8 private funds		8 private funds	8 private funds.
Number of advisers		12,234 advisers		12,234 advisers	9,176 advisers.[5]
Total new annual burden		1,174,464 hours		$358,994,496	$233,290,624.

Notes:

[1] *See* SIFMA data sets, *supra* Note 1 to Table 1 Rule 211(h)(1)–2 PRA Estimates.

[2] This includes the internal initial burden estimate annualized over a three-year period, plus 4 hours of ongoing annual burden hours and assumes notices and consent forms would be issued once a quarter to investors. The estimates assume that most private fund advisers will rely on the disclosure-based or investor consent exceptions to the rules and thus distribute written notices and consent forms to investors (and collect, retain, and track consent forms); however, the estimates also take into account that certain fund agreements may not permit or otherwise contemplate the activity restricted by the rule (*e.g.,* liquid funds may not contemplate an adviser clawback of performance compensation) and, accordingly, the estimates take into account that advisers to those funds will not prepare written notices (or, if applicable, prepare, collect, retain, and track consent forms) as contemplated by the rule. The estimate of 8 hours is based on the following calculation: ((12 initial hours/3 years) + 4 hours of additional ongoing burden hours) = 8 hours.

[3] This estimated burden is based on the estimated wage rate of $565/hour, for 5 hours, for outside legal services and $353/hour, for one hour, for outside accounting services, at the same frequency as the internal burden hours estimate. The Commission's estimates of the relevant wage rates for external time costs, such as outside legal services, take into account staff experience, a variety of sources including general information websites, and adjustments for inflation.

[4] This includes the internal initial burden estimate annualized over a three-year period, plus 2 hours of ongoing annual burden hours. The estimate of 4 hours is based on the following calculation: ((6 initial hours/3 years) + 2 hours of additional ongoing burden hours) = 4 hours.

[5] We estimate that 75% of advisers will use outside legal services for these collections of information. This estimate takes into account that advisers may elect to use outside legal services (along with in-house counsel), based on factors such as adviser budget and the adviser's standard practices for using outside legal services, as well as personnel availability and expertise.

E. Adviser-Led Secondaries

Final rule 211(h)(2)–2 requires an adviser registered or required to be registered with the Commission that is conducting an adviser-led secondary transaction to distribute to investors a fairness opinion or valuation opinion from an independent opinion provider and a summary of any material business relationships the adviser or any of its related persons has, or has had within the past two years, with the independent opinion provider.[1835] This requirement provides an important check against an adviser's conflicts of interest in structuring and leading a transaction from which it may stand to profit at the expense of private fund investors and helps ensure that private fund investors are offered a fair price for their private fund interests. Specifically, this requirement is designed to help ensure that investors receive the benefit of an independent price assessment, which we believe will improve their decision-making ability and their overall confidence in the transaction. The collection of information is necessary to provide investors with information about securities transactions in which they may engage.

Each requirement to disclose information, offer to provide information, or adopt policies and procedures constitutes a ''collection of information'' requirement under the PRA. This collection of information is found at 17 CFR 275.211(h)(2)–2 and is mandatory. The respondents to these collections of information requirements will be investment advisers that are registered or required to be registered with the Commission that advise one or more private funds. Based on IARD data, as of December 31, 2022, there were 15,361 investment advisers registered with the Commission.[1836] According to this data, 5,248 registered advisers provide advice to private funds.[1837] Of these 5,248 advisers, we estimate that 10%, or approximately 525 advisers, conduct an adviser-led secondary transaction each year. Of these advisers, we further estimate that each conducts one adviser-led secondary transaction each year. As a result, an adviser will have obligations under the rule with regard to 80 investors.[1838] As noted above, because the information collected pursuant to final rule 211(h)(2)–2 requires disclosures to private fund investors,

advisers (at the Federal level); 562 State-registered advisers to private funds; and 1,922 State exempt reporting advisers.

[1835] *See* final rule 211(h)(2)–2.

[1836] Excluding advisers that provide advice solely to SAFs, there were 15,288 investment advisers registered with the Commission.

[1837] *See* Form ADV, Part 1A, Schedule D, Section 7.B.(1). The final rule will not apply to SAF advisers with respect to SAFs they advise. These figures do not include SAF advisers that manage only SAFs.

[1838] *See supra* section VII.B.

these disclosures will not be kept confidential.

One commenter generally criticized the hours estimates underlying the cost estimates in the Proposing Release as unsupported, arbitrary, and possibly underestimated.[1839] Some commenters asserted that the Commission's estimate of the cost for a fairness opinion was likely too low in light of available information on fairness opinions.[1840] However, many of these commenters stated that a valuation opinion would likely be less costly in most circumstances.[1841] We believe that these commenters' concerns on costs are substantially mitigated by the option in the final rule for a valuation opinion instead of a fairness opinion; however, we have adjusted the estimates upwards to address comments received, which generally stated that the proposed estimate underestimated the cost of fairness opinions.[1842] We have also adjusted this estimate upwards from the proposal to reflect the final rule and updated data for certain estimates. We have adjusted these estimates to reflect that the final rule will not apply to SAF advisers with respect to SAFs they advise.

We have made certain estimates of this data solely for this PRA analysis. The table below summarizes the annual burden estimates associated with the rule's requirements.

TABLE 4—RULE 211(h)(2)–2 PRA ESTIMATES

	Internal initial burden hours	Internal annual burden hours	Wage rate [1]	Internal time cost	Annual external cost burden
Estimates					
Preparation/Procurement of fairness or valuation opinion.	0 hours	10 hours [2]	$429.33 (blended rate for compliance attorney ($425), assistant general counsel ($543), and senior business analyst ($320)).	$4,293.30	$100,000.[3]
Preparation of material business relationship summary.	0 hours	2 hours	$484 (blended rate for compliance attorney ($425) and assistant general counsel ($543)).	$968	$565.[4]
Distribution of fairness/valuation opinion and material business relationship summary.	0 hours	1 hour	$73 (rate for general clerk)	$73	$0.
Total new annual burden per private fund.		13 hours		$5,334.30	$100,565.
Number of advisers		525 advisers [5]		525 advisers	525 advisers.
Total new annual burden		6,825 hours		$2,800,507.50	$52,796,625.

Notes:
[1] *See* SIFMA data sets *supra* Note 1 to Table 1 Rule 211(h)(1)–2 PRA Estimates.
[2] Includes the time an adviser will spend gathering materials to provide to the independent opinion provider so that the latter can prepare the fairness or valuation opinion.
[3] This estimated burden is based on our understanding of the general cost of a fairness/valuation opinion in the current market. The cost will vary based on, among other things, the complexity, terms, and size of the adviser-led secondary transaction, as well as the nature of the assets of the fund.
[4] This estimated burden is based on the estimated wage rate of $565/hour, for 1 hour, for outside legal services at the same frequency as the internal burden hours estimate. The Commission's estimates of the relevant wage rates for external time costs, such as outside legal services, take into account staff experience, a variety of sources including general information websites, and adjustments for inflation.
[5] We estimate that 10% of all registered private fund advisers conduct an adviser-led secondary transaction each year.

F. Preferential Treatment

Final rule 211(h)(2)–3 prohibits all private fund advisers from providing preferential terms to investors regarding certain redemptions or providing certain information about portfolio holdings or exposures, subject to certain limited exceptions.[1843] The rule also prohibits these advisers from providing any other preferential treatment to any investor in the private fund unless the adviser provides written disclosures to prospective and current investors in a private fund regarding all preferential treatment the adviser or its related persons are providing to other investors in the same fund. For prospective investors, the new rule requires advisers to provide the written notice regarding any preferential treatment related to any all material economic terms prior to an investor's investment in the fund.[1844] The final rule also requires advisers to provide investors with comprehensive annual disclosure of all preferential treatment provided by the adviser or its related persons since the last annual notice. The final rule requires the adviser to distribute to current investors an initial notice of such preferential treatment (i) for an illiquid fund, as soon as reasonably practicable following the end of the fund's fundraising period and (ii) for a liquid fund, as soon as reasonably practicable following the investor's investment in the private fund.

The new rule is designed to protect investors and serve the public interest by requiring disclosure of preferential treatment afforded to certain investors. The new rule will increase transparency to better inform investors regarding the breadth of preferential terms, the potential for those terms to affect their investment in the private fund, and the potential costs (including compliance costs) associated with these preferential terms. Also, this disclosure will help investors shape the terms of their relationship with the adviser of the private fund. The collection of information is necessary to provide

[1839] *See* AIC Comment Letter I. Another commenter's calculation of aggregate costs associated with the adviser-led secondaries rule yields substantially higher aggregate costs, but per-fund costs comparable to those reflected here. The commenter's aggregate cost result is driven by the commenter assuming, without basis or discussion, that the adviser-led secondaries rule's costs will be borne over 4,533 fairness opinions instead of 504, as was assumed by the Proposing Release. *See* LSTA Comment Letter, Exhibit C. We believe this to be an error in the commenter's analysis and have continued to assume approximately 10 percent of advisers conduct an adviser-led secondary transaction each year. *See supra* section VI.D.6.

[1840] *See* AIC Comment Letter I; Houlihan Comment Letter; MFA Comment Letter I; MFA Comment Letter I, Appendix A; Ropes & Gray Comment Letter.

[1841] MFA Comment Letter I; MFA Comment Letter I, Appendix A; AIC Comment Letter I.

[1842] *See* Houlihan Comment Letter; LSTA Comment Letter.

[1843] *See* final rule 211(h)(2)–3(b).

[1844] *See* final rule 211(h)(2)–3(b)(1).

private fund investors with information about their private fund investments.

Each requirement to disclose information, offer to provide information, or adopt policies and procedures constitutes a ''collection of information'' requirement under the PRA. This collection of information is found at 17 CFR 275.211(h)(2)–3 and is mandatory. The respondents to these collections of information requirements will be all investment advisers that advise one or more private funds. Based on IARD data, as of December 31, 2022, there were 12,234 investment advisers (including both registered and unregistered advisers, but excluding advisers managing solely SAFs) that provide advice to private funds.[1845] We estimate that these advisers, on average, each provide advice to 8 private funds (excluding SAFs). We further estimate that these private funds, on average, each have a total of 63 investors. As a result, an average private fund adviser has a total of 504 investors across all private funds it advises. As noted above, because the information collected pursuant to rule 211(h)(2)–3 requires disclosures to private fund investors and prospective investors, these disclosures will not be kept confidential.

One commenter generally criticized the hours estimates underlying the cost estimates in the Proposing Release as unsupported, arbitrary, and possibly underestimated.[1846] Another commenter emphasized that existing fund documents would need to be amended to come into compliance with the proposed rules and that the release fails to identify or quantify the transaction costs associated with the renegotiation of fund documents.[1847] Another commenter made a similar argument, asserting that, without a legacy status provision for existing relationships, the proposed changes likely will require advisers to renegotiate agreements with investors and that proposal significantly underestimates the costs of the proposals on existing private funds.[1848]

We have adjusted this estimate upwards from the proposal to reflect the final rule (including with respect to the exceptions in paragraph (a) of the final rule), updated data, new methodology for certain estimates, and comments we received to our estimates asserting that we underestimated these figures in the proposal. We have also adjusted these estimates to reflect that the final rule will not apply to SAF advisers with respect to SAFs they advise.

We have made certain estimates of this data solely for this PRA analysis. The table below summarizes the initial and ongoing annual burden estimates.

TABLE 5—RULE 211(h)(2)–3 PRA ESTIMATES

	Internal initial burden hours	Internal annual burden hours	Wage rate [1]	Internal time cost	Annual external cost burden
Estimates					
Preparation of written notice [6].	12 hours	8 hours [2]	$435 (blended rate for compliance attorney ($425), accounting manager ($337), and assistant general counsel ($543)).	$3,480	$565.[3]
Provision/distribution of written notice [6].	1 hours	3.33 hours [4]	$73 (rate for general clerk).	$243.09.	
Total new annual burden per private fund.		11.33 hours		$3,723.09	$565.
Avg. number of private funds per adviser.		8 private funds		8 private funds	8 private funds.
Number of advisers		12,234 advisers		12,234 advisers	9,176 advisers.[5]
Total new annual burden		1,108,890 hours		$364,386,264.48	$41,475,520.

Notes:

[1] *See* SIFMA data sets, *supra* Note 1 to Table 1 Rule 211(h)(1)–2 PRA Estimates.

[2] This includes the internal initial burden estimate annualized over a three-year period, plus 4 hours of ongoing annual burden hours and assumes notices will be issued once annually to existing investors and once quarterly for prospective investors. The estimate of 8 hours is based on the following calculation: ((12 initial hours/3 years) + 4 hours of additional ongoing burden hours) = 8 hours. The burden hours associated with reviewing preferential treatment provided to other investors in the same fund and updating the written notice take into account that (i) most closed-end funds will only raise new capital for a finite period of time and thus the burden hours will likely decrease after the fundraising period terminates for such funds since they will not continue to seek new investors and will not continue to agree to new preferential treatment for new investors and (ii) most open-end private funds continuously raise capital and thus the burden hours will likely remain the same year over year since they will continue to seek new investors and will continue to agree to preferential treatment for new investors.

[3] This estimated burden is based on the estimated wage rate of $565/hour, for 1 hours, for outside legal services at the same frequency as the internal burden hours estimate. The Commission's estimates of the relevant wage rates for external time costs, such as outside legal services, take into account staff experience, a variety of sources including general information websites, and adjustments for inflation.

[4] This includes the internal initial burden estimate annualized over a three-year period, plus 3 hours of ongoing annual burden hours. The estimate of 3.33 hours is based on the following calculation: ((1 initial hours/3 years) + 3 hours of additional ongoing burden hours) = 3.33 hours.

[5] We estimate that 75% of advisers will use outside legal services for these collections of information. This estimate takes into account that advisers may elect to use outside legal services (along with in-house counsel), based on factors such as adviser budget and the adviser's standard practices for using outside legal services, as well as personnel availability and expertise.

[6] References to written notices in this table, and the burdens associated with the preparation, provision, and distribution thereof, include estimates related to advisers (i) offering the same preferential redemption terms to all existing and future investors and (ii) offering the same preferential information to all other investors, in each case, in accordance with the exceptions to the prohibitions aspect of the final rule.

[1845] The following types of private fund advisers (excluding advisers managing solely SAFs), among others, will be subject to the rule: unregistered advisers (*i.e.,* advisers those that may be prohibited from registering with us), foreign private advisers, and advisers that rely on the intrastate exemption from SEC registration and/or the *de minimis* exemption from SEC registration. However, we are unable to estimate the number of advisers in certain of these categories because these advisers do not file reports or other information with the SEC and we are unable to find reliable, public information. As a result, the above estimate is based on information from SEC-registered advisers to private funds, exempt reporting advisers (at the State and Federal levels), and State-registered advisers to private funds. These figures are approximate, exclude in each instance advisers that manage solely SAFs, and assume that all exempt reporting advisers are advisers to private funds. The breakdown is as follows: 5,248 SEC-registered advisers to private funds; 5,234 exempt reporting advisers (at the Federal level); 562 State-registered advisers to private funds; and 1,922 State exempt reporting advisers.

[1846] *See* AIC Comment Letter I.

[1847] *See* CCMR Comment Letter I.

[1848] *See* MFA Comment Letter I. We note, however, that the final rule contains a legacy provision.

G. Written Documentation of Adviser's Annual Review of Compliance Program

The amendment to rule 206(4)–7 requires investment advisers that are registered or required to be registered to document the annual review of their compliance policies and procedures in writing.[1849] We believe that such a requirement will focus renewed attention on the importance of the annual compliance review process and will help ensure that advisers maintain records regarding their annual compliance review that will allow our staff to determine whether an adviser has complied with the compliance rule.

This collection of information is found at 17 CFR 275.206(4)–7 and is mandatory. The Commission staff uses the collection of information in its examination and oversight program. As noted above, responses provided to the Commission in the context of its examination and oversight program concerning the amendments to rule 206(4)–7 will be kept confidential subject to the provisions of applicable law.

Based on IARD data, as of December 31, 2022, there were 15,361 investment advisers registered with the Commission. In our most recent PRA submission for rule 206(4)–7, we estimated a total hour burden of 1,293,840 hours and a total monetized time burden of $322,036,776. As noted above, all advisers that are registered or required to be registered, including advisers to SAFs, will be required to document their annual review in writing.

Commenters argued there would be certain additional costs associated with the amendment to rule 206(4)–7, such as compliance consultants or outside counsel.[1850] We have adjusted this estimate upwards from the proposal to reflect the final amendments, updated data, and comments we received to our estimates asserting that we underestimated these figures in the proposal. The table below summarizes the initial and ongoing annual burden estimates associated with the amendments to rule 206(4)–7.

TABLE 6—RULE 206(4)–7 PRA ESTIMATES

	Internal annual burden hours	Wage rate [1]	Internal time cost	Annual external cost burden
Estimates				
Written documentation of annual review.	5.5 hours [2]	$484 (blended rate for compliance attorney ($425) and assistant general counsel ($543)).	$2,662	$459.[3]
Number of advisers	15,361 advisers		15,361 advisers	7,681 advisers.[4]
Total new annual burden	84,486 hours		$40,890,982	$3,525,579.

Notes:
[1] *See* SIFMA data sets, *supra* Note 1 to Table 1 Rule 211(h)(1)–2 PRA Estimates.
[2] We estimate that these amendments will increase each registered investment adviser's average annual collection burden under rule 206(4)–7 by 5.5 hours.
[3] This estimated burden is based on the sum of the estimated wage rate of $565/hour, for 0.5 hours, ($282.5) for outside legal services and the estimated wage rate of $353/hour, for 0.5 hours, ($176.5) for outside accountant assistance.
[4] We estimate that 50% of advisers will use outside legal services for these collections of information. This estimate takes into account that advisers may elect to use outside legal services (along with in-house counsel), based on factors such as adviser budget and the adviser's standard practices for using outside legal services, as well as personnel availability and expertise.

H. Recordkeeping

The amendments to rule 204–2 will require advisers to private funds, where the adviser is registered or required to be registered with the Commission, to retain books and records related to the quarterly statement rule, the audit rule, the adviser-led secondaries rule, the restricted activities rules, and the preferential treatment rule.[1851] These amendments will help facilitate the Commission's inspection and enforcement capabilities.

Specifically, the books and records amendments related to the quarterly statement rule will require advisers to (i) retain a copy of any quarterly statement distributed to fund investors as well as a record of each addressee and the date(s) the statement was sent; (ii) retain all records evidencing the calculation method for all expenses, payments, allocations, rebates, offsets, waivers, and performance listed on any statement delivered pursuant to the quarterly statement rule; and (iii) make and keep documentation substantiating the adviser's determination that the private fund it manages is a liquid fund or an illiquid fund pursuant to the quarterly statement rule.[1852]

The books and records amendments related to the audit rule will require advisers to keep a copy of any audited financial statements distributed along

[1849] *See* rule 206(4)–7(b).

[1850] Curtis Comment Letter; SBAI Comment Letter.

[1851] *See* final amended rule 204–2.

[1852] *See* final amended rule 204–2(a)(20)(i) and (ii), and (a)(22).

with a record of each addressee and the corresponding date(s) sent.[1853] Additionally, the rule will require the adviser to keep a record documenting steps it took to cause a private fund client with which it is not in a control relationship to undergo a financial statement audit that will comply with the rule.[1854]

The books and records amendments related to the adviser-led secondaries rule will require advisers to retain a copy of any fairness or valuation opinion and summary of material business relationships distributed pursuant to the rule along with a record of each addressee and the corresponding date(s) sent.[1855]

The books and records amendments related to the preferential treatment rule will require advisers to retain copies of all written notices sent to current and prospective investors in a private fund pursuant to final rule 211(h)(2)–3.[1856] In addition, advisers will be required to retain copies of a record of each addressee and the corresponding date(s) sent.[1857]

The books and records amendments related to the restricted activities rule will require advisers to retain copies of all notifications, consent forms, or other documents distributed to (and received from) private fund investors pursuant to the restricted activities rule, along with a record of each addressee and the corresponding date(s) sent.

The respondents to these collections of information requirements will be investment advisers that are registered or required to be registered with the Commission that advise one or more private funds. Based on IARD data, as of December 31, 2022, there were 15,361 investment advisers registered with the Commission. According to this data, 5,248 registered advisers provide advice to private funds.[1858] We estimate that these advisers, on average, each provide advice to 10 private funds.[1859] We further estimate that these private funds, on average, each have a total of 80 investors.[1860] As a result, an average private fund adviser has, on average, a total of 800 investors across all private funds it advises.

In our most recent PRA submission for rule 204–2,[1861] we estimated for rule 204–2 a total hour burden of 2,803,536 hours, and the total annual internal cost burden is $179,000,834.[1862] This collection of information is found at 17 CFR 275.204–2 and is mandatory. The Commission staff uses the collection of information in its examination and oversight program. As noted above, responses provided to the Commission in the context of its examination and oversight program concerning the amendments to rule 204–2 will be kept confidential subject to the provisions of applicable law.

Several commenters stated that the recordkeeping requirements would be burdensome.[1863] We have adjusted the estimates upwards from the proposal to reflect the final amendments, updated data, and comments we received to our estimates asserting that we underestimated these figures in the proposal. We are also revising the estimates upwards to reflect the additional recordkeeping obligations we are adopting, such as the requirement to maintain records related to the restricted activities rule. We have adjusted these estimates to reflect that the final quarterly statement, audit, adviser-led secondaries, restricted activities, and preferential treatment rules will not apply to SAF advisers with respect to SAFs they advise as well.

The table below summarizes the initial and ongoing annual burden estimates associated with the amendments to rule 204–2.

TABLE 7—RULE 204–2 PRA ESTIMATES

	Internal annual burden hours [1]	Wage rate [2]	Internal time cost	Annual external cost burden
Estimates				
Retention of quarterly statement and calculation information; making and keeping records re liquid/illiquid fund determination.	0.50 hours	$77.5 (blended rate for general clerk ($73) and compliance clerk ($82)).	$38.75	$0
Avg. number of private funds per adviser.	10 private funds.		10 private funds	$0
Number of advisers	5,248 advisers		5,248 advisers	$0
Sub-total burden	26,240 hours		$2,033,600	$0
Retention of written notices re preferential treatment.	1 hours	$77.5 (blended rate for general clerk ($73) and compliance clerk ($82)).	$77.5	$0
Avg. number of private funds per adviser.	10 private funds [3].		10 private funds [3]	$0
Number of advisers	5,248 advisers		5,248 advisers	$0
Sub-total burden	52,480 hours		$4,067,200	$0

[1853] *See* final amended rule 204–2(a)(21)(i).

[1854] *See* final amended rule 204–2(a)(21)(ii).

[1855] *See* final amended rule 204–2(a)(23).

[1856] *See* final amended rule 204–2(a)(7)(v).

[1857] *Id.*

[1858] *See* Form ADV, Part 1A, Schedule D, Section 7.B.(1). The final quarterly statement, audit, adviser-led secondaries, restricted activities, and preferential treatment rules will not apply to SAF advisers with respect to SAFs they advise. These figures do not include SAF advisers that manage only SAFs.

[1859] *See* Form ADV, Part 1A, Schedule D, Section 7.B.(1). The final quarterly statement, audit, adviser-led secondaries, restricted activities, and preferential treatment rules will not apply to SAFs. These figures do not include SAFs.

[1860] *See* Form ADV, Part 1A, Schedule D, Section 7.B.(1).A., #13.

[1861] Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Revisions to Rule 204–2, OMB Report, OMB 3235–0278 (May 2023).

[1862] Under the currently approved PRA for Rule 204–2, there is no cost burden other than the internal cost of the hour burden, and we believe that the amendments will not result in any external cost burden.

[1863] *See, e.g.,* AIMA/ACC Comment Letter; ATR Comment Letter.

TABLE 7—RULE 204–2 PRA ESTIMATES—Continued

	Internal annual burden hours [1]	Wage rate [2]	Internal time cost	Annual external cost burden
Retention and distribution of audited financial statements; making and keeping records re: steps to cause a private fund client that the adviser does not control to undergo a financial statement audit.	0.50 hours	$77.5 (blended rate for general clerk ($73) and compliance clerk ($82)).	$38.75	$0
Avg. number of private funds per adviser.	10 private funds.		10 private funds	$0
Number of advisers	5,248 advisers		5,248 advisers	$0
Sub-total burden	26,240 hours		$2,033,600	$0
Retention and distribution of fairness/valuation opinion and summary of material business relationships.	1.5 hour	$77.5 (blended rate for general clerk ($73) and compliance clerk ($82)).	$116.25	$0
Avg. number of private funds per adviser that conduct an adviser-led transaction.	1 private fund		1 private fund	$0
Number of advisers	525 advisers [4]		525 advisers [4]	$0
Sub-total burden	787.5 hours		$61,031.25	$0
Retention of written notices, consent forms, and other documents for restricted activities.	3.5 hours	$77.5 (blended rate for general clerk ($73) and compliance clerk ($82)).	$271.25	$0
Avg. number of private funds per adviser.	10 private funds [3].		10 private funds [3]	$0
Number of advisers	5,248 advisers		5,248 advisers	$0
Sub-total burden	183,680 hours		$14,235,200	
Total burden	289,427.5 hours.		$22,430,631.25	$0

Notes:

[1] Hour burden and cost estimates for these rule amendments assume the frequency of each collection of information for the substantive rule with which they are associated. For example, the hour burden estimate for recordkeeping obligations associated with the amendments to rule 204–2(a)(20) and (22) will assume the same frequency of collection of information as under final rule 211(h)(1)–2.

[2] *See* SIFMA data sets, *supra* Note 1 to Table 1 Rule 211(h)(1)–2 PRA Estimates.

[3] Final rules 211(h)(2)–1 and 211(h)(2)–3 apply to all private fund advisers, but the amendments to rule 204–2 only apply to advisers that are registered or required to be registered with the Commission. As discussed above, we estimate that advisers that are registered or required to be registered with the Commission each advise 10 private funds on average.

[4] *See supra* section VII.E (Adviser-Led Secondaries).

I. Request for Comment Regarding Rule 211(h)(2)–1

We request comment on whether the estimates associated with the new collection of information requirements in ''Rule 211(h)(2)–1 under the Advisers Act'' are reasonable. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (1) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (4) determine whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons wishing to submit comments on the collection of information requirements should direct them to the OMB Desk Officer for the Securities and Exchange Commission, *MBX.OMB.OIRA.SEC_desk_officer@omb.eop.gov,* and should send a copy to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090, with reference to File No. S7–03–22. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this release; therefore a comment to OMB is best assured of having its full effect if OMB receives it within 30 days after publication of this release. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7–03–22, and be submitted to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736.

VIII. Final Regulatory Flexibility Analysis

The Commission has prepared the following Final Regulatory Flexibility Analysis (''FRFA'') in accordance with section 4(a) of the RFA.[1864] It relates to the following rules and rule amendments under the Advisers Act: (i) rule 211(h)(1)–1; (ii) rule 211(h)(1)–2; (iii) rule 206(4)–10; (iv) rule 211(h)(2)–1; (v) rule 211(h)(2)–2; (vi) rule 211(h)(2)–3; (vii) amendments to rule 204–2; and (viii) amendments to rule 206(4)–7.

A. Reasons for and Objectives of the Final Rules and Rule Amendments

1. Final Rule 211(h)(1)–1

We are adopting final rule 211(h)(1)–1 under the Advisers Act (''definitions rule''), which contains numerous definitions for purposes of final rules 211(h)(1)–2, 206(4)–10, 211(h)(2)–1, 211(h)(2)–2, and 211(h)(2)–3 and the

[1864] 5 U.S.C. 603(a).

final amendments to rule 204–2.[1865] We chose to include these definitions in a single rule for ease of reference, consistency, and brevity.

2. Final Rule 211(h)(1)–2

We are adopting final rule 211(h)(1)–2 under the Advisers Act, which requires any investment adviser registered or required to be registered with the Commission that provides investment advice to a private fund (other than a SAF) that has at least two full fiscal quarters of operating results to prepare and distribute a quarterly statement to private fund investors that includes certain standardized disclosures regarding the costs of investing in the private fund and the private fund's performance.[1866] We believe that providing this information to private fund investors in a simple and clear format is appropriate and in the public interest and will improve investor protection and make investors better informed. The reasons for, and objectives of, final rule 211(h)(1)–2 are discussed in more detail in sections I and II above. The burdens of this requirement on small advisers are discussed below as well as above in sections VI and VII, which discuss the burdens on all advisers. The professional skills required to meet these specific burdens also are discussed in section VII.

3. Final Rule 206(4)–10

We are adopting final rule 206(4)–10 under the Advisers Act, which will generally require all investment advisers that are registered or required to be registered with the Commission to have their private fund clients (other than a SAF client) undergo a financial statement audit that meets the requirements of the audit provision of the custody rule (*i.e.,* rule 206(4)–2(b)(4)), which are incorporated into the new rule by reference, as described above in section II. The final rule is designed to provide protection for the fund and its investors against the misappropriation of fund assets and to provide an important check on the adviser's valuation of private fund assets, which often serve as the basis for the calculation of the adviser's fees, and to align with the audit requirements in the audit provision of the custody rule. The reasons for, and objectives of, the final audit rule are discussed in more detail in sections I and II, above. The burdens of these requirements on small advisers are discussed below as well as above in sections VI and VII, which discuss the burdens on all advisers. The professional skills required to meet these specific burdens also are discussed in section VII.

4. Final Rule 211(h)(2)–1

Final rule 211(h)(2)–1 will restrict all private fund advisers (other than an adviser to SAFs with respect to such funds) from, directly or indirectly, engaging in certain sales practices, conflicts of interest, and compensation schemes that are contrary to the public interest and the protection of investors. Specifically, the rule prohibits an adviser from engaging in the following activities, unless it provides written disclosure to investors and, in some cases, obtain investor consent: (1) charging certain fees and expenses to a private fund (including fees or expenses associated with an investigation of the adviser or its related persons by governmental or regulatory authorities, regulatory, examination, or compliance expenses or fees of the adviser or its related persons,[1867] or fees and expenses related to a portfolio investment (or potential portfolio investment) on a non-pro rata basis when multiple private funds and other clients advised by the adviser or its related persons have invested (or propose to invest) in the same portfolio investment); (2) reducing the amount of any adviser clawback by actual, potential, or hypothetical taxes applicable to the adviser, its related persons, or their respective owners or interest holders; and (3) borrowing money, securities, or other fund assets, or receiving a loan or an extension of credit, from a private fund client.[1868] Each of these restrictions is described in more detail above in section II. As discussed above, we believe that these sales practices, conflicts of interest, and compensation schemes must be restricted, and the final rule will prohibit these activities, unless the adviser provides specified disclosures to investors and, in some cases, obtain investor consent under the final rule. Also, the final rule restricts these activities even if they are performed indirectly, for example by an adviser's related persons, because the activities have an equal potential to harm investors regardless of whether the adviser engages in the activity directly or indirectly. The reasons for, and objectives of, the final rule are discussed in more detail in sections I and II, above. The burdens of these requirements on small advisers are discussed below as well as above in sections VI and VII, which discuss the burdens on all advisers. The professional skills required to meet these specific burdens also are discussed in section VII.

5. Final Rule 211(h)(2)–2

We are adopting final rule 211(h)(2)–2 under the Advisers Act, which generally requires an adviser that is registered or required to be registered with the Commission and is conducting an adviser-led secondary transaction with respect to any private fund that it advises (other than a SAF), where the adviser (or its related persons) offers fund investors the option between selling their interests in the private fund, and converting or exchanging them for new interests in another vehicle advised by the adviser or its related persons, to, prior to the due date of an investor participation election form in respect of the transaction, obtain and distribute to investors in the private fund a fairness opinion or valuation opinion from an independent opinion provider and a summary of any material business relationships that the adviser or any of its related persons has, or has had within the two-year period immediately prior to the issuance date of the fairness opinion or valuation opinion, with the independent opinion provider. The specific requirements of the final rule are described above in section II. The final rule is designed to provide an important check against an adviser's conflicts of interest in structuring and leading a transaction from which it may stand to profit at the expense of private fund investors. The reasons for, and objectives of, the final rule are discussed in more detail in sections I and II above. The burdens of these requirements on small advisers are discussed below as well as above in sections VI and VII, which discuss the burdens on all advisers. The professional skills required to meet these specific burdens also are discussed in section VII.

6. Final Rule 211(h)(2)–3

Final rule 211(h)(2)–3 will prohibit a private fund adviser (other than an adviser to SAFs with respect to such funds), directly or indirectly, from: (1) granting an investor in a private fund or in a similar pool of assets the ability to redeem its interest on terms that the adviser reasonably expects to have a material, negative effect on other investors in that private fund or in a similar pool of assets, with an exception

[1865] *See* final rule 211(h)(1)–1.

[1866] *See* final rule 211(h)(1)–2.

[1867] However, the final rule prohibits advisers from charging for fees and expenses related to an investigation that results or has resulted in a court or governmental authority imposing a sanction for a violation of the Act or the rules promulgated thereunder.

[1868] *See* final rule 211(h)(2)–1(a).

for redemptions that are required by applicable law, rule, regulation, or order of certain governmental authorities and another if the adviser offers the same redemption ability to all existing and future investors in the private fund or similar pool of assets; or (2) providing information regarding the portfolio holdings or exposures of the private fund, or of a similar pool of assets, to any investor in the private fund if the adviser reasonably expects that providing the information would have a material, negative effect on other investors in that private fund or in a similar pool of assets, with an exception where the adviser offers such information to all other existing investors in the private fund and any similar pool of assets at the same time or substantially the same time.[1869] The final rule will also prohibit these advisers from providing any other preferential treatment to any investor in a private fund unless the adviser provides written disclosures to prospective investors of the private fund regarding preferential treatment related to any material economic terms, as well as written disclosures to current investors in the private fund regarding all preferential treatment, which the adviser or its related persons has provided to other investors in the same fund.[1870] These requirements are described above in section II. The final rule is designed to restrict sales practices that present a conflict of interest between the adviser and the private fund client that are contrary to the public interest and protection of investors and certain practices that can be fraudulent and deceptive. The disclosure elements of the final rule are designed to also help investors shape the terms of their relationship with the adviser of the private fund. The reasons for, and objectives of, the final rule are discussed in more detail in sections I and II, above. The burdens of these requirements on small advisers are discussed below as well as above in sections VI and VII, which discuss the burdens on all advisers. The professional skills required to meet these specific burdens also are discussed in section VII.

7. Final Amendments to Rule 204–2

We are also adopting related amendments to rule 204–2, the books and records rule, which sets forth various recordkeeping requirements for registered investment advisers. We are amending the current rule to require investment advisers to private funds to make and keep records relating to the quarterly statements required under final rule 211(h)(1)–2, the financial statement audits performed under final rule 206(4)–10, disclosures regarding restricted activities provided under final rule 211(h)(2)–1, fairness opinions or valuation opinions required under final rule 211(h)(2)–2, and disclosure of preferential treatment required under final rule 211(h)(2)–3. The reasons for, and objectives of, the final amendments to the books and records rule are discussed in more detail in sections I and II above. The burdens of these requirements on small advisers are discussed below as well as above in sections VI and VII, which discuss the burdens on all advisers. The professional skills required to meet these specific burdens also are discussed in section VII.

8. Final Amendments to Rule 206(4)–7

We are adopting amendments to rule 206(4)–7 to require all SEC-registered advisers to document the annual review of their compliance policies and procedures in writing, as described above in section III. The final amendments are designed to focus renewed attention on the importance of the annual compliance review process and will better enable our staff to determine whether an adviser has complied with the review requirement of the compliance rule. The reasons for, and objectives of, the final amendments are discussed in more detail in sections I and III, above. The burdens of these requirements on small advisers are discussed below as well as above in sections VI and VII, which discuss the burdens on all advisers. The professional skills required to meet these specific burdens also are discussed in section VII.

B. Significant Issues Raised by Public Comments

One commenter provided its own calculations of the number of small entities impacted by the rules using both the Commission's definition of small entity and a different definition, and the commenter's reasoning for using a different definition is premised on the commenter's belief that the Commission is required to conduct a regulatory impact analysis. [1871] However, as discussed above, the Commission was not required to perform a regulatory impact analysis.[1872] Under Commission rules, for the purposes of the Advisers Act and the RFA, an investment adviser generally is a small entity if it meets the definition set forth in Advisers Act rule 0–7(a).

Additionally, in providing its own calculations, this commenter calculated the number of private funds that would be ''small entities'' according to its own definition,[1873] as well as the definition set forth in Advisers Act rule 0–7(a), which sets forth the criteria for determining whether an investment adviser *(and not a private fund)* is a ''small entity'' for purposes of the RFA analysis. As a result, this commenter assumed that the ''small entities'' directly subject to the rules would be private funds, rather than investment advisers to private funds. The Commission's analysis, however, correctly analyzed the impact on investment advisers.

More generally, as discussed above, many commenters expressed broader concerns that there may be negative effects on competition, including through effects on smaller, emerging advisers.[1874] For example, commenters stated that restrictions on preferential treatment may hinder smaller advisers' abilities to secure initial seed or anchor investors, stating that smaller, emerging advisers often need to provide anchor investors significant preferential rights.[1875] Commenters also stated more generally that increased compliance costs on advisers may reduce competition by causing advisers, particularly smaller advisers, to close their funds and reducing the choices investors have among competing advisers and funds.[1876] In particular, some commenters stated that the combined costs of multiple ongoing rulemakings would harm investors by making it cost-prohibitive for many advisers to stay in business or for new advisers to start a business, and that this effect would further harm competition by creating new barriers to entry.[1877] Commenters lastly stated that the loss of smaller advisers would result in reduced diversity of investment advisers, based on an assertion that most women- and minority-owned advisers are smaller and more frequently associated with first time funds, and that reduced diversity of investment advisers may also have

[1869] *See* final rule 211(h)(2)–3.

[1870] *See* final rule 211(h)(2)–3(b).

[1871] *See* LSTA Comment Letter, Exhibit C.

[1872] *See supra* section VI.B.

[1873] This commenter stated that, according to a benchmark from the Small Business Administration, ''investment vehicles'' with assets of under $35 million would constitute a ''small business.'' *See* LSTA Comment Letter, Exhibit C.

[1874] *See supra* section VI.E.2.

[1875] *Id.*

[1876] *Id.*

[1877] *Id.*

downstream effects on entrepreneurial diversity.[1878]

The Commission's analysis more generally considered potential impact on small entities, meaning small advisers, and identified several factors that may mitigate potential negative effects.[1879] First, the potential harms to smaller advisers from the preferential treatment rule will be mitigated to the extent that smaller, emerging advisers do not need to be able to offer anchor investors preferential rights that have a material negative effect on other investors in order to effectively compete, and to the extent that smaller emerging advisers are able to compete effectively by offering anchor investors other types of preferential terms.[1880] Second, the compliance cost effects on the smallest advisers will be mitigated where those advisers do not meet the minimum assets under management required to register with the SEC.[1881] Third, the literature on the downstream effects of diversity in investment advisory services indicates that the effects are strongest for venture capital, and so the effect may be mitigated wherever an adviser's funds are sufficiently concentrated in venture capital that they may forgo SEC registration and thus forgo many of the costs of the final rules.[1882] Lastly, with respect to commenter concerns on the combined costs of multiple rulemakings, each adopting release considers an updated economic baseline that incorporates any new regulatory requirements, including compliance costs, at the time of each adoption, and considers the incremental new benefits and incremental new costs over those already resulting from the preceding rules.[1883] With respect to competitive effects, the Commission acknowledges that there are incremental effects of new compliance costs on advisers that may vary depending on the total amount of compliance costs already facing advisers and acknowledges costs from overlapping transition periods for recently adopted rules and the final private fund adviser rules.[1884]

[1878] *Id.*

[1879] Certain other commenters expressed broader concerns that there may be negative effects on competition, including through effects on smaller, emerging advisers. *See supra* section VI.E.2.

[1880] *Id.*

[1881] Some registered advisers may therefore have the option of reducing their assets under management in order to forgo registration, thereby avoiding the costs of the final rules that only apply to registered advisers, such as the mandatory audit rule. *Id.*

[1882] *Id.*

[1883] *See supra* sections VI.D, VI.E.2.

[1884] *Id.*

We have also taken several steps to lessen the possible burden on smaller advisers. First, for significant portions of the rules, we have allowed a longer transition period, *i.e.,* up to 18 months, for smaller private fund advisers.[1885] Second, we have provided certain legacy status provisions, namely regarding contractual agreements that govern a private fund and that were entered into prior to the compliance date if the rule would require the parties to amend such an agreement, for all advisers under the prohibitions aspect of the preferential treatment rule and certain aspects of the restricted activities rule.[1886] Third, for the restricted activities rule, we adopted certain disclosure-based exceptions rather than outright prohibitions.[1887] Fourth, we have extended the adviser-led secondaries rule to allow for valuation opinions in addition to fairness opinions.[1888] Fifth, for the preferential activities prohibitions, we adopted certain exceptions to the prohibition on the provision of certain preferential redemption terms, such as when those terms are offered to all investors.[1889] To the extent the effects identified by commenters still occur with these changes to the final rules, smaller advisers may be impacted, but these potential negative effects on smaller advisers must be evaluated in light of (1) the other pro-competitive aspects of the final rules, in particular the pro-competitive effects from enhancing transparency, which are likely to help smaller advisers effectively compete, and (2) the other benefits of the final rules.[1890]

C. Legal Basis

The Commission is adopting final rules 211(h)(1)–1, 211(h)(1)–2, 211(h)(2)–1, 211(h)(2)–2, 211(h)(2)–3, and 206(4)–10 under the Advisers Act under the authority set forth in sections 203(d), 206(4), 211(a), and 211(h) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(d), 80b–6(4) and 80b–11(a) and (h)). The Commission is adopting amendments to rule 204–2 under the Advisers Act under the authority set forth in sections 204 and 211 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–4 and 80b–11). The Commission is adopting amendments to rule 206(4)–7 under the Advisers Act under the authority set forth in sections 203(d), 206(4), and 211(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(d), 80b–6(4), and 80b–11(a)).

[1885] *See supra* section IV (allowing up to 18 months for smaller private fund advisers to comply with the quarterly statement rule, the mandatory private fund adviser audit rule, the adviser-led secondaries rule, and the restricted activities rule).

[1886] *See supra* section IV (allowing legacy status under limited circumstances to prevent advisers and investors from having to renegotiate existing fund documents).

[1887] *See supra* section II.E (discussing disclosure-based exceptions and, in some cases, consent-based exceptions for certain fees and expenses, post-tax clawbacks, non-pro rata allocations, and borrowing).

[1888] *See supra* section II.D.2.

[1889] *See supra* section II.G.

[1890] *See supra* section VI.E.2.

D. Small Entities Subject to Rules

In developing these rules and amendments, we have considered their potential impact on small entities. Some of the rules and amendments will affect many, but not all, investment advisers registered with the Commission, including some small entities. The amendments to rule 206(4)–7 will affect all investment advisers that are registered or required to be registered with the Commission, including some small entities, and final rules 211(h)(2)–1 and 211(h)(2)–3 will apply to all advisers to private funds (even if not registered), including some small entities. Final rule 211(h)(1)–1 will affect all advisers that are also affected by one of the rules applying to private fund advisers discussed below, including all that are small entities, regardless of whether they are registered. Under Commission rules, for the purposes of the Advisers Act and the RFA, an investment adviser generally is a small entity if it: (1) has assets under management having a total value of less than $25 million; (2) did not have total assets of $5 million or more on the last day of the most recent fiscal year; and (3) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year.[1891]

Other than the definitions rule, restrictions rule, and preferential treatment rule, our rules and amendments will not affect most investment advisers that are small entities (''small advisers'') because those rules apply only to registered advisers, and small registered advisers are generally registered with one or more State securities authorities and not with the Commission. Under section 203A of the Advisers Act, most small advisers are prohibited from registering with the Commission and are regulated by State regulators. Based on IARD data, we estimate that as of December 31, 2022,

[1891] 17 CFR 275.0–7(a) (Advisers Act rule 0–7(a)).

approximately 489 SEC-registered advisers are small entities under the RFA.[1892] All of these advisers will be affected by the amendments to the compliance rule, and we estimate that approximately 26 small advisers to one or more private funds will be affected by the quarterly statement rule, audit rule, and secondaries rule.[1893]

The restricted activities rule and the preferential treatment rule, however, will have an impact on *all* investment advisers to private funds, regardless of whether they are registered with the Commission, one or more State securities authorities, or are unregistered. It is difficult for us to estimate the number of advisers not registered with us that have private fund clients. However, we are able to provide the following estimates based on IARD data. As of December 31, 2022, there are 5,368 ERAs, all of whom advise private funds, by definition.[1894] All ERAs will, therefore, be subject to the rules that will apply to all private fund advisers. We estimate that there are no ERAs that would meet the definition of ''small entity.'' [1895] We do not have a method for estimating the number of State-registered advisers to private funds that would meet the definition of ''small entity.''

Additionally, the restricted activities rule and the preferential treatment rule will apply to other advisers that are not registered with the SEC or with the States and that do not make filings with either the SEC or States. This includes foreign private advisers,[1896] advisers that are entirely unregistered, and advisers that rely on the intrastate exemption from SEC registration and/or the *de minimis* exemption from SEC registration. We are unable to estimate the number of advisers in each of these categories because these advisers do not file reports or other information with the SEC and we are unable to find reliable, public information. As a result, our estimates are based on information from SEC-registered advisers to private funds, exempt reporting advisers (at the State and Federal levels), and State-registered advisers to private funds.

The definitions rule will affect all advisers that are also affected by one of the rules applying to private fund advisers discussed above. It has no independent substantive requirements or economic impacts. Therefore, the number of small advisers affected by this rule is accounted for in those discussions and not separately and additionally delineated.

E. Projected Reporting, Recordkeeping, and Other Compliance Requirements

1. Final Rule 211(h)(1)–1

Final rule 211(h)(1)–1 will not impose any reporting, recordkeeping, or other compliance requirements on investment advisers because it has no independent substantive requirements or economic impacts. The rule will not affect an adviser unless it was complying with final rules 211(h)(1)–2, 206(4)–10, 211(h)(2)–1, 211(h)(2)–2, or 211(h)(2)–3, each of which is discussed below.

2. Final Rule 211(h)(1)–2

Final rule 211(h)(1)–2 will impose certain compliance requirements on investment advisers, including those that are small entities. It will require any investment adviser registered or required to be registered with the Commission that provides investment advice to a private fund (other than a SAF) that has at least two full fiscal quarters of operating results to prepare and distribute quarterly statements with certain fee and expense and performance disclosure to private fund investors. The final requirements, including compliance and related recordkeeping requirements that will be required under the final amendments to rule 204–2 and rule 206(4)–7, are summarized in this FRFA (section VIII.A. above). All of these final requirements are also discussed in detail, above, in sections I and II, and these requirements and the burdens on respondents, including those that are small entities, are discussed above in sections VI and VII (the Economic Analysis and Paperwork Reduction Act analysis, respectively) and below. The professional skills required to meet these specific burdens are also discussed in section VII.

As discussed above, there are approximately 26 small advisers to private funds currently registered with us, and we estimate that 100 percent of these advisers will be subject to the final rule 211(h)(1)–2. As discussed in our Paperwork Reduction Act Analysis in section VII above, we estimate that the final rule 211(h)(1)–2 under the Advisers Act, which will require advisers to prepare and distribute quarterly statements, will create a new annual burden of approximately 190 hours per adviser, or 4,940 hours in aggregate for small advisers. We therefore expect the annual monetized aggregate cost to small advisers associated with the final rule to be $2,416,310.[1897]

3. Final Rule 206(4)–10

Final rule 206(4)–10 will impose certain compliance requirements on investment advisers, including those that are small entities. All SEC-registered investment advisers that provide investment advice, including small entity advisers, to private fund clients (other than a SAF) will be required to comply with the final rule's requirements to have their private fund clients undergo a financial statement audit (at least annually and upon liquidation) and distribute audited financial statements to private fund investors, in alignment with the requirements of the audit provision of the custody rule (which the final rule will incorporate by reference). The final requirements, including compliance and related recordkeeping requirements that will be imposed under the final amendments to rule 204–2 and rule 206(4)–7, are summarized in this FRFA (section VIII.A. above). All of these final requirements are also discussed in detail, above, in sections I and II, and these requirements and the burdens on respondents, including those that are small entities, are discussed above in sections VI and VII (the Economic Analysis and Paperwork Reduction Act analysis, respectively) and below. The professional skills required to meet these specific burdens are also discussed in section VII.

As discussed above, there are approximately 26 small advisers to private funds currently registered with us, and we estimate that 100 percent of these advisers will be subject to the final rule 206(4)–10. As discussed above in our Paperwork Reduction Act Analysis in section VII above, we estimate that final rule 206(4)–10 under the Advisers Act will create a new annual burden of approximately 13.30 hours per adviser, or 345.80 hours in aggregate for small advisers. We therefore expect the annual monetized aggregate cost to small

[1892] Based on SEC-registered investment adviser responses to Items 5.F. and 12 of Form ADV.

[1893] The final quarterly statement, audit, and adviser-led secondaries rules will not apply to SAF advisers with respect to SAFs they advise. This figure does not include SAF advisers that manage only SAFs.

[1894] *See* section 203(l) of the Advisers Act and rule 203(m)–1.

[1895] In order for an adviser to be an SEC ERA it would first need to have an SEC registration obligation, and an adviser with that little in assets under management (*i.e.,* assets under management that is low enough to allow the adviser to qualify as a small entity) would not have an SEC registration obligation.

[1896] *See* section 202(a)(30) of the Advisers Act (defining ''foreign private adviser'').

[1897] This includes the internal time cost and the annual external cost burden and assumes that, for purposes of the annual external cost burden, 50% of small advisers will use outside legal services, as set forth in the PRA estimates table.

advisers associated with the final rule to be $19,560,515.[1898]

4. Final Rule 211(h)(2)–1

Final rule 211(h)(2)–1 will impose certain compliance requirements on investment advisers, including those that are small entities. Final rule 211(h)(2)–1 will restrict all private fund advisers (other than an adviser to SAFs with respect to such funds) from engaging in certain sales practices, conflicts of interest, and compensation schemes that are contrary to the public interest and the protection of investors. Specifically, the rule prohibits advisers from engaging in the following activities, unless they provide written disclosure to investors regarding such activities and in some cases obtain investor consent: (1) charging certain fees and expenses to a private fund (including fees or expenses associated with an investigation of the adviser or its related persons by governmental or regulatory authorities, regulatory, examination, or compliance expenses or fees of the adviser or its related persons, or fees and expenses related to a portfolio investment (or potential portfolio investment) on a non-pro rata basis when multiple private funds and other clients advised by the adviser or its related persons have invested (or propose to invest) in the same portfolio investment); (2) reducing the amount of any adviser clawback by actual, potential, or hypothetical taxes applicable to the adviser, its related persons, or their respective owners or interest holders; and (3) borrowing money, securities, or other fund assets, or receiving a loan or an extension of credit from a private fund client. The requirements, including compliance and related recordkeeping requirements that will be imposed under the final amendments to rule 204–2 and rule 206(4)–7, are summarized in this FRFA (section VIII.A. above). All of these final requirements are also discussed in detail, above, in sections I and II, and these requirements and the burdens on respondents, including those that are small entities, are discussed above in sections VI and VII (the Economic Analysis and Paperwork Reduction Act analysis, respectively) and below. The professional skills required to meet these specific burdens are also discussed in section VII.

As discussed above, there are approximately 26 small advisers to private funds currently registered with us, and we estimate that 100 percent of these advisers will be subject to the final rule 211(h)(2)–1. As discussed above, we estimate that there are no ERAs that meet the definition of ''small entity'' and we do not have a method for estimating the number of State-registered advisers to private funds that meet the definition of ''small entity.'' [1899] As discussed above in our Paperwork Reduction Act Analysis in section VII above, rule 211(h)(2)–1 under the Advisers Act is estimated to create a new annual burden of approximately 120 hours per adviser, or 3,120 hours in aggregate for small advisers. We therefore expect the annual monetized aggregate cost to small advisers associated with the rule to be $1,589,280.[1900]

5. Final Rule 211(h)(2)–2

Final rule 211(h)(2)–2 will impose certain compliance requirements on investment advisers, including those that are small entities. The rule generally requires an adviser that is registered or required to be registered with the Commission and is conducting an adviser-led secondary transaction with respect to any private fund that it advises (other than a SAF), where the adviser (or its related persons) offers fund investors the option between selling their interests in the private fund, or converting or exchanging them for new interests in another vehicle advised by the adviser or its related persons, to, prior to the due date of an investor participation election form in respect of the transaction, obtain and distribute to investors in the private fund a fairness opinion or valuation opinion from an independent opinion provider and a summary of any material business relationships that the adviser or any of its related persons has, or has had within the two-year period immediately prior to the issuance date of the fairness opinion or valuation opinion, with the independent opinion provider. The final requirements, including compliance and related recordkeeping requirements that will be imposed under final amendments to rule 204–2 and 206(4)–7, are summarized in this FRFA (section VIII.A. above). All of these final requirements are also discussed in detail, above, in sections I and II, and these requirements and the burdens on respondents, including those that are small entities, are discussed above in sections VI and VII (the Economic Analysis and Paperwork Reduction Act analysis, respectively) and below. The professional skills required to meet these specific burdens also are discussed in section VII.

As discussed above, there are approximately 26 small advisers to private funds currently registered with us, and we estimate that 100 percent of these advisers will be subject to final rule 211(h)(2)–2. As discussed above in our Paperwork Reduction Act Analysis in section VII above, we estimate that final rule 211(h)(2)–2 under the Advisers Act will create a new annual burden of approximately 1.5 hours per adviser, or 39 hours in aggregate for small advisers.[1901] We therefore expect the annual monetized aggregate cost to small advisers associated with the final rule to be $317,697.90.[1902]

6. Final Rule 211(h)(2)–3

Final rule 211(h)(2)–3 will impose certain compliance requirements on investment advisers, including those that are small entities. Final rule 211(h)(2)–3 will prohibit a private fund adviser (other than an adviser to SAFs with respect to such funds), including indirectly through its related persons, from: (1) granting an investor in the private fund or in a similar pool of assets the ability to redeem its interest on terms that the adviser reasonably expects to have a material, negative effect on other investors in that private fund or in a similar pool of assets, with an exception for redemptions that are required by applicable law, rule, regulation, or order of certain governmental authorities and another if the adviser offers the same redemption ability to all existing and future investors in the private fund or similar pool of assets; and (2) providing information regarding the private fund's portfolio holdings or exposures of the private fund or of a similar pool of assets to any investor in the private fund if the adviser reasonably expects that providing the information would have a material, negative effect on other investors in that private fund or in a similar pool of assets, with an exception where the adviser offers such information to all other existing investors in the private fund and any similar pool of assets at the same time or substantially the same time. The rule will also prohibit these advisers from providing any other preferential

[1898] This includes the internal time cost and the annual external cost burden, as set forth in the PRA estimates table.

[1899] *See supra* section VIII.D.

[1900] This includes the internal time cost and the annual external cost burden and assumes that, for purposes of the annual external cost burden, 75% of small advisers will use outside legal services, as set forth in the PRA table.

[1901] Similar to the PRA analysis, we assume that 10% (~3) of all small advisers will conduct an adviser-led secondary transaction on an annual basis.

[1902] This includes the internal time cost and the annual external cost burden, as set forth in the PRA estimates table.

treatment to any investor in the private fund unless the adviser provides written disclosures to prospective investors of the private fund regarding preferential treatment related to any material economic terms, as well as written disclosures to current investors in the private fund regarding all preferential treatment, which the adviser or its related persons provided to other investors in the same fund. The final requirements, including compliance and related recordkeeping requirements that will be imposed under final amendments to rule 204–2 and 206(4)–7, are summarized in this FRFA (section VIII.A. above). All of these final requirements are also discussed in detail, above, in sections I and II, and these requirements and the burdens on respondents, including those that are small entities, are discussed above in sections VI and VII (the Economic Analysis and Paperwork Reduction Act analysis, respectively) and below. The professional skills required to meet these specific burdens also are discussed in section VII.

As discussed above, there are approximately 26 small advisers to private funds currently registered with us, and we estimate that 100 percent of these advisers will be subject to the final rule 211(h)(2)–3. As discussed above, we estimate that there are no ERAs that meet the definition of ''small entity'' and we do not have a method for estimating the number of State-registered advisers to private funds that meet the definition of ''small entity.'' [1903] As discussed above in our Paperwork Reduction Act Analysis in section VII above, we estimate that final rule 211(h)(2)–3 under the Advisers Act will create a new annual burden of approximately 113.30 hours per adviser, or 2,945.80 hours in aggregate for small advisers. We therefore expect the annual monetized aggregate cost to small advisers associated with the final rule to be $1,081,003.40.[1904]

7. Final Amendments to Rule 204–2

The final amendments to rule 204–2 will impose certain recordkeeping requirements on investment advisers to private funds, including those that are small entities. All SEC-registered investment advisers to private funds, including small entity advisers, will be required to comply with recordkeeping amendments. Although all SEC-registered investment advisers, and advisers that are required to be registered with the Commission, are subject to rule 204–2 under the Advisers Act, our final amendments to rule 204–2 will only impact private fund advisers that are SEC registered. The final amendments are summarized in this FRFA (section VIII.A. above). The final amendments are also discussed in detail, above, in sections I and II, and the requirements and the burdens on respondents, including those that are small entities, are discussed above in sections VI and VII (the Economic Analysis and Paperwork Reduction Act analysis, respectively) and below. The professional skills required to meet these specific burdens also are discussed in section VII.

As discussed above, there are approximately 26 small advisers to private funds currently registered with us, and we estimate that 100 percent of advisers registered with us will be subject to the final amendments to rule 204–2. As discussed above in our Paperwork Reduction Act Analysis in section VII above, we estimate that the final amendments to rule 204–2 under the Advisers Act, which will require advisers to retain certain copies of documents required under final rules 206(4)–10, 211(h)(1)–2, 211(h)(2)–1, 211(h)(2)–2, and 211(h)(2)–3, will create a new annual burden of approximately 55.17 hours per adviser, or 1,434.50 hours in aggregate for small advisers. We therefore expect the annual monetized aggregate cost to small advisers associated with our final amendments to be $111,173.75.[1905]

8. Final Amendments to Rule 206(4)–7

Final amendments to rule 206(4)–7 will impose certain compliance requirements on investment advisers, including those that are small entities. All SEC-registered investment advisers, and advisers that are required to be registered with the Commission, will be required to document the annual review of their compliance policies and procedures in writing. The final requirements are summarized in this FRFA (section VIII.A. above). All of these final requirements are also discussed in detail in sections I and III above, and these requirements and the burdens on respondents, including those that are small entities, are discussed above in sections VI and VII (the Economic Analysis and Paperwork Reduction Act analysis, respectively) and below. The professional skills required to meet these specific burdens also are discussed in section VII. As discussed above, there are approximately 489 small advisers currently registered with us, and we estimate that 100 percent of these advisers will be subject to the final amendments to rule 206(4)–7. As discussed above in our Paperwork Reduction Act Analysis in section VII above, we estimate that these amendments will create a new annual burden of approximately 5.5 hours per adviser, or 2,689.50 hours in aggregate for small advisers. We therefore expect the annual monetized aggregate cost to small advisers associated with our final amendments to be $1,414,173.[1906]

F. Significant Alternatives

The RFA directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with adopting these rules and rule amendments, the Commission considered the following alternatives: (i) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules and rule amendments for such small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the rules and rule amendments, or any part thereof, for such small entities.

Regarding the first alternative, we are adopting staggered compliance dates based on adviser size for certain of the rules. We believe that smaller private fund advisers will likely need additional time to modify existing practices, policies, and procedures to come into compliance. Accordingly, we are providing certain staggered compliance dates, with a longer transition period for smaller private fund advisers.

Regarding the fourth alternative, we do not believe that differing reporting requirements or an exemption from coverage of the rules and rule amendments, or any part thereof, for small entities, would be appropriate or consistent with investor protection. Because the specific protections of the Advisers Act that underlie the rules and rule amendments apply equally to clients of both large and small advisory firms, it would be inconsistent with the

[1903] *See supra* section VIII.D.

[1904] This includes the internal time cost and the annual external cost burden and assumes that, for purposes of the annual external cost burden, 75% of small advisers will use outside legal services, as set forth in the PRA estimates table.

[1905] This includes the internal time cost and the annual external cost burden, as set forth in the PRA estimates table.

[1906] This includes the internal time cost and the annual external cost burden and assumes that, for purposes of the annual external cost burden, 50% of small advisers will use outside legal services, as set forth in the PRA estimates table.

purposes of the Act to specify different requirements for small entities under the rules and rule amendments.

Regarding the second alternative, the restricted activities rule and the preferential treatment rule are particularly intended to provide clarification to *all* private fund advisers, not just small advisers, as to what the Commission considers to be conduct that would be prohibited under section 206 of the Act and contrary to the public interest and protection of investors under section 211 of the Act. Despite our examination and enforcement efforts, this type of inappropriate conduct persists; these rules will prohibit or restrict this conduct for *all* private fund advisers. Similarly, we also have endeavored to consolidate, and simplify compliance with, the rules for *all* private fund advisers. With respect to the rules and amendments other than the restricted activities rule and the preferential treatment rule, we have sought to clarify, consolidate, and/or simplify compliance and reporting requirements consistent with our statutory authority to promulgate rules reasonably designed prevent fraudulent, deceptive, or manipulative acts, or to prohibit or restrict sales practices, conflicts of interest or compensation schemes that we deem contrary to the public interest and protection of investors, by investment advisers. For instance, we have changed the categorization of whether a private fund is a liquid or illiquid fund from a six factor test in the proposal to a two factor text in the final rule in an effort to facilitate compliance with this rule.

Regarding the third alternative, we do not consider using performance rather than design standards to be consistent with our statutory authority to promulgate rules reasonably designed to prevent fraudulent, deceptive, or manipulative acts, or to prohibit or restrict sales practices, conflicts of interest or compensation schemes, that we deem contrary to the public interest and protection of investors by investment advisers.

Statutory Authority

The Commission is adopting final rules 211(h)(1)–1, 211(h)(1)–2, 211(h)(2)–1, 211(h)(2)–2, 211(h)(2)–3, and 206(4)–10 under the Advisers Act under the authority set forth in sections 203(d), 206(4), 211(a), and 211(h) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3(d), 80b–6(4) and 80b–11(a) and (h)]. The Commission is adopting amendments to rule 204–2 under the Advisers Act under the authority set forth in sections 204 and 211 of the Investment Advisers Act of 1940 [15 U.S.C. 80b–4 and 80b–11]. The Commission is adopting amendments to rule 206(4)–7 under the Advisers Act under the authority set forth in sections 203(d), 206(4), and 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–3(d), 80b–6(4), and 80b–11(a)].

List of Subjects in 17 CFR Part 275

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

Text of Rules

For the reasons set forth in the preamble, the Commission is amending title 17, chapter II of the Code of Federal Regulations as follows:

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

■ 1. The authority citation for part 275 continues to read in part as follows:

Authority: 15 U.S.C. 80b–2(a)(11)(G), 80b–2(a)(11)(H), 80b–2(a)(17), 80b–3, 80b–4, 80b–4a, 80b–6(4), 80b–6a, and 80b–11, unless otherwise noted.

* * * * *

Section 275.204–2 is also issued under 15 U.S.C. 80b–6.

* * * * *

■ 2. Amend § 275.204–2 by:
■ a. Removing the period at the end of paragraph (a)(7)(iv)(B) and adding ‘‘; and’’ in its place; and
■ b. Adding paragraphs (a)(7)(v) and (a)(20) through (24).

The additions read as follows:

§ 275.204–2 Books and records to be maintained by investment advisers.

(a) * * *

(7) * * *

(v) Any notice required pursuant to § 275.211(h)(2)–3 as well as a record of each addressee and the corresponding date(s) sent.

* * * * *

(20)(i) A copy of any quarterly statement distributed pursuant to § 275.211(h)(1)–2, along with a record of each addressee and the corresponding date(s) sent; and

(ii) All records evidencing the calculation method for all expenses, payments, allocations, rebates, offsets, waivers, and performance listed on any statement delivered pursuant to § 275.211(h)(1)–2.

(21) For each private fund client:

(i) A copy of any audited financial statements prepared and *distributed* pursuant to § 275.206(4)–10, along with a record of each addressee and the corresponding date(s) sent; or

(ii) A record documenting steps taken by the adviser to cause a private fund client that the adviser does not control, is not controlled by, and with which it is not under common control to undergo a financial statement audit pursuant to § 275.206(4)–10.

(22) Documentation substantiating the adviser's determination that a private fund client is a *liquid fund* or an *illiquid fund* pursuant to § 275.211(h)(1)–2.

(23) A copy of any *fairness opinion* or *valuation opinion* and material business relationship summary *distributed* pursuant to § 275.211(h)(2)–2, along with a record of each addressee and the corresponding date(s) sent.

(24) A copy of any notification, consent or other document *distributed* or received pursuant to § 275.211(h)(2)–1, along with a record of each addressee and the corresponding date(s) sent for each such document distributed by the adviser.

* * * * *

■ 3. Amend § 275.206(4)–7 by revising paragraph (b) to read as follows:

§ 275.206(4)–7 Compliance procedures and practices.

* * * * *

(b) *Annual review.* Review and document in writing, no less frequently than annually, the adequacy of the policies and procedures established pursuant to this section and the effectiveness of their implementation; and

* * * * *

■ 4. Add §§ 275.206(4)–9 and 275.206(4)–10 to read as follows:

§ 275.206(4)–9 [Reserved]

§ 275.206(4)–10 Private fund adviser audits.

(a) As a means reasonably designed to prevent such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative, an investment adviser that is registered or required to be registered under section 203 of the Investment Advisers Act of 1940 shall cause each private fund that it advises (other than a *securitized asset fund*), directly or indirectly, to undergo a financial statement audit (as defined in § 210.1–02(d) of this chapter (rule 1–02(d) of Regulation S–X)) that meets the requirements of § 275.206(4)–2(b)(4)(i) through (b)(4)(iii) and shall cause audited financial statements to be delivered in accordance with § 275.206(4)–2(c), if the private fund does not otherwise undergo such an audit;

(b) For a private fund (other than a *securitized asset fund*) that the adviser does not *control* and is neither *controlled* by nor under common *control* with, the adviser is prohibited

from providing investment advice, directly or indirectly, to the private fund if the adviser fails to take all reasonable steps to cause the private fund to undergo a financial statement audit that meets the requirements of § 275.206(4)–2(b)(4) and to cause audited financial statements to be delivered in accordance with § 275.206(4)–2(c), if the private fund does not otherwise undergo such an audit; and

(c) For purposes of this section, defined terms shall have the meanings set forth in § 275.206(4)–2(d), except for the term *securitized asset fund,* which shall have the meaning set forth in § 275.211(h)(1)–1.

■ 5. Add §§ 275.211(h)(1)–1, 275.211(h)(1)–2, 275.211(h)(2)–1, 275.211(h)(2)–2, and 275.211(h)(2)–3 to read as follows:

§ 275.211(h)(1)–1 Definitions

For purposes of §§ 275.206(4)–10, 275.211(h)(1)–2, 275.211(h)(2)–1, 275.211(h)(2)–2, and 275.211(h)(2)–3:

Adviser clawback means any obligation of the adviser, its related persons, or their respective owners or interest holders to restore or otherwise return performance-based compensation to the private fund pursuant to the private fund's governing agreements.

Adviser-led secondary transaction means any transaction initiated by the investment adviser or any of its related persons that offers private fund investors the choice between:

(1) Selling all or a portion of their interests in the private fund; and

(2) Converting or exchanging all or a portion of their interests in the private fund for interests in another vehicle advised by the adviser or any of its related persons.

Committed capital means any commitment pursuant to which a person is obligated to acquire an interest in, or make capital contributions to, the private fund.

Control means the power, directly or indirectly, to direct the management or policies of a person, whether through ownership of securities, by contract, or otherwise. For the purposes of this definition, control includes:

(1) Each of an investment adviser's officers, partners, or directors exercising executive responsibility (or persons having similar status or functions) is presumed to control the investment adviser;

(2) A person is presumed to control a corporation if the person:

(i) Directly or indirectly has the right to vote 25 percent or more of a class of the corporation's voting securities; or

(ii) Has the power to sell or direct the sale of 25 percent or more of a class of the corporation's voting securities;

(3) A person is presumed to control a partnership if the person has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital of the partnership;

(4) A person is presumed to control a limited liability company if the person:

(i) Directly or indirectly has the right to vote 25 percent or more of a class of the interests of the limited liability company;

(ii) Has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital of the limited liability company; or

(iii) Is an elected manager of the limited liability company;

(5) A person is presumed to control a trust if the person is a trustee or managing agent of the trust.

Covered portfolio investment means a portfolio investment that allocated or paid the investment adviser or its related persons portfolio investment compensation during the reporting period.

Distribute, distributes, or *distributed* means send or sent to all of the private fund's investors, unless the context otherwise requires; provided that, if an investor is a pooled investment vehicle that is controlling, controlled by, or under common control with (a "control relationship") the adviser or its related persons, the adviser must look through that pool (and any pools in a control relationship with the adviser or its related persons) in order to send to investors in those pools.

Election form means a written solicitation distributed by, or on behalf of, the adviser or any related person requesting private fund investors to make a binding election to participate in an adviser-led secondary transaction.

Fairness opinion means a written opinion stating that the price being offered to the private fund for any assets being sold as part of an adviser-led secondary transaction is fair.

Fund-level subscription facilities means any subscription facilities, subscription line financing, capital call facilities, capital commitment facilities, bridge lines, or other indebtedness incurred by the private fund that is secured by the unfunded capital commitments of the private fund's investors.

Gross IRR means an internal rate of return that is calculated gross of all fees, expenses, and *performance-based compensation* borne by the private fund.

Gross MOIC means a multiple of invested capital that is calculated gross of all fees, expenses, and performance-based compensation borne by the private fund.

Illiquid fund means a private fund that:

(1) Is not required to redeem interests upon an investor's request; and

(2) Has limited opportunities, if any, for investors to withdraw before termination of the fund.

Independent opinion provider means a person that:

(1) Provides fairness opinions or valuation opinions in the ordinary course of its business; and

(2) Is not a related person of the adviser.

Internal rate of return means the discount rate that causes the net present value of all cash flows throughout the life of the fund to be equal to zero.

Liquid fund means a private fund that is not an illiquid fund.

Multiple of invested capital means, as of the end of the applicable fiscal quarter:

(1) The sum of:

(i) The unrealized value of the illiquid fund; and

(ii) The value of all distributions made by the illiquid fund;

(2) Divided by the total capital contributed to the illiquid fund by its investors.

Net IRR means an internal rate of return that is calculated net of all fees, expenses, and performance-based compensation borne by the private fund.

Net MOIC means a multiple of invested capital that is calculated net of all fees, expenses, and performance-based compensation borne by the private fund.

Performance-based compensation means allocations, payments, or distributions of capital based on the private fund's (or any of its investments') capital gains, capital appreciation and/or other profit.

Portfolio investment means any entity or issuer in which the private fund has directly or indirectly invested.

Portfolio investment compensation means any compensation, fees, and other amounts allocated or paid to the investment adviser or any of its related persons by the portfolio investment attributable to the private fund's interest in such portfolio investment, including, but not limited to, origination, management, consulting, monitoring, servicing, transaction, administrative, advisory, closing, disposition, directors, trustees or similar fees or payments.

Related person means:

(1) All officers, partners, or directors (or any person performing similar functions) of the adviser;

(2) All persons directly or indirectly controlling or controlled by the adviser;

(3) All current employees (other than employees performing only clerical, administrative, support or similar functions) of the adviser; and

(4) Any person under common control with the adviser.

Reporting period means the private fund's fiscal quarter covered by the quarterly statement or, for the initial quarterly statement of a newly formed private fund, the period covering the private fund's first two full fiscal quarters of operating results.

Securitized asset fund means any private fund whose primary purpose is to issue asset backed securities and whose investors are primarily debt holders.

Similar pool of assets means a pooled investment vehicle (other than an investment company registered under the Investment Company Act of 1940, a company that elects to be regulated as such, or a securitized asset fund) with substantially similar investment policies, objectives, or strategies to those of the *private fund* managed by the investment adviser or its related persons.

Statement of contributions and distributions means a document that presents:

(1) All capital inflows the private fund has received from investors and all capital outflows the private fund has distributed to investors since the private fund's inception, with the value and date of each inflow and outflow; and

(2) The net asset value of the private fund as of the end of the reporting period.

Unfunded capital commitments means committed capital that has not yet been contributed to the private fund by investors.

Valuation opinion means a written opinion stating the value (as a single amount or a range) of any assets being sold as part of an adviser-led secondary transaction.

§ 275. 211(h)(1)–2 Private fund quarterly statements.

(a) *Quarterly statements.* As a means reasonably designed to prevent such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative, an investment adviser that is registered or required to be registered under section 203 of the Investment Advisers Act of 1940 shall prepare a quarterly statement that complies with paragraphs (a) through (g) of this section for any private fund (other than a securitized asset fund) that it advises, directly or indirectly, that has at least two full fiscal quarters of operating results, and distribute the quarterly statement to the private fund's investors, if such private fund is not a fund of funds, within 45 days after the end of each of the first three fiscal quarters of each fiscal year of the private fund and 90 days after the end of each fiscal year of the private fund and, if such private fund is a fund of funds, within 75 days after the end of the first three fiscal quarters of each fiscal year and 120 days after the end of each fiscal year, in either case, unless such a quarterly statement is prepared and distributed by another person.

(b) *Fund table.* The quarterly statement must include a table for the private fund that discloses, at a minimum, the following information, presented both before and after the application of any offsets, rebates, or waivers for the information required by paragraphs (b)(1) and (2) of this section:

(1) A detailed accounting of all compensation, fees, and other amounts allocated or paid to the investment adviser or any of its related persons by the private fund during the reporting period, with separate line items for each category of allocation or payment reflecting the total dollar amount, including, but not limited to, management, advisory, sub-advisory, or similar fees or payments, and performance-based compensation;

(2) A detailed accounting of all fees and expenses allocated to or paid by the private fund during the reporting period (other than those listed in paragraph (b)(1) of this section), with separate line items for each category of fee or expense reflecting the total dollar amount, including, but not limited to, organizational, accounting, legal, administration, audit, tax, due diligence, and travel fees and expenses; and

(3) The amount of any offsets or rebates carried forward during the reporting period to subsequent periods to reduce future payments or allocations to the adviser or its related persons.

(c) *Portfolio investment table.* The quarterly statement must include a separate table for the private fund's covered portfolio investments that discloses, at a minimum, the following information for each covered portfolio investment: a detailed accounting of all portfolio investment compensation allocated or paid to the investment adviser or any of its related persons by the covered portfolio investment during the reporting period, with separate line items for each category of allocation or payment reflecting the total dollar amount, presented both before and after the application of any offsets, rebates, or waivers.

(d) *Calculations and cross-references.* The quarterly statement must include prominent disclosure regarding the manner in which all expenses, payments, allocations, rebates, waivers, and offsets are calculated and include cross references to the sections of the private fund's organizational and offering documents that set forth the applicable calculation methodology.

(e) *Performance.* (1) No later than the time the adviser sends the initial quarterly statement, the adviser must determine that the private fund is an illiquid fund or a liquid fund.

(2) The quarterly statement must present the following with equal prominence:

(i) *Liquid funds.* For a liquid fund:

(A) Annual net total returns for each fiscal year over the past 10 fiscal years or since inception, whichever time period is shorter;

(B) Average annual net total returns over the one-, five-, and 10-fiscal-year periods; and

(C) The cumulative net total return for the current fiscal year as of the end of the most recent fiscal quarter covered by the quarterly statement.

(ii) *Illiquid funds.* For an illiquid fund:

(A) The following performance measures, shown since inception of the illiquid fund through the end of the quarter covered by the quarterly statement (or, to the extent quarter-end numbers are not available at the time the adviser distributes the quarterly statement, through the most recent practicable date) and computed with and without the impact of any fund-level subscription facilities:

(*1*) Gross IRR and gross MOIC for the illiquid fund;

(*2*) Net IRR and net MOIC for the illiquid fund; and

(*3*) Gross IRR and gross MOIC for the realized and unrealized portions of the illiquid fund's portfolio, with the realized and unrealized performance shown separately.

(B) A statement of contributions and distributions for the illiquid fund.

(iii) *Other matters.* The quarterly statement must include the date as of which the performance information is current through and prominent disclosure of the criteria used and assumptions made in calculating the performance.

(f) *Consolidated reporting.* To the extent doing so would provide more meaningful information to the private fund's investors and would not be misleading, the adviser must consolidate the reporting required by paragraphs (a) through (e) of this section to cover *similar pools of assets.*

(g) *Format and content.* The quarterly statement must use clear, concise, plain

English and be presented in a format that facilitates review from one quarterly statement to the next.

(h) *Definitions.* For purposes of this section, defined terms shall have the meanings set forth in § 275.211(h)(1)–1.

§ 275.211(h)(2)–1 Private fund adviser restricted activities.

(a) An investment adviser to a private fund (other than a securitized asset fund) may not, directly or indirectly, do the following with respect to the private fund, or any investor in that private fund:

(1) Charge or allocate to the private fund fees or expenses associated with an investigation of the adviser or its related persons by any governmental or regulatory authority, unless the investment adviser requests each investor of the private fund to consent to, and obtains written consent from at least a majority in interest of the private fund's investors that are not related persons of the adviser for, such charge or allocation; provided, however, that the investment adviser may not charge or allocate to the private fund fees or expenses related to an investigation that results or has resulted in a court or governmental authority imposing a sanction for a violation of the Investment Advisers Act of 1940 or the rules promulgated thereunder;

(2) Charge or allocate to the private fund any regulatory or compliance fees or expenses, or fees or expenses associated with an examination, of the adviser or its related persons, unless the investment adviser distributes a written notice of any such fees or expenses, and the dollar amount thereof, to the investors of such private fund client in writing within 45 days after the end of the fiscal quarter in which the charge occurs;

(3) Reduce the amount of an adviser clawback by actual, potential, or hypothetical taxes applicable to the adviser, its related persons, or their respective owners or interest holders, unless the investment adviser distributes a written notice to the investors of such private fund client that sets forth the aggregate dollar amounts of the adviser clawback before and after any reduction for actual, potential, or hypothetical taxes within 45 days after the end of the fiscal quarter in which the adviser clawback occurs;

(4) Charge or allocate fees or expenses related to a portfolio investment (or potential portfolio investment) on a non-pro rata basis when multiple private funds and other clients advised by the adviser or its related persons (other than a securitized asset fund) have invested (or propose to invest) in the same portfolio investment, unless:

(i) The non-pro rata charge or allocation is fair and equitable under the circumstances; and

(ii) Prior to charging or allocating such fees or expenses to a private fund client, the investment adviser distributes to each investor of the private fund a written notice of the non-pro rata charge or allocation and a description of how it is fair and equitable under the circumstances; and

(5) Borrow money, securities, or other private fund assets, or receive a loan or an extension of credit, from a private fund client, unless the adviser:

(i) Distributes to each investor a written description of the material terms of, and requests each investor to consent to, such borrowing, loan, or extension of credit; and

(ii) Obtains written consent from at least a majority in interest of the private fund's investors that are not related persons of the adviser.

(b) Paragraphs (a)(1) and (a)(5) of this section shall not apply with respect to contractual agreements governing a private fund (and, with respect to paragraph (a)(5) of this section, contractual agreements governing a borrowing, loan, or extension of credit entered into by a private fund) that has commenced operations as of the compliance date and that were entered into in writing prior to the compliance date if paragraph (a)(1) or (a)(5) of this section, as applicable, would require the parties to amend such governing agreements; provided that this paragraph (b) does not permit an investment adviser to such a fund to charge or allocate to the private fund fees or expenses related to an investigation that results or has resulted in a court or governmental authority imposing a sanction for a violation of the Investment Advisers Act of 1940 or the rules promulgated thereunder.

(c) For purposes of this section, defined terms shall have the meanings set forth in § 275.211(h)(1)–1.

§ 275.211(h)(2)–2 Adviser-led secondaries.

(a) As a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts, practices, or courses of business within the meaning of section 206(4) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–6(4), an investment adviser that is registered or required to be registered under section 203 of the Act (15 U.S.C. 80b–3) conducting an adviser-led secondary transaction with respect to any private fund that it advises (other than a securitized asset fund) shall comply with paragraphs (a)(1) and (2) of this section. The investment adviser shall:

(1) Obtain, and distribute to investors in the private fund, a fairness opinion or valuation opinion from an independent opinion provider; and

(2) Prepare, and distribute to investors in the private fund, a written summary of any material business relationships the adviser or any of its related persons has, or has had within the two-year period immediately prior to the issuance of the fairness opinion or valuation opinion, with the independent opinion provider; in each case, prior to the due date of the election form in respect of the adviser-led secondary transaction.

(b) For purposes of this section, defined terms shall have the meanings set forth in § 275.211(h)(1)–1.

§ 275.211(h)(2)–3 Preferential treatment.

(a) An investment adviser to a private fund (other than a securitized asset fund) may not, directly or indirectly, do the following with respect to the private fund, or any investor in that private fund:

(1) Grant an investor in the private fund or in a similar pool of assets the ability to redeem its interest on terms that the adviser reasonably expects to have a material, negative effect on other investors in that private fund or in a similar pool of assets, except:

(i) If such ability to redeem is required by the applicable laws, rules, regulations, or orders of any relevant foreign or U.S. Government, State, or political subdivision to which the investor, the private fund, or any similar pool of assets is subject; or

(ii) If the investment adviser has offered the same redemption ability to all other existing investors, and will continue to offer such redemption ability to all future investors, in the private fund and any similar pool of assets;

(2) Provide information regarding the portfolio holdings or exposures of the private fund, or of a similar pool of assets, to any investor in the private fund if the adviser reasonably expects that providing the information would have a material, negative effect on other investors in that private fund or in a similar pool of assets, except if the investment adviser offers such information to all other existing investors in the private fund and any similar pool of assets at the same time or substantially the same time.

(b) An investment adviser to a private fund (other than a securitized asset fund) may not, directly or indirectly, provide any preferential treatment to any investor in the private fund unless

the adviser provides written notices as follows:

(1) *Advance written notice for prospective investors in a private fund.* The investment adviser shall provide to each prospective investor in the private fund, prior to the investor's investment in the private fund, a written notice that provides specific information regarding any preferential treatment related to any material economic terms that the adviser or its *related persons* provide to other investors in the same private fund.

(2) *Written notice for current investors in a private fund.* The investment adviser shall *distribute* to current investors:

(i) For an illiquid fund, as soon as reasonably practicable following the end of the private fund's fundraising period, written disclosure of all preferential treatment the adviser or its *related persons* has provided to other investors in the same private fund;

(ii) For a liquid fund, as soon as reasonably practicable following the investor's investment in the private fund, written disclosure of all preferential treatment the adviser or its related persons has provided to other investors in the same private fund; and

(iii) On at least an annual basis, a written notice that provides specific information regarding any preferential treatment provided by the adviser or its related persons to other investors in the same private fund since the last written notice provided in accordance with this section, if any.

(c) For purposes of this section, defined terms shall have the meanings set forth in § 275.211(h)(1)–1.

(d) Paragraph (a) of this section shall not apply with respect to contractual agreements governing a private fund that has commenced operations as of the compliance date and that were entered into in writing prior to the compliance date if paragraph (a) of this section would require the parties to amend such governing agreements.

By the Commission.

Dated: August 23, 2023.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2023–18660 Filed 9–13–23; 8:45 am]

BILLING CODE 8011–01–P

FEDERAL REGISTER

Vol. 88 Thursday,

No. 177 September 14, 2023

Part III

Department of Health and Human Services

45 CFR Part 84

Discrimination on the Basis of Disability in Health and Human Service Programs or Activities; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 84

RIN 0945–AA15

Discrimination on the Basis of Disability in Health and Human Service Programs or Activities

AGENCY: Office for Civil Rights (OCR), Office of the Secretary, HHS.

ACTION: Proposed rule.

SUMMARY: The Department of Health and Human Services (HHS or the Department) is committed to protecting the civil rights of individuals with disabilities under section 504 of the Rehabilitation Act of 1973 (section 504). To implement the prohibition of discrimination on the basis of disability, the Department proposes to update and amend its section 504 regulation. The proposed rule would add new provisions that clarify existing requirements under section 504 prohibiting recipients of financial assistance from the Department (recipients) from discriminating on the basis of disability in their programs and activities, including in health care, child welfare, and other human services. The proposed rule includes new requirements prohibiting discrimination in the areas of medical treatment; the use of value assessments; web, mobile, and kiosk accessibility; and requirements for accessible medical equipment, so that persons with disabilities have an opportunity to participate in or benefit from health care programs and activities that is equal to the opportunity afforded others. It also adds a section on child welfare to expand on and clarify the obligation to provide nondiscriminatory child welfare services. The proposed rule would also update the definition of disability and other provisions to ensure consistency with statutory amendments to the Rehabilitation Act, enactment of the Americans with Disabilities Act and the Americans with Disabilities Amendments Act of 2008, the Affordable Care Act, as well as Supreme Court and other significant court cases. It also further clarifies the obligation to provide services in the most integrated setting. Finally, the proposed rule would make other clarifying edits, including updating outdated terminology and references.

DATES:

Comments: Submit comments on or before November 13, 2023.

Meeting: Pursuant to Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, the Department of Health and Human Services' Tribal Consultation Policy, and the Department's Plan for Implementing Executive Order 13175, the Office for Civil Rights solicits input by tribal officials as we develop the implementing regulations for section 504 of the Rehabilitation Act of 1973 at 45 CFR part 84. The Tribal consultation meeting will be held on October 6, 2023 from 2 p.m. to 4 p.m. Eastern Time.

ADDRESSES:

Meeting: To participate in the Tribal consultation, you must register in advance at *https://www.zoomgov.com/meeting/register/vJIsceGqpzsjEwi5AQ8pvdIholm7Xp4hwLs.*

Comments: You may submit comments to this proposed rule, identified by RIN 0945–AA15, by any of the following methods. Please do not submit duplicate comments.

Federal eRulemaking Portal. You may submit electronic comments at *http://www.regulations.gov* by searching for the Docket ID number HHS–OCR–2023–0013. Follow the instructions at *http://www.regulations.gov* online for submitting comments through this method.

Regular, Express, or Overnight Mail: You may mail comments to U.S. Department of Health and Human Services, Office for Civil Rights, Attention: Disability NPRM, RIN 0945–AA15, Hubert H. Humphrey Building, Room 509F, 200 Independence Avenue SW, Washington, DC 20201.

All comments sent by the methods and received or officially postmarked by the due date specified above will be posted without change to content to *http://www.regulations.gov,* including any personal information provided, and such posting may occur before or after the closing of the comment period.

We will consider all comments received or officially postmarked by the date and time specified in the **DATES** section above, but, because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to provide individual acknowledgements of receipt.

Please allow sufficient time for mailed comments to be timely received in the event of delivery or security delays. Electronic comments with attachments should be in Microsoft Word or Portable Document Format (PDF).

Please note that comments submitted by fax or email, and those submitted or postmarked after the comment period, will not be accepted.

Docket: For complete access to background documents or posted comments, go to *http://www.regulations.gov* and search for Docket ID number HHS–OCR–2023–0013.

FOR FURTHER INFORMATION CONTACT: Molly Burgdorf, Office for Civil Rights, Department of Health and Human Services at (202) 545–4884 or (800) 537–7697 (TDD), or via email at *504@hhs.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background
A. Purpose and Relevant Law
B. Summary of the Proposed Rule
II. Reasons for the Proposed Rulemaking
III. Nondiscrimination in Programs and Activities
A. New Provisions Addressing Discrimination on the Basis of Disability Under Section 504
Medical Treatment (§ 84.56)
Value Assessment Methods (§ 84.57)
Children, Parents, Caregivers, Foster Parents, and Prospective Parents in the Child Welfare System (§ 84.60)
Subpart I: Web, Mobile, and Kiosk Accessibility (§§ 80.82–80.88)
Subpart J: Accessible Medical Equipment (§§ 84.90–84.94)
B. Revised Provisions Addressing Discrimination and Ensuring Consistency With Statutory Changes, Supreme Court, and Other Case Law
Purpose and Broad Coverage (§ 84.1): Revisions to Subpart A
Application (§ 84.2): Revisions to Subpart A
Relationship to Other Laws (§ 84.3): Revisions to Subpart A
Definition of Disability (§ 84.4): Revisions to Subpart A
Notice (§ 84.8): Revisions to Subpart A
Definitions (§ 84.10): Revisions to Subpart A
Employment Practices (§ 84.16): Revisions to Subpart B
Program Accessibility (§§ 84.21–84.23): Revisions to Subpart C
Childcare, Preschool, Elementary and Secondary, and Adult Education (§§ 84.31, 84.38): Revisions to Subpart D
Health, Welfare, and Social Services (§§ 84.51–84.55): Revisions to Subpart F
Subpart G: General Requirements
General Prohibitions Against Discrimination (§ 84.68)
Illegal Use of Drugs (§ 84.69)
Maintenance of Accessible Features (§ 84.70)
Retaliation or Coercion (§ 84.71)
Personal Services and Devices (§ 84.72)
Service Animals (§ 84.73)
Mobility Devices (§ 84.74)
Direct Threat (§ 84.75)
Integration (§ 84.76)
Subpart H: Communications (§§ 84.77–84.81)
Subpart K: Procedures (§ 84.98)
IV. Executive Order 12866 and Related Executive Orders on Regulatory Review
Regulatory Impact Analysis Summary
Regulatory Flexibility Act—Initial Small Entity Analysis

Executive Order 13132: Federalism
Paperwork Reduction Act
National Technology Transfer and Advancement Act of 1995
Executive Order 12250 on Leadership and Coordination of Nondiscrimination Laws
V. Effective Date
VI. Request for Comment

I. Background

A. Purpose and Relevant Law

Section 504 prohibits discrimination on the basis of disability in programs and activities [1] that receive Federal financial assistance as well as in programs and activities conducted by any Federal agency.[2] Section 504 provides:

> No otherwise qualified individual with a disability in the United States, as defined in Section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Post Office.[3]

The Office for Civil Rights (OCR) in HHS enforces section 504 as well as two other statutes that prohibit discrimination on the basis of disability. Title II of the Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability in, among other areas, all health care and social services programs and activities of State and local government entities.[4] OCR also enforces section 1557 (section 1557) of the Patient Protection and Affordable Care Act (ACA),[5] which prohibits discrimination on various bases including disability in any health program or activity, any part of which receives Federal financial assistance, including credits, subsidies, or contract of insurance or under any program or activity that is administered by an Executive Agency or any entity established under Title I of the ACA.[6]

Congress passed the Rehabilitation Act in 1973, and what was then the U.S. Department of Health, Education, and Welfare (HEW) issued regulations to implement section 504 in 1977.[7] In the more than 40 years since, major legislative and judicial developments have shifted the legal landscape of disability discrimination protections under section 504. These developments include multiple statutory amendments to the Rehabilitation Act, the enactment of the ADA and ADA Amendments Act of 2008 (ADAAA), the ACA, and Supreme Court and other significant court cases. It is crucial that section 504 be interpreted consistently with these developments and laws to ensure conformity with current law and to protect against discrimination on the basis of disability. To provide that clarity, the Department proposes amendments to its existing section 504 regulation on nondiscrimination obligations for recipients of Federal financial assistance (part 84).

In addition, since section 504 also covers programs and activities conducted by the Department, the Department intends to publish a separate rulemaking to update its existing federally conducted regulation, which has not been amended since it was enacted in 1998 (part 85).[8]

B. Summary of the Proposed Rule

The Department proposes to amend its existing regulation implementing section 504 for federally assisted programs and activities to address the obligations of recipients of Federal financial assistance to comply with section 504 across a variety of contexts. The proposed rule clarifies the application of section 504 to several areas not explicitly addressed through the existing regulation, including medical treatment decisions; the use of value assessments; web, mobile, and kiosk accessibility; and accessible medical equipment. The proposed rule also expands on and clarifies the requirements in the current regulation applicable to federally funded child welfare programs and activities.

In addition, the Department proposes to update pertinent provisions throughout the rule to promote consistency with title II of the ADA and the corresponding U.S. Department of Justice (DOJ) ADA regulations. The proposed rule will add the following new sections to the section 504 regulations that track the ADA regulations: definition of ''disability,'' notice, maintenance of accessible features, retaliation and coercion, personal devices and services, service animals, mobility devices, and communications. The proposed rule also contains the following sections that are similar to the ADA regulations: purpose and broad coverage, definitions, general prohibitions against discrimination, program accessibility, illegal use of drugs, direct threat, and integration. The proposed rule will also provide more detailed standards on the obligation to provide programs and activities in the most integrated setting appropriate and will make non-substantive clarifying edits, including updating outdated terminology and references and omitting obsolete regulatory sections.

Section 504 and the ADA are generally understood by courts to impose similar requirements. Moreover, the vast majority of recipients have been covered by either title II of the ADA (State and local government entities) or title III of the ADA (certain private entities) since 1991. Therefore, the rule proposes to adopt ADA language in appropriate circumstances. Doing so will allow for greater public understanding and ease of compliance by regulated entities.

II. Reasons for the Proposed Rulemaking

The Department is issuing this proposed rule to address discrimination on the basis of disability by recipients of HHS financial assistance.[9] The

[1] The statutory text of section 504 explains that ''program or activity'' means ''all of the operations of'' an agency. 29 U.S.C. 794(b)(1)(A). The term ''programs and activities'' is therefore intended to cover the same types of operations that are covered under title II of the Americans with Disabilities Act (ADA).

[2] 29 U.S.C. 794.

[3] *Id.*

[4] 42 U.S.C. 12132 (''. . . no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity''). The ADA regulations generally designate HHS as the agency with responsibility for investigating complaints of discrimination in ''programs, services, and regulatory activities relating to the provision of health care and social services.'' 28 CFR 35.190(b)(3). With respect to employment, the standards contained in title I of the ADA apply to determinations of employment discrimination under section 504. Title I of the ADA provides, ''No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.'' 42 U.S.C. 12112. Title II entities are also obligated to fulfill the ADA's title I requirements in their capacity as employers, which are distinct from their obligations under this rule.

[5] 42 U.S.C. 18116.

[6] In its Notice of Proposed Rulemaking on regulations implementing Section 1557 of the Affordable Care Act, 45 CFR pt. 92, the Department has proposed to revise its interpretation that ''Federal financial assistance'' does not include Medicare Part B, and to make conforming necessary amendments to the appendices of regulations implementing both Title VI of the Civil Rights Act and section 504. 87 FR 47824, 47828 (Aug. 4, 2022). Those proposed changes are not separately addressed in this rule.

[7] In 1980, Congress reorganized HEW into several Federal agencies including the Department of Health and Human Services and the Department of Education. The existing section 504 regulations of HEW continued in place with HHS.

[8] 45 CFR pt. 85.

[9] The Department notes that on January 15, 2021, OCR posted on its website a Request for Information (RFI) addressing a number of disability discrimination issues under part 84 of section 504. The RFI was later withdrawn, without being published in the **Federal Register**. OCR subsequently received letters urging HHS to address the issues in the RFI.

proposed regulation offers clear and specific requirements to help recipients and beneficiaries better understand their rights and responsibilities under section 504. In the years since HEW first promulgated its section 504 regulation, it has rarely been amended, with the most recent amendment occurring in 2005.[10] The proposed rule addresses developments in statutory and case law regarding disability discrimination. To promote voluntary compliance with the law, we provide further clarity and elaboration to the legal standards.

Furthermore, the proposed rule is consistent with the goals and objectives of several recent Executive Orders that address equitable access to benefits and services for underserved populations. As detailed below, people with disabilities have historically been underserved by, denied equitable access to, or excluded from health programs and activities. Executive Order 14035 (Advancing Diversity, Equity, Inclusion, and Accessibility Across the Federal Government) and Executive Order 13985 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government) explicitly describe people with disabilities as an underserved community and priority population for Federal policy intervention. The rulemaking is also consistent with Executive Order 14009 (Strengthening Medicaid and the Affordable Care Act), which requires agencies with authorities and responsibilities related to Medicaid and the ACA to review existing regulations to ensure they promote equitable access to high-quality health care accessible and affordable for every American, including reviewing policies or practices that may undermine protections for people with pre-existing conditions, including complications related to COVID–19, under the ACA. Finally, this rulemaking is consistent with Executive Order 14070 (Continuing to Strengthen Americans' Access to Affordable, Quality Health Coverage), which directs the Department to examine policies or practices that strengthen benefits and improve access to health care providers.

People with disabilities are often excluded from health programs and activities and denied an equal opportunity to participate in and benefit from quality health care.[11] That discrimination contributes to significant health disparities and poorer health outcomes than persons with disabilities would experience absent the discrimination.[12]

The National Council on Disability (NCD), an independent Federal agency, has observed that ''[o]ne of the hallmarks of societal attitudes toward disabilities has been a tendency of people without disabilities to overestimate the negative aspects and underestimate the positive features of the lives of those who have disabilities.'' [13] Research in the field of health care supports this assertion.[14] One recent study demonstrates that large proportions of practicing U.S. physicians appear to hold biased or stigmatized perceptions of people with disabilities.[15] The study found that many physicians perceive that people with disabilities experience a lower quality of life because of their disabilities—even though most individuals with disabilities report that they experience an excellent or good quality of life. Furthermore, only 40.7% of physicians surveyed were confident of their ability to provide the same quality of care to patients with disabilities and only 56.5% strongly agreed that they welcome patients with disabilities into their practices.[16] Flawed perceptions, stereotypes, and biases about individuals with disabilities can lead to prohibited discrimination.[17]

These issues are not limited to health care. For example, the NCD 2012 report, ''Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children,'' included research and accounts of parents who had been treated unfairly because of their disabilities, documenting persistent and systemic discrimination against parents with disabilities whose children were involved with the child welfare system.[18] The Department is issuing this proposed regulation to offer clear and specific requirements to help recipients better understand their obligations under the law and to help individuals with disabilities better understand their rights. The Department believes this added clarity and transparency will support recipients in providing programs and activities free of discrimination on the basis of disability.

This preamble will address first the new provisions being added to the existing section 504 rule (Section III(A) in the Table of Contents above)—medical treatment; value assessment; child welfare; web, mobile, and kiosk accessibility; and accessible medical equipment—and then will address the updated provisions (Section III(B) in the Table of Contents). However, the text of the rule itself does not start with the

[10] Amendments to the section 504 regulations over time have included changes such as addressing the withholding of medical care from infants with disabilities (changes that the Supreme Court invalidated in *Bowen* v. *Amer. Hosp. Ass'n,* 476 U.S. 610 (1986)); changes to the accessible building standards; and changes to the definition of ''program or activity'' to conform to the Civil Rights Restoration Act of 1987.

[11] *See, e.g.,* Elizabeth A. Courtney-Long et al., *Socioeconomic Factors at the Intersection of Race and Ethnicity Influencing Health Risks for People with Disabilities,* 4 J. of Racial and Ethnic Health Disparities 213 (2017), *https://doi.org/10.1007/s40615-016-0220-5;* Susan Havercamp et al., *National Health Surveillance of Adults with Disabilities, Adults with Intellectual and Developmental Disabilities, and Adults with No Disabilities,* 8 Disability & Health J. 165 (2015), *https://doi.org/10.1016/j.dhjo.2014.11.002;* Lisa I. Iezzoni et al., *Have Almost Fifty Years of Disability Civil Rights Laws Achieved Equitable Care?,* 41 Health Affairs 1371 (2022), *https://doi.org/10.1377/hlthaff.2022.00413;* Tara Lagu et al., *'I Am Not The Doctor For You': Physicians' Attitudes About Caring For People With Disabilities,* 41 Health Affairs 1387 (2022), *https://doi.org/10.1377/hlthaff.2022.00475;* Monika Mitra et al., (2022) *Advancing Health Equity and Reducing Health Disparities for People with Disabilities in the United States,* 41 Health Affairs 1379 (2022), *https://doi.org/10.1377/hlthaff.2022.00499.* Nat'l Council on Disability, Health Equity Framework for People With Disabilities (2022), *https://www.ncd.gov/sites/default/files/NCD_Health_Equity_Framework.pdf;* Nat'l Council on Disability, The Current State of Health Care for People with Disabilities (2009).

[12] *See, e.g.,* Nat'l Council on Disability, Bioethics and Disability Report Series (2019), *https://ncd.gov/publications/2019/bioethics-report-series;* Tara Lagu et al., *The Axes of Access—Improving Care Quality for Patients with Disabilities,* 370 New Eng. J. Med. 1847 (May 2014); Tara Lagu et al., *Ensuring Access to Health Care for Patients with Disabilities,* 175 JAMA Internal Med. 157 (Dec. 2014); Tim Gilmer, *Equal Health Care: If Not Now, When*?, New Mobility (July 2013), *http://www.newmobility.com/equal-health-care-if-not-now-when;* Gloria L. Krahn et al., *Persons with Disabilities as an Unrecognized Health Disparity Population,* 105 Am. J. of Pub. Health (Suppl 2) S198 (S198–S206) (2015); Kristi L. Kirschner et al., *Structural Impairments that Limit Access to Health Care for Patients with Disabilities,* 297 JAMA 1121 (2007).

[13] Nat'l Council on Disability, Assisted Suicide: A Disability Perspective (Mar. 24, 1997), *https://ncd.gov/publications/1997/03241997.*

[14] *See, e.g.,* Laura VanPuymbrouck, et al., *Explicit and Implicit Disability Attitudes of Healthcare Providers,* Rehabilitation Psych., 65(2) 2020, at 101–112; Stefanie Ames et al., *Perceived Disability-Based Discrimination in Health Care for Children With Medical Complexity,* Pediatrics, 152(1) 2023, *https://doi.org/10.1542/peds.2022-060975.*

[15] *See* Tara Lagu et al., *'I Am not the Doctor For You': Physicians' Attitudes about Caring for People with Disabilities,* 41 Health Affairs 1387 (2022), *https://doi.org/10.1377/hlthaff.2022.00475;* Laura VanPuymbrouck et al., *Explicit and Implicit Disability Attitudes of Healthcare Providers,* Rehabilitation Psych., 65(2) 2020, at 101–112, *https://doi.org/10.1037/rep0000317.*

[16] Lisa I. Iezzoni et al., *Physicians' Perceptions of People with Disability and their Health Care,* 40 Health Aff. 297 (Feb. 2021), *https://pubmed.ncbi.nlm.nih.gov/33523739/* (citing GL Albrecht et al., *The Disability Paradox: High Quality of Life Against All Odds,* 48 Soc. Sci. Med., 977 (1999)).

[17] *See, e.g., Lesley* v. *Chie,* 250 F.3d 47, 55 (1st Cir. 1985) (Physician's decision could be ''discriminatory on its face, because it rested on stereotypes of the disabled rather than an individualized inquiry into the patient's condition'').

[18] Nat'l Council on Disability, Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and their Children (2012), *https://www.ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf.*

new provisions but, instead, follows in numerical order. This explanation is being provided so that a reader can understand how the order of this preamble corresponds to the text of the regulation.

Throughout this NPRM, the terms ''individual with a disability,'' ''people with disabilities,'' and ''person with a disability'' are used interchangeably. No substantive difference is intended.

III. Nondiscrimination in Programs and Activities

A. New Provisions Addressing Discrimination on the Basis of Disability Under Section 504 § 84.56 Medical Treatment

The Department funds a wide array of programs and activities in which recipients make decisions regarding medical treatment. Medical literature, government agency reports, and court decisions demonstrate that individuals with disabilities face discrimination at every stage of the medical treatment process. Biases and stereotypes about the impact of disability affect decisions in different contexts, including diagnoses, day-to-day treatment decisions, emergency care decisions, and the allocation of scarce medical resources in health crises.[19] Recent experiences during the COVID–19 public health emergency further illustrate the harms that discrimination can pose. In March 2020 NCD observed that ''discrimination by medical practitioners who, through ignorance of the law or due to the belief that people with disabilities are less valuable, and therefore less deserving of medical care, than those who are not'' resulted in ''people with chronic illnesses and other disabilities [being] left behind, denied resources to survive, and as a result, suffer[ing] great losses of life.'' [20]

We propose to clarify the general prohibition on discrimination against qualified individuals with disabilities in the medical treatment context and elaborate on specific prohibitions in this context. ''Medical treatment'' is used in this section in a generic, nonspecific manner; it is intended to be broad and inclusive. It refers to the management and care of a patient to identify, address, treat, or ameliorate a physical or mental health condition, injury, disorder, or symptom, whether or not the condition constitutes a disability and whether the medical approach is preventive, curative, rehabilitative, or palliative. It includes the use of a wide range of regimens for both physical and mental conditions, interventions, or procedures, such as surgery; the prescribing, dispensing, or management of medications; exercise; physical therapy; rehabilitation services; and the provision of durable medical equipment.

Throughout this section, the terms ''provider'' and ''medical professional'' are sometimes used in place of ''recipient,'' which is defined in § 84.10.

Discrimination Against People With Disabilities in Medical Treatment

Although section 504 has prohibited discrimination in any program or activity receiving Federal financial assistance since it was enacted, discrimination continues to underpin health inequities faced by people with disabilities.[21] People with disabilities have reduced access to medical treatment, a reality that leads to significant health disparities and poorer health outcomes.[22] People with disabilities are significantly more likely than people without disabilities to have unmet medical, dental, and prescription needs.[23] Unmet health care needs contribute to various indicators of health inequity: for example, individuals with disabilities in the United States have a shorter average life expectancy than people without disabilities and are three times as likely to have heart disease, stroke, diabetes, or cancer than adults without disabilities.[24] People with certain types of serious mental illness have a significantly shorter life expectancy than the general population,[25] and people with mental illness have an increased risk of physical disease, as well as reduced access to adequate health care.[26] Pregnant people with disabilities receive poorer maternity care, experience higher incidents of pregnancy and birth-related complications, and are eleven times more likely to experience maternal

[19] *See, e.g., Donlon* v. *Hillsborough Cnty.,* No. 18–cv–549–LM, 2019 WL 2062436 (D.N.H. May 9, 2019) (granting Plaintiff's motion under the ADA to amend her complaint alleging that she was denied medical treatment and emergency care because she had been stereotyped based on her mental illness. The court said that ''[t]he facts alleged raise a plausible inference of such unreasonable care that would imply pretext for a discriminatory motive.''); *Pesce* v. *Coppinger,* 355 F. Supp. 3d 35, 47 (D. Mass. 2018) (granting Plaintiff's motion under the ADA for a preliminary injunction because the failure of the correctional facility to provide methadone for opioid addiction ''is either 'arbitrary or capricious as to imply that it was a pretext for some 'discriminatory motive' or 'discriminatory on its face,' '' (citing *Kiman* v. *N.H. Dep't of Corr.,* 151 F.3d 274, 285 (1st Cir. 2006); *Sumes* v. *Andres,* 938 F. Supp. 9, 12 (D.D.C. 1996) (finding that there was no bona fide medical reason for a physician's refusal to treat the plaintiff, the court held that the ADA and section 504 had been violated because the denial of treatment was based on deafness); *Howe* v. *Hull,* 874 F. Supp. 779, 788–89 (N.D. Ohio 1994) (denying Defendant's motion for summary judgment under the ADA because the refusal of the hospital to admit the plaintiff for treatment was based on her HIV status).

[20] Letter from Nat'l Council on Disability to Roger Severino, Dir., U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., (March 18, 2020), *https://ncd.gov/publications/2020/ncd-covid-19-letter-hhs-ocr.*

[21] While this proposed section 504 regulation relates specifically to disability discrimination, other categories of discrimination, including discrimination on the basis of race, color, national origin, sex (including pregnancy, sexual orientation, and gender identity), and age, also impact the health care system. Many of these forms of discrimination intersect with disability discrimination, contributing to and at times exacerbating the nature and extent of the harms people with disabilities experience. In addition, many communities of color experience higher rates of disability and health risks in the U.S. *See, e.g.,* Centers for Disease Control and Prevention, Adults with Disabilities: Ethnicity and Race, *https://www.cdc.gov/ncbddd/disabilityandhealth/materials/infographic-disabilities-ethnicity-race.html* (last visited Oct. 1, 2022).

[22] *See, e.g.,* Nat'l Council on Disability, Bioethics and Disability Report Series (2019), *https://ncd.gov/publications/2019/bioethics-report-series;* Tara Lagu et al., *The Axes of Access—Improving Care Quality for Patients with Disabilities,* 370 N. Engl. J. Med. 1847 (May 2014); Tara Lagu et al., *Ensuring Access to Health Care for Patients with Disabilities,* 175 JAMA Internal Med. 157 (Feb. 2015); Tim Gilmer, *Equal Health Care: If Not Now, When?,* New Mobility (July 1, 2013), *http://www.newmobility.com/equal-health-care-if-not-now-when;* Gloria L. Krahn et al., *Persons with Disabilities as an Unrecognized Health Disparity Population,* 105 Am. J. of Public Health S198 (2015); Kristi L. Kirschner et al., *Structural Impairments that Limit Access to Health Care for Patients with Disabilities,* 297 JAMA 1121 (Mar. 2007).

[23] *See, e.g.,* Elham Mahmoudi et al., *Disparities in Access to Health Care Among Adults with Physical Disabilities: Analysis of a Representative National Sample for a Ten-Year Period,* 8 Disability & Health J. 182 (Apr. 2015), *https://doi.org/10.1016/j.dhjo.2014.08.007;* Stephen P. Gulley et al., *Disability in Two Health Care Systems: Access, Quality, Satisfaction, and Physician Contacts among Working-Age Canadians and Americans with Disabilities,* 1 Disability & Health J. 196 (Oct. 2008).

[24] Ctrs. for Disease Control & Prevention, *Disability Inclusion, https://www.cdc.gov/ncbddd/disabilityandhealth/disability-inclusion.html;* Valerie Forman-Hoffman et al., *Disability Status, Mortality, and Leading Causes of Death in the United States Community Population,* 53(4) Medical Care 346 (Apr. 2015), *https://pubmed.ncbi.nlm.nih.gov/25719432;* Williams, M. et al., *Exploring Health Disparities Among Individuals with Disabilities within the United States,* Am. Pub. Health Ass'n. (Oct. 2020), *https://apha.confex.com/apha/2020/meetingapp.cgi/Paper/473208;* Nat'l Council on Disability, Health Equity Framework for People with Disabilities (2022), *https://ncd.gov/sites/default/files/NCD_Health_Equity_Framework.pdf.*

[25] *See, e.g.,* Andrea Fiorillo & Norman Sartorius, *Mortality Dap and Physical Comorbidity of People with Severe mental Disorders: The Public Health Scandal* Ann. Gen. Psychiatry 20, 52 (2021). *https://doi.org/10.1186/s12991-021-00374-y;* Steve Brown et al., *Twenty Five Year Mortality of a Community Cohort with Schizophrenia,* Br. J. Psychiatry (2010), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4560167/.*

[26] Joseph Firth et al., *The Lancet Psychiatry Commission: A Blueprint for Protecting Physical Health in People with Mental Illness,* The Lancet Psychiatry, Vol. 6, 675–712 (2019), *https://doi.org/10.1016/S2215-0366(19)30132-4.*

death than people without disabilities.[27] People with physical disabilities are less likely to receive mammograms, Pap smears, or other recommended routine preventive screenings.[28] People with disabilities are also more likely to have risk factors associated with cancer than people without disabilities.[29] During the first year of the COVID–19 pandemic, one-third of the individuals who died in the United States were living in congregate settings, often to receive necessary services and supports—the majority of whom were individuals with disabilities.[30] Adults with disabilities were also considerably more likely than their peers without disabilities to either delay care or not get needed medical care for health issues other than COVID–19.[31]

Although many factors contribute to these health inequities, discriminatory medical decisions—often driven by stereotypes about disability—are a key factor. The National Academies of Sciences, Engineering, and Medicine report that provider assumptions about people with disabilities limit health and health care for people with disabilities, noting that health care providers assume that people with disabilities ''differ in significant, meaningful, and somewhat undefined ways from other people[;] that people with disabilities have a lower level of cognitive ability, independence, and interest in improving and maintaining current function; [and] that the quality of life for a disabled person is severely compromised, [which] limits the type, scope, and aggressiveness of considered treatment options.'' [32]

These assumptions have been documented in many programs and activities that frequently receive HHS funding. For example, a 2021 study entitled ''Physicians' Perceptions of People with Disability and Their Health Care'' found that large proportions of practicing U.S. physicians appeared to hold biased or stigmatized perceptions of people with disabilities, such as perceiving worse quality of life for people with disabilities.[33] The study showed that, for example, 82% of doctors thought people with disabilities had a lower quality of life than people without disabilities,[34] only 40% felt confident in their ability to provide the same level to care to patients with disabilities as those without disabilities,[35] and only 56% strongly agreed that they welcomed patients with disabilities into their practice.[36] A related study released in January 2022 also made clear that many physicians are uncertain about their legal responsibilities resulting from laws prohibiting discrimination on the basis of disability or how to ensure the provision of equitable care to patients with disabilities.[37] For example, more than 71% of physicians surveyed provided incorrect answers about who makes decisions about reasonable accommodations for patients with a disability.[38] Another study published in October 2022 found that some providers seek ways to avoid treating patients with disabilities and to discharge them from their practice.[39] These medical provider attitudes do not reflect the high quality of life reported by many people with disabilities. In 2019, NCD observed, ''most report a high quality of life and level of happiness, especially when they have access to the health care services and supports that they need to equally participate in and contribute to their communities.'' [40] Most individuals with disabilities report an excellent or good quality of life.[41] As NCD noted previously, ''[. . .] negative predictions of life quality have little to do with the actual life experiences of people with disabilities. People with disabilities commonly report more satisfaction with their lives than others might have expected. Though they commonly encounter obstacles, prejudice, and discrimination, most people with disabilities manage to derive satisfaction and pleasure from their lives.'' [42]

Stereotypes about the value and quality of the lives of people with disabilities have led to discriminatory medical decisions in both the provision and denial of medical treatment.[43] The general pattern of discrimination against people with disabilities in medical treatment decisions extends across the array of contexts in which recipients make those decisions.

Below is a discussion of several of the most significant contexts in which this pattern of discrimination has come to the Department's attention, including in the areas of organ transplantation, denial of life-sustaining care, crisis standards of care, participation in clinical research, and other forms of medical treatment for people with disabilities, including forced sterilization. Following that is a subsection-by-subsection analysis of this proposed section.

[27] *See, e.g.,* Jessica L. Gleason et al., *Risk of Adverse Maternal Outcomes in Pregnant Women with Disabilities,* JAMA Network Open (2021), *https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2787181; Willi Horner-Johnson et al., Perinatal Health Risks and Outcomes Among US Women with Self-Reported Disability,* 41 Health Aff. 2011 (Sep. 2022), *https://doi.org/10.1377/hlthaff.2022.00497.*

[28] Lisa Iezzoni et al., *Associations Between Disability and Breast or Cervical Cancers, Accounting for Screening Disparities,* Medical Care 139 (2021), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7855335/; see also,* C. Brook Steele et al., *Prevalence of Cancer Screening Among Adults with Disabilities,* United States, 2013. Preventing Chronic Disease (2017), *http://dx.doi.org/10.5888/pcd14.160312.*

[29] M.A. Nosek et al., *Breast and Cervical Cancer Screening Among Women with Physical Disabilities,* 78 Archives of Physical Medicine and Rehabilitation, S39 (1997), *https://doi.org/10.1016/s0003-9993(97)90220-3; See also,* Lisa Iezzoni, *Cancer Detection, Diagnosis, and Treatment for Adults with Disabilities,* 23 Lancet E164 (Apr. 2022), *https://doi.org/10.1016/S1470-2045(22)00018-3.*

[30] Nat'l Council on Disability, The Impact of COVID–19 on People with Disabilities, 87 (2021), *https://ncd.gov/sites/default/files/NCD_COVID-19_Progress_Report_508.pdf.*

[31] Akobirshoev et al., *Delayed Medical Care and Unmet Care Needs Due to the COVID–19 Pandemic among Adults with Disabilities in the US,* 41 Health Aff. 1505 (Oct. 2022), *https://doi.org/10.1377/hlthaff.2022.00509.*

[32] Nat'l Acad. of Sciences, Engineering, & Med., *People Living with Disabilities: Health Equity, Health Disparities, and Health Literacy: Proceedings of a Workshop* (2018), *https://doi.org/10.17226/24741.*

[33] Lisa I. Iezzoni et al., *Physicians' Perceptions of People with Disability and Their Health Care,* 40 Health Aff. 297 (Feb. 2021), *https://pubmed.ncbi.nlm.nih.gov/33523739/.*

[34] *Id.* at 300.

[35] *Id.*

[36] *Id.* at 301.

[37] Lisa I. Iezzoni et al., *US Physicians' Knowledge about the Americans with Disabilities Act and Accommodation of Patients with Disability,* 41 Health Aff. 96 (Jan. 2022), *https://pubmed.ncbi.nlm.nih.gov/34982624/.*

[38] *Id.* at 100–101.

[39] Tara Lagu et al., *'I Am Not the Doctor For You': Physicians' Attitudes about Caring for People with Disabilities,* 41 Health Aff. 96 (Jan. 2022), *https://doi.org/10.1377/hlthaff.2022.00475.*

[40] Nat'l Council on Disability, Medical Futility and Disability Bias (2019), *https://ncd.gov/sites/default/files/NCD_Medical_Futility_Report_508.pdf; see also,* Mary Crossley, *Ending-Life Decisions: Some Disability Perspectives,* 33 Ga. St. U. L. Rev. 900 (2017).

[41] Lisa I. Iezzoni et al., *Physicians' Perceptions of People with Disability and their Health Care,* 40 Health Aff. 297 (Feb. 2021), *https://pubmed.ncbi.nlm.nih.gov/33523739/* (citing GL Albrecht et al, *The Disability Paradox: High Quality of life against all odds,* 48 Soc. Sci. Med. 977 (1999)).

[42] Nat'l Council on Disability, Assisted Suicide: A Disability Perspective (1997), *https://ncd.gov/publications/1997/03241997.*

[43] *See, e.g.,* Tara Lagu et al., '*I am Not the Doctor For You:' Physicians' Attitudes About Caring for People with Disabilities, supra* note 39 (''Many physicians also expressed explicit bias toward people with disabilities and described strategies for discharging them from their practices. Physicians raised concerns about the expense of providing physical and communication accommodations, including insufficient reimbursement for physicians' efforts and competing demands for staff time and other practice resources. Many participants described caring for very few patients who need accommodations, with little acknowledgment that the barriers to obtaining care and inability to track or respond to accommodation needs could lead to an underidentification of the number of people with disabilities who seek care.'').

Organ Transplantation

The Department plays a significant role in organ transplantation in the U.S. Within the Department, the Health Resources & Services Administration (HRSA) exercises oversight of solid organ transplantation according to a statutory and regulatory framework. The National Organ Transplant Act of 1984, as amended (NOTA) authorized the establishment of the Organ Procurement and Transplantation Network (OPTN) to allocate donor organs to individuals waiting for an organ transplant.[44] Under NOTA, the Secretary of Health and Human Services (Secretary) contracts with a non-profit entity to operate the OPTN, which currently is the United Network for Organ Sharing (UNOS). Additionally, the Centers for Medicare & Medicaid Services (CMS) makes payment for organ procurement costs under the Medicare and Medicaid programs to organ procurement organizations (OPOs) that meet safety requirements. Under Federal law, CMS is charged with certifying OPOs that must meet the OPO Conditions for Coverage in the regulations at 42 CFR 486.301 through 486.360, which include outcome and process measures.[45] OPOs are non-profit organizations responsible for the procurement of organs for transplantation. CMS also certifies that transplant programs, located within hospitals with Medicare provider agreements, perform transplantation procedures from living and deceased donors. Transplant programs must comply with the Medicare transplant program conditions of participation (CoPs) regulations at 42 CFR 482.68 through 482.104, and with the hospital CoPs at §§ 482.1 through 482.58.

NCD published a 2019 report, ''Organ Transplant Discrimination Against People with Disabilities,'' describing how people with disabilities who are otherwise qualified candidates for an organ transplant are excluded at many phases of the transplant process because of health care providers' inaccurate assumptions about quality of life, lifespan, and post-transplant compliance.[46] In February 2022, NCD issued a ''Health Equity Framework for People with Disabilities'' and recommended that HHS regulate this area.[47] The NCD organ transplant report states that discrimination occurs even though disabilities unrelated to a person's need for an organ transplant generally have little or no impact on the likelihood that the transplant will be successful, and that, if a person with a disability receives adequate support, their disability should have very limited impact on their ability to adhere to a post-transplant care regimen.[48]

OCR's investigative experience confirms ongoing concerns about discrimination at various points in the transplant process. Medical providers and transplant programs continue to refuse to evaluate patients with disabilities who are otherwise qualified for transplant eligibility and fail to place qualified patients on transplant waiting lists because of exclusions and limitations for certain disabilities that are not supported by objective evidence or that do not take into account reasonable modifications in assessing an individual's ability to manage postoperative care needs and other aspects of transplantation.[49] For example, in 2019, OCR resolved a case alleging discrimination against an individual with autism spectrum disorder, in which the complainant alleged the University of North Carolina Medical Center deemed the patient ineligible to be considered for evaluation for placement on a heart transplant wait list because of the individual's diagnosis of Autism Spectrum Disorder and anticipated difficulties managing postoperative care. OCR worked directly with the recipient to enter a voluntary resolution agreement and the medical facility agreed to reevaluate the individual's eligibility for placement on the waiting list and consider the services and supports the individual could access to manage postoperative care.[50]

The Department has heard from a number of stakeholders urging action on this issue. On May 6, 2019, 17 major organizations that serve and advocate for individuals with disabilities sent a letter asking OCR to issue a regulation and guidance that addresses discriminatory practices in organ transplantation.[51] On October 12, 2016, a bipartisan group of 30 members of Congress sent a letter to OCR urging it to issue guidance on discrimination against individuals with disabilities, particularly individuals with intellectual and developmental disabilities, in organ transplantation.[52] The letter cited data documenting consideration of disability status in organ transplantation. The Department agrees that action remains needed. Moreover, while 34 states have passed State laws protecting the rights of people with disabilities to access organ transplantation, 16 States and the District of Columbia lack legislation addressing this issue.[53] And even where State laws do address this issue, it is unclear whether those laws are adequately enforced. Additionally, according to a 2019 NCD report, transplant centers in states that have passed antidiscrimination legislation continue to publicly post discriminatory criteria for organ transplantation, suggesting that some State law requirements are not well-known or enforced.[54]

Research has documented the persistence of organ transplantation policies that discriminate against individuals with disabilities,

[44] Sec. 372, Public Law 98–507; 42 U.S.C. 274.

[45] 42 U.S.C. 1320b–8; sec. 371(b)(3)(C) and sec. 1138(b) of the Public Health Service Act (42 U.S.C. 273(b)(3)(C)).

[46] Nat'l Council on Disability, Organ Transplants Discrimination against People with Disabilities: Part of the Bioethics and Disability Series (2019), *https://ncd.gov/sites/default/files/NCD_Organ_Transplant_508.pdf.*

[47] Nat'l Council on Disability, Health Equity Framework for People with Disabilities (2022), *https://ncd.gov/sites/default/files/NCD_Health_Equity_Framework.pdf.*

[48] Nat'l Council on Disability, Organ Transplants Discrimination against People with Disabilities: Part of the Bioethics and Disability Series, 38–40 (2019), *https://ncd.gov/sites/default/files/NCD_Organ_Transplant_508.pdf.*

[49] *See, e.g., Bussoletti* v. *Univ. of Pitt. Med. Ctr.* (07–068765); *Walker* v. *Univ. Cal. San Diego Med. Ctr.* (08–80649); *Parsons* v. *Cnty of Santa Clara, Santa Clara Valley Med. Ctr.* (07–69439); *Paladino* v. *Union City Renal Ctr.* (06–44878); *Beaton* v. *Sutter Mem'l Hosp.* (03–11505); *Eggemeyer* v. *Ill. Dep't of Human Serv. Randolph Cnty. Office* (03–004371); *HIV/AIDS Legal Servs Alliance* v. *Health Plan P of Cal.* (09–02–3296); *Lewis* v. *Willis Knighton Med. Ctr.* (03–12129), on file with OCR. In at least one of the above complaints, OCR recommended that the covered entity evaluate its transplant listing policies after discovering that the covered entity's policy listed ''severe mental retardation'' as a contraindication for transplant.

[50] *See Disability Rts. of N.C.* v. *Univ. of N.C. Hosp.,* (19–318735), *https://www.hhs.gov/about/news/2019/02/12/ocr-resolves-disability-complaint-individual-who-was-denied-opportunity-heart-transplant-list.html* (No violation was found but a voluntary resolution agreement was entered into with the facility).

[51] Letter from Matt Valliere et al., to Roger Severino, Dir., U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., (May 6, 2019). The letter is on file with OCR.

[52] Letter from Thirty (30) Members of Congress to Jocelyn Samuels, former Dir., U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., (Oct. 12, 2016), on file with OCR.

[53] Nat'l Down Syndrome Soc'y, *Nondiscrimination in Organ Transplantation Laws & Toolkit* (2022), *https://www.ndss.org/programs/ndss-legislative-agenda/healthcare-research/nondiscrimination-in-organ-transplantation-laws-toolkit/.*

[54] Nat'l Council on Disability, Organ Transplant Discrimination Against People With Disabilities 53–54 (2019), *https://ncd.gov/sites/default/files/NCD_Organ_Transplant_508.pdf; See also* Isabella Newburg, Note, *The Heart of the Discrimination Problem: Insufficient State Protection for People with Intellectual and Developmental Disabilities in the Organ Transplant Process,* 107 Ia. L. Rev. 877, 894 (2022).

particularly against individuals with intellectual and developmental disabilities, psychiatric disabilities, and HIV.[55] A 2009 study reported that 85% of pediatric transplant centers considered neurodevelopmental status in evaluation, and 71% considered subnormal IQ a relative or absolute contraindication to transplant.[56] Programs continue to list these conditions as reasons for denying transplants, despite evidence that, for example, individuals with intellectual or developmental disabilities who have received organ transplants have rates of successful outcomes and medical adherence comparable to those of the general population.[57] A literature review published in ''Pediatric Transplantation'' found scant scientific data to support the idea that having an intellectual or developmental disability would pose a heightened risk of poorer outcomes following a transplant.[58]

In a policy statement, the American Society of Transplant Surgeons recommends ''that no patient will be discriminated against or precluded from transplant listing solely due to the presence of a disability or handicap, whether physical or psychological . . . This [transplant] decision would be made due to the clinical risk benefit analysis for the specific patient, and not on any external factors.'' The Society further indicates support for ''efforts to identify and eliminate any Transplant Center processes or practices that allow discrimination.'' [59]

Media reports have also documented denials of organ transplants based on disability.[60] For example, in 2013, the news widely covered the initial denial of a kidney transplant to a three-year-old girl by Children's Hospital of Philadelphia because she had Wolf-Hirschhorn syndrome, which delays growth and causes intellectual and developmental disabilities.[61] In 2006, Oklahoma University Medical Center denied a young woman placement on a waiting list for a kidney transplant based on her diagnosis of Mild Intellectual Disability.[62] In February 2022, CBS News covered families' allegations that hospitals denied transplant eligibility for children with Down syndrome and other developmental disabilities.[63] In addition, the general obligation to make reasonable modifications for qualified individuals with disabilities under proposed § 84.68(b)(7) applies to organ transplantation. For example, transplant programs receiving Federal financial assistance must allow individuals to meet the requirement that they can manage postoperative care needs with a reasonable modification, such as the assistance of a formal or informal support system. These types of supports may include, for example, support from family or friends, paid services, long-term services and supports, and other forms of assistance.

The continuing evidence of discrimination against individuals with disabilities in organ transplantation demonstrates the need for a rule specifically discussing the application of section 504's requirements in the medical treatment context.

Life-Sustaining Treatment

People with disabilities face significant discrimination in access to life-sustaining care. These discriminatory judgments arise when clinicians seek to end the continued provision of life-sustaining care that is still actively sought by a person with a disability or their authorized representative. This proposed rule uses the term ''life-sustaining care'' here broadly, to encompass both critical care treatment and life-saving or life-extending care provided outside the context of an acute medical crisis. Discrimination is particularly salient in the context of medical futility determinations, when hospitals and providers decide to discontinue or deny medical treatment based on the judgment that the treatment would do little or nothing to benefit the patient.[64] Section 504 does not prohibit giving medical providers discretion to make medical futility judgments; it does require that medical futility judgments be made on a nondiscriminatory basis. There is ample evidence that perceptions about patients with disabilities' quality of life often affects judgments related to patient benefit and leads to the discriminatory denial of life-sustaining care. The result can be premature death for patients with disabilities.

NCD published a report in 2019 examining the issue of medical futility determinations and disability bias, discussing decisions by health care providers to withhold or withdraw life-sustaining care for individuals with disabilities that are driven by subjective quality of life judgments.[65] Clinical literature documents how futility determinations can be used to deny care to people with disabilities based on their use of assistive technology, ongoing support needs, and other factors that do not prevent a treatment from being effective in saving or extending life.[66] As discussed above,

[55] Nat'l Council on Disability, Organ Transplant Discrimination Against People With Disabilities, 30 (2019), *https://ncd.gov/sites/default/files/NCD_Organ_Transplant_508.pdf* (''Disability discrimination persists in the evaluation process because, in spite of evidence to the contrary, many physicians still view HIV and AIDS, as well as intellectual, developmental, or psychiatric disabilities, as relative or absolute contraindications to transplant.'').

[56] Aaron Wightman et al., *Consideration of Children with Intellectual Disability as Candidates for Solid Organ Transplantation—A Practice in Evolution,* Pediatric Transplantation 22, no. 1 (Feb. 2018), citing Richards CT et al., *Use of Neurodevelopmental Delay in Pediatric Solid Organ Transplant Listing Decisions: Inconsistencies in Standards across Major Pediatric Transplant Centers.* Pediatric Transplantation no. 13, 843–85 (2009).

[57] *See, e.g.,* E. Samuel-Jones et al., *Cardiac Transplantation in Adult Patients with Mental Retardation: Do Outcomes Support Consensus Guidelines,* 53 Psychomatics 133 (2012) (concluding people with intellectual disabilities can receive long-term benefit from heart transplantation when they have the support necessary to ensure adherence to post-transplant regimens); Marilee Martens et al., *Organ Transplantation, Organ Donation and Mental Retardation,* Pediatric Transplantation. 2006 Sept.;10(6):658–64 (reviewed the literature on accessibility and outcomes of organ transplantation in individuals with intellectual disability and on the prevalence of organ donation in this population. The one- and three-year patient survival rates were 100% and 90%, respectively).

[58] Marilee A. Martens et al., *Organ Transplantation, Organ Donation, and Mental Retardation,* 10 Pediatric Transplantation 658 (2006).

[59] Am. Soc'y of Transplant Surgeons, *Statement Concerning Eligibility for Solid Organ Transplant Candidacy* (Feb. 12, 2021), *https://asts.org/about-asts/position-statements#.Ysxi0LfMKUk.*

[60] *See, e.g.,* Sara Reardon, *Push Is On for States to Ban Organ Transplant Discrimination,* Kaiser Health News (Mar. 8, 2021), *https://khn.org/news/article/organ-transplant-discrimination-disabilities-state-legislation/;* Sunshine Bodey, *My Son Has Autism. Discrimination Almost Cost Him His Life,* Wash. Post (Aug. 30, 2017), *https://www.washingtonpost.com/opinions/my-son-has-autism-discrimination-almost-cost-him-his-life/2017/08/30/b899dc58-88e8-11e7-961d-2f373b3977ee_story.html;* Lenny Berstein, *People with Autism, Intellectual Disabilities Fight Bias in Transplants,* Wash. Post (Mar. 4, 2017), *https://www.washingtonpost.com/national/health-science/people-with-autism-intellectual-disabilities-fight-bias-in-transplants/2017/03/04/756ff5b8-feb2-11e6-8f41-ea6ed597e4ca_story.html?utm_term=.144fbd126817.*

[61] Kim Painter, *Disabled NJ Girl Thrives, Inspires After Transplant,* USA Today (Oct. 5, 2013), *https://www.usatoday.com/story/news/nation/2013/10/05/disabled-transplant-amelia-rivera/2917989/.*

[62] David Shapiro, *Disabled Woman Dies While Awaiting Second Chance at Transplant,* NPR (June 13, 2012), *https://www.npr.org/sections/health-shots/2012/06/13/154914089/disabled-woman-dies-while-awaiting-second-chance-at-kidney-transplant.*

[63] Michael Roppolo, *They Say Their Children Are Being Denied Transplants Because of Their Disabilities. A New Federal Law May Help Change That.,* CBS News, (Feb. 28, 2022), *https://www.cbsnews.com/news/organ-transplants-discrimination-disability-rights.*

[64] Medical futility sometimes goes under other names such as ''nonbeneficial treatment.''

[65] Nat'l Council on Disability, Medical Futility and Disability Bias: Part of the Bioethics and Disability Series (Nov. 2019), *https://ncd.gov/sites/default/files/NCD_Medical_Futility_Report_508.pdf.*

[66] *See* LJ Schneiderman et al., *Medical Futility: Its Meaning and Ethical Implications,* 112 Ann. Intern.

recent research has documented that a large proportion of practicing physicians in the United States hold biased perceptions of people with disabilities, in particular perceiving people with disabilities as having worse quality of life (in contrast to the self-perception of many people with disabilities themselves).[67] Such perceptions of the quality of life of people with disabilities can play a role in the discriminatory use of futility determinations to deny medically effective care.

Of particular concern are determinations by providers that an intervention should not be provided if it ''fails to return or sustain an acceptable quality of life'' for a patient in the judgment of the provider, even if the patient or their authorized representative would consider such an outcome acceptable.[68] For example, the idea that if treatment ''cannot end dependence on intensive medical care, the treatment should be considered futile,'' [69] may discriminate against people whose disabilities create continuing support needs. Similarly, some sources have defined futility in terms of an inability to exit a hospital or institutional long-term care setting [70] or a patient's reliance on others for activities of daily living.[71] When these definitions are used to deny care to people with disabilities, they are likely to be discriminatory.

Physicians discriminate on the basis of disability when they act based on judgments that a patient's life is not worth living because they have a disability that substantially limits their major life activities and bodily functions, *e.g.,* they may need assistance with the activities of daily living. Denying a medical treatment on that basis if the treatment would be provided to a similarly situated patient without a disability is discrimination on the basis of disability. As discussed earlier in this section, people with disabilities frequently report having a good quality of life notwithstanding their need for assistance in many of the areas cited in the literature as a basis for a futility determination, such as mechanical ventilation, the use of assistive technology, the need for ongoing physical assistance with activities of daily living, mobility impairments, cognitive disability, and other similar factors.[72]

One study of the application of medical futility determinations found that mobility status, and particularly a patient's immobility (defined as being ''bed-bound or only able to move from bed to chair''), played a significant role in providers' determinations of qualitative futility—that is, determinations that an intervention will not return or sustain an acceptable quality of life—suggesting that physicians may be more likely to determine that a patient's likely outcome is unacceptably poor and should thus be considered medically futile if the patient has a mobility impairment.[73] In the same study, one-third of the determinations of futility based on perceptions of a patient's quality of life were made without a discussion with the patient about their perception of their quality of life, a significant problem given that patients frequently report substantially different perceptions of their own quality of life than their physicians assume.[74] A 2016 review found that futility determinations continue to be used by physicians and that such judgments often take into account clinician perceptions of patient quality of life, including dependence on life-sustaining equipment, devices, and medications.[75] This clinical literature supports the view that qualitative futility judgments are used to deny access to life-sustaining care against the wishes of the patient or their authorized representative based on clinician judgments that the life of a given patient with a disability is not worth living.[76]

In a 2015 policy statement from the American Thoracic Society, the American Association for Critical Care Nurses, the American College of Chest Physicians, the European Society for Intensive Care Medicine, and the Society of Critical Care Medicine entitled ''Responding to Requests for Potentially Inappropriate Treatments in Intensive Care Units,'' the term medical futility was defined more narrowly, referring only to ''treatments that have no chance of achieving the intended physiologic goal.'' The policy statement contrasts this narrow definition of futility with broader definitions that include futility based on quality-of-life judgments, stating that ''broader definitions of futility are problematic because they often hinge on controversial value judgments about quality of life or require a degree of prognostic certainty that is often not attainable.'' [77]

Disability and civil rights organizations have expressed serious concern regarding disability discrimination in medical futility decisions and other areas regarding denial of life-sustaining care. In a July 10, 2018, letter from 22 disability organizations to OCR and to HHS' Administration for Community Living (ACL), the writers noted that sometimes medical determinations of futility are motivated by inappropriate consideration of cost or value judgments regarding the quality of life of individuals with disabilities seeking life-saving medical treatment rather

---

Med. 949 (1990) (indicating the use of assistive technology, ongoing support needs, etc. in futility determinations). *See also* Maryam Aghabaray et al., *Medical Futility and its Challenges: a Review Study,* 9 J. Med. Ethics & History of Med. 11 (2016), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5203684/* (clarifying the continued use of these standards in the present day).

[67] Lisa I. Iezzoni et al., *Physicians' Perceptions of People with Disability and Their Health Care,* 40 Health Aff. 297 (Feb. 2021), *https://pubmed.ncbi.nlm.nih.gov/33523739/,* citing GL Albrecht et al., *The Disability Paradox: High Quality of Life Against All Odds,* 48 Soc. Sci. Med. 977 (1999).

[68] L. Morata, *An Evolutionary Concept Analysis of Futility in Health Care,* 74 J. Advanced Nursing 1289 (June 2018).

[69] *Id.*

[70] L.J. Schneiderman et al., *Medical Futility,* 118 Handbook of Clinical Neurology 167 (Jan. 2013); *Morata L., supra* note 68.

[71] R. Sibbald, et al., *Perceptions of ''Futile Care'' Among Caregivers in Intensive Care Units,* 177 CMAJ 1201 (Nov. 2007); Müller R, Kaiser S. et al., *Perceptions of Medical Futility in Clinical Practice–a Qualitative Systematic Review,* 48 J. Critical Care 78 (Dec. 2018).

[72] Gary Albrecht et al., *The Disability Paradox: High Quality of Life Against All Odds,* 48 Soc. Sci. Med. 977 (Apr. 1999); Sonia Frick et al., *Medical Futility: Predicting Outcome of Intensive Care Unit Patients by Nurses and Doctors—a Prospective Comparative Study,* 456 Critical Care Med. (Feb. 2003); Lisbeth Ørtenblad et al., *Users' Experiences With Home Mechanical Ventilation: A Review of Qualitative Studies,* Respiratory Care 1157 (Sep. 2019); Peter A. Ubel et al., *Whose Quality of Life? A Commentary Exploring Discrepancies Between Health State Evaluations of Patients and the General Public,* Quality of Life Research, 599 (Sept. 2003).

[73] J.R. Curtis et al., *Use of the Medical Futility Rationale in Do-Not-Attempt-Resuscitation Orders,* 273 JAMA 124, 125 (1995).

[74] *Id. See also* Gary Albrecht et al., *The Disability Paradox: High Quality of Life Against All Odds,* 48 Soc Sci Med. 977 (Apr. 1999).

[75] Maryam Aghabaray et al., *Medical Futility and its Challenges: A Review Study,* 9 J. of Med. Ethics and History of Med. 11 (2016), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5203684/.*

[76] Nat'l Council on Disability, Medical Futility and Disability Bias, Part of the Bioethics and Disability Series (2019), *https://ncd.gov/sites/default/files/NCD_Medical_Futility_Report_508.pdf;* Maryam Aghabaray et al., *Medical Futility and its Challenges: A Review Study,* 9 J. Med. Ethics & History of Med. 11 (2016), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5203684/;* Dominic J. Wilkinson et al., *Knowing When to Stop: Futility in the Intensive Care Unit,* 2 Current Op. in Anesthesiology 24 (2011), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3252683/* (recognizing that judgments concerning qualitative futility led to cessation of care in intensive care units).

[77] G.T. Bosslet et al., *An official ATS/AACN/ACCP/ESICM/SCCM Policy Statement: Responding to Requests for Potentially Inappropriate Treatments in Intensive Care Units,* 191 Am. J. Respiratory & Critical Care Med. 1318 (June 2015).

than an assessment of the individual's ability to benefit from treatment.[78]

On May 6, 2019, a coalition of 17 leading organizations that advocate for or serve individuals with disabilities wrote to OCR, raising selected disability discrimination issues.[79] They pointed to ''so-called 'futile care' laws and policies, which allow doctors to deny life-sustaining treatment to individuals with disabilities who want and need it.'' On September 3, 2019, the American Civil Liberties Union wrote a letter to OCR highlighting that medical futility determinations are an area of concern for discrimination against individuals with disabilities.[80] OCR has also heard from stakeholders that discrimination in medical futility determinations and biased provider counseling remain sources of concern for people with disabilities and may result in the denial of medically effective life-sustaining treatment against the wishes of patients with disabilities and their authorized representatives.[81]

Crisis Standards of Care

When an emergency or crisis has a substantial effect on usual health care operations and the level of care that is possible to deliver, hospitals and health systems may adopt crisis standards of care. These policies may authorize or recommend prioritization of scarce resources through means not used outside of crisis conditions. OCR received numerous complaints against states alleging disability discrimination relating to crisis standards of care during the early months of the COVID–19 public health emergency. Federal agencies, advocates, the media, members of the public, and other stakeholders also raised general concerns about the potential for discrimination on the basis of disability in the application of these standards.[82]

OCR resolved a number of civil rights complaints and provided technical assistance to recipients, including complaints against Tennessee,[83] Utah,[84] North Carolina,[85] several regional consortia of hospital systems within Texas,[86] and Arizona,[87] among others, regarding application of their triage and ventilator allocation guidelines to individuals with disabilities. In February 2022, OCR released a guidance document entitled ''Frequently Asked Questions for Providers during the COVID–19 Public Health Emergency: Federal Civil Rights Protections for Individuals with Disabilities under Section 504 and Section 1557.'' The document includes a section on crisis standards of care.[88] The guidance was intended to assist states and providers seeking to comply with applicable civil rights laws during the COVID–19 public health emergency. That guidance was specific to the circumstances of the COVID–19 pandemic. The Department proposes to address in this proposed regulation the application of section 504 to the allocation of scarce medical treatments or other resources more generally.

The COVID–19 public health emergency has illustrated the importance of regulating in this area, including within the context of crisis standards of care. For example, many crisis standards of care protocols issued prior to and during the COVID–19 public health emergency included categorical exclusions of people with disabilities from access to critical care despite their possessing the potential to benefit from treatment. Recipients may not categorically exclude individuals with disabilities or groups of individuals with disabilities from critical care provided that treatment is

[78] Letter from 22 organizations to U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts and Admin. for Cmty. Living (July 10, 2018), on file with OCR.

[79] Letter from Matt Valliere et al., on behalf of 17 organizations, to U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts (May 6, 2019), on file with OCR.

[80] *See* Memorandum from Ronald Newman et al., American Civil Liberties Union, to U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts. (Sep. 3, 2019), on file with OCR.

[81] *See, e.g.* Letter from Nat'l Council on Disability to U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., (Dec. 11, 2019) (HHS on assisted suicide, medical futility and QALYs reports), *https://ncd.gov/publications/2019/ncd-letter-hhs-3-bioethics-reports;* Letter from Nat'l Council on Disability to U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., (Mar. 18, 2020) (addressing COVID–19, *https://ncd.gov/publications/2020/ncd-covid-19-letter-hhs-ocr;* Letter from Consortium of Citizens with Disabilities to Sec'y Azar, U.S. Dep't of Health & Hum. Servs. & Roger Severino, Director, OCR, (Mar. 20, 2020) (addressing COVID–19 and disability discrimination), *https://www.c-c-d.org/fichiers/Letter-re-COVID-19-and-Disability-Discrimination-final.pdf;* Letter from 27 Members of the House and five Senators to Alex Azar, Sec'y, U.S. Dep't of Health & Hum. Servs. & Bill Barr, Att'y Gen., U.S. Dep't of Justice, (Mar. 25, 2020) (urging HHS, AG to Protect Disability Community), *https://chrissmith.house.gov/uploadedfiles/2020-03-25_bipartisan_bicameral_letter_to_hhs_and_doj_-_covid-19_and_disability_discrimination.pdf;* Letter from eight senators to Sec'y. Azar, Admin. Verma, and Dir. Severino U.S. Dep't of Health & Hum. Servs (Apr. 10, 2020) (related to Rationing of Care) *https://www.warren.senate.gov/imo/media/doc/2020.04.09%20Letter%20to%20HHS%20OCR%20re%20Rationing%20of%20Care.pdf;* Letter from eight senators to Sec'y. Azar, Admin. Verma, and Dir. Severino U.S. Dep't of Health & Hum. Servs (Apr. 10, 2020) (related to Rationing of Care) *https://www.warren.senate.gov/imo/media/doc/2020.04.09%20Letter%20to%20HHS%20OCR%20re%20Rationing%20of%20Care.pdf;* Press Release, Am. Assoc. People with Disabilities, *Over 400 Organizations Urge Department of Health and Human Services to Issue Guidance to Prohibit Discrimination during Medical Rationing* (Apr. 17, 2020), *https://www.aapd.com/press-releases/civil-rights-letter-covid-medical-rationing/?fbclid=IwAR0uKHogSaq8zknb--gVKL9-oplHXyX1a1lGpyx306WHpr0ZQWoxSk2C1oM;* Letter from Autistic Self Advocacy Network, DREDF, Epilepsy Foundation, Justice in Aging and The Arc of the United State to Melanie Fontes Rainer, Acting Dir., OCR and Samuel Bagenstos, General Counsel, U.S. Dep't of Health & Hum. Servs. (Aug. 18, 2022), on file with OCR. *Over 400 Organizations Urge Department of Health and Human Services to Issue Guidance to Prohibit Discrimination during Medical Rationi*ng (Apr. 17, 2020), *https://www.aapd.com/press-releases/civil-rights-letter-covid-medical-rationing/?fbclid=IwAR0uKHogSaq8zknb--gVKL9-oplHXyX1a1lGpyx306WHpr0ZQWoxSk2C1oM;* Letter from Autistic Self Advocacy Network, DREDF, Epilepsy Foundation, Justice in Aging & The Arc of the United State to Melanie Fontes Rainer, Acting Dir., OCR & Samuel Bagenstos, Gen. Counsel, U.S. Dep't of Health & Hum. Servs. (Aug. 18, 2022), on file with OCR.

[82] On March 25, 2020, a bipartisan bicameral Congressional coalition sent then-Secretary Azar and then-Attorney General Barr a letter asking HHS to notify states of their civil rights obligations as they review and develop their crisis standards of care. *Lankford, Gillibrand Lead Bipartisan, Bicameral Call to Protect Civil Rights for People with Disabilities Amidst COVID–19 Pandemic, lankford.senate.gov* (Mar. 25, 2020). This call followed an earlier letter to OCR by the National Council on Disability asking for similar guidance. Letter from Nat'l Council on Disability to U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts. (Mar. 18, 2020), *https://www.ncd.gov/publications/2020/ncd-covid-19-letter-hhs-ocr.* Since the NCD letter, a variety of national organizations representing broad-based constituents have reached out to OCR with similar requests, including the Consortium on Citizens with Disabilities, Cystic Fibrosis Research, Inc., the Disability Rights Education and Defense Fund, the National Disability Rights Network, National Right to Life, and others.

[83] *See* U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts. OCR Resolves Complaint with Tennessee After it Revises its Triage Plans to Protect Against Disability Discrimination (Jun. 26, 2020), *https://www.hhs.gov/about/news/2020/06/26/ocr-resolves-complaint-tennessee-after-it-revises-its-triage-plans-protect-against-disability.html.*

[84] *See* U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., OCR Resolves Complaint with Utah After it Revised Crisis Standards of Care to Protect Against Age and Disability Discrimination (Aug. 20, 2020), *https://www.hhs.gov/about/news/2020/08/20/ocr-resolves-complaint-with-utah-after-revised-crisis-standards-of-care-to-protect-against-age-disability-discrimination.html.*

[85] *See* U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., OCR Provides Technical Assistance to Ensure Crisis Standards of Care Protect Against Age and Disability Discrimination (Jan. 14, 2021), *https://www.hhs.gov/about/news/2021/01/14/ocr-provides-technical-assistance-ensure-crisis-standards-of-care-protect-against-age-disability-discrimination.html.*

[86] *See id.*

[87] *See* U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., OCR Provides Technical Assistance to the State of Arizona to Ensure Crisis Standards of Care Protect Against Age and Disability Discrimination (May 25, 2021), *https://www.hhs.gov/about/news/2021/05/25/ocr-provides-technical-assistance-state-arizona-ensure-crisis-standards-care-protect-against-age-disability-discrimination.html.*

[88] U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., FAQs for Healthcare Providers during the COVID–19 Public Health Emergency: Federal Civil Rights Protections for Individuals with Disabilities under section 504 and Section 1557 (Feb. 4, 2022), *https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/disabilty-faqs/index.html.*

not futile for said individuals. Judgments of futility may not be based on criteria otherwise prohibited in this section or elsewhere in section 504.[89] Similarly, many crisis standards of care protocols included other forms of discrimination on the basis of disability that did not involve categorical exclusions, such as prioritizing resources on the basis of patients' anticipated life-expectancy long after their acute care episode. OCR has previously clarified that a patient's likelihood of survival long after hospital discharge is unlikely to be related to the need to make allocation decisions about scarce resources on a temporary basis or the effectiveness of the medical interventions being allocated, and thus should not be used as a prioritization criterion in crisis standards of care protocols.[90]

Participation in Clinical Research

Clinical research participation can offer considerable benefit to both the individuals participating within it and society at large. In addition to the intangible benefits of advancing scientific discovery and contributing to the development of potential medical interventions, those participating in clinical research are often able to obtain access to diagnostic, preventative, or therapeutic interventions and treatments that would not otherwise be available to them. Longstanding literature, including a recent report from the National Academies of Science, Engineering and Medicine, has highlighted the problem of the systemic exclusion of women, people of color, and other marginalized groups from clinical research.[91] Such exclusions harm those who are denied the direct benefits of research participation. They also threaten the generalizability of research findings and potentially the reach of subsequent medical innovations for those groups who are excluded.

Recent research has documented that people with disabilities also face systemic and unnecessary exclusion from clinical research.[92] Although study exclusions can be justifiable based on the nature of the clinical research being conducted, exclusions can also be the result of a failure to take into account the availability of reasonable modifications to a study protocol that might permit the participation of people with disabilities. They also may be the result of overly broad exclusion criteria rooted in stereotypes, bias, or misunderstandings of the capabilities of people with specific disabilities. Investigators may have valid reasons for excluding people whose disabilities are medically incompatible with the study being conducted. When evaluating potential study participants on an individualized basis, clinical judgment may be necessary on the part of the investigator to assess the appropriateness of study participation. However, it is important that study exclusion criteria be written in a way that does not unnecessarily screen out people with disabilities whose research participation would not alter the intended purpose of the program of clinical research being undertaken.

Similarly, overly broad exclusion criteria may be motivated by concerns regarding the ability of potential study participants with disabilities to perform research-related tasks that can be reasonably modified, such as filling out tests or responding to instructions from research personnel, or by the failure to take into account the recipient's obligation to provide for effective communication with persons who are deaf, have vision loss, or otherwise need alternative forms of communication.

Nondiscriminatory Criteria

Section 84.4(b)(4), while being revised in the amendment segment of this proposed rule, results in the text being redesignated as § 84.68(b)(3), prohibits the use of discriminatory methods of administration, criteria, and protocols, including discrimination in the allocation of scarce resources. Resources necessary for medical treatment are sometimes scarce for a variety of reasons. A therapeutic agent or vaccine may be newly developed, and production may not yet have caught up to the level of demand for it. More generally, supply chain issues may prevent drugs, devices, and equipment from getting to places where they are needed. And, as was evidenced in the response to COVID–19, medical emergencies may overtax hospitals and the larger health care system. In circumstances like these, recipients may find it necessary to create a protocol or methodology for allocating those treatments and resources.

This section does not require hospitals or the broader health care system to allocate resources in any specific way; it just prohibits them from using criteria that subject individuals with disabilities to discrimination on the basis of disability. For example, as OCR has previously indicated in guidance,[93] practices or protocols in which recipients deny medical resources based on the projected length or scope of resources needed, and thus deny care to certain individuals with a disability because they are concerned that treating a patient with a disability may require more of a particular resource than treating individuals without a disability, may discriminate against persons with disabilities. Similarly, if recipients deny a patient with disabilities access to resources because of forecasts that the person may not live as long as an individual without a disability after treatment, this may also discriminate against persons with disabilities.[94] The further in the future a provider looks to establish a patient survival prediction, the less likely that prediction will be related to the medical effectiveness of the resources being rationed during the temporary shortage, and doing so may screen out people with disabilities without being necessary to operate a program of critical care.[95]

Certain criteria for allocating scarce medical treatments may discriminate against people with disabilities even if they rely on predictions of short-term mortality. For example, throughout the COVID–19 pandemic, many states and hospitals indicated they planned to make use of the Sequential Organ Failure Assessment (SOFA) to make judgments about short-term life expectancy in the event that crisis standards of care were activated. The SOFA is a composite instrument, incorporating scores from multiple other instruments into a composite score that has been used within crisis standards of

[89] Ari Ne'eman et al., *The Treatment of Disability under Crisis Standards of Care: an Empirical and Normative Analysis of Change over Time during COVID–19,* 45 J. Health Polit. Policy Law 831 (2021), *https://doi.org/10.1215/03616878-9156005.*

[90] U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., FAQs for Healthcare Providers during the COVID–19 Public Health Emergency: Federal Civil Rights Protections for Individuals with Disabilities under section 504 and Section 1557 (Feb. 4, 2022), *https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/disabilty-faqs/index.html.*

[91] Nat'l Acad. of Science, Engineering & Med., *Improving Representation in Clinical Trials and Research: Building Research Equity for Women and Underrepresented Groups,* The Nat'l Acad. Press (2022), *https://doi.org/10.17226/26479.*

[92] Willyanne DeCormier Plosky et al., *Excluding People with Disabilities from Clinical Research: Eligibility Criteria Lack Clarity and Justification,*41 Health Aff. 10 (Jan. 2022). *https://doi.org/10.1377/hlthaff.2022.00520;* Katie McDonald et al., *Eligibility criteria in NIH-funded Clinical Trials: Can Adults with Intellectual Disability Get In?* 15 Disability & Health (2022), *https://doi.org/10.1016/j.dhjo.2022.101368.*

[93] U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., FAQs for Healthcare Providers during the COVID–19 Public Health Emergency: Federal Civil Rights Protections for Individuals with Disabilities under section 504 and Section 1557 (Feb. 4, 2022), *https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/disabilty-faqs/index.html.*

[94] *See id.* at Question 7.

[95] *Id.*

care allocation to predict short-term life expectancy. Among the component instruments of the SOFA is the Glasgow Coma Scale (GCS). Application of the GCS, a tool designed to measure the severity of acute brain injuries, may not yield a valid result (*i.e.,* it may not correspond to actual mortality risk) when applied to patients with underlying disabilities that impact speech or motor movement issues. The GCS assigns a more severe score to patients who cannot articulate intelligible words or who cannot obey commands for movement. However, many disabilities result in these same attributes—such as autism and cerebral palsy—but do not contribute to short-term mortality. As a result, the use of the SOFA with patients with such underlying disabilities may lead to an unduly pessimistic prediction of short-term survival, giving such patients lower priority in accessing scarce critical care resources.

As the American Academy of Developmental Medicine and Dentistry (AADMD) notes, ''in the field of developmental medicine, there are patients who, at their natural baseline often cannot hear a command, move their limbs or communicate verbally. Given the combination of characteristics inherent in the population of people with intellectual and developmental disabilities, it would be possible to use 'objective' data surrounding the SOFA score to predict a significantly higher mortality risk than is really the case.'' [96] Similar impacts may exist for other types of disabilities and other prognostic scoring tools, measures, diagnostic instruments, and methodologies for assessment or the allocation of scarce medical resources.

The general requirement that recipients must provide reasonable modifications when necessary to avoid discrimination that appears in proposed § 84.68(b)(7) applies in circumstances of scarce resources, just as it does elsewhere. Section 504 might, for example, require reasonable modifications in the administration of assessment tools such as the SOFA and the GCS (which may be used within a larger scoring rubric for the allocation of scarce resources) to ensure that the tools measure accurately what they are intended to measure in people with disabilities. For example, a scoring tool may assess the inability of a person with cerebral palsy to articulate words, but it would be discriminatory to use that determination to indicate an actual mortality risk that is not implied by that disability. Similarly, some crisis standards of care protocol have used ''therapeutic trials'' involving the provision of mechanical ventilation for a set period of time to evaluate the effectiveness of ventilator treatment for a particular patient. However, patients with particular types of disabilities may take longer to respond to treatment, and the test period may need to be longer to accurately evaluate the effectiveness of mechanical ventilation for these patients. In this situation, a recipient may need to allow an individual with a disability some additional time on a ventilator to assess likely clinical improvement, unless doing so would constitute a fundamental alteration of the ventilator trial.[97]

§ 84.56(a) Discrimination Prohibited

Proposed § 84.56(a) confirms the basic requirement that no qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in medical treatment under any program or activity that receives Federal financial assistance, including in the allocation or withdrawal of any good, benefit, or service. Section 84.56(a) makes specific the general prohibition of disability-based discrimination proposed in § 84.68(a), as well as the general prohibition that applies to health, welfare, and other social services in § 84.52(a), and underscores that those prohibitions broadly apply to medical treatment decisions made by recipients.

For example, a patient with HIV seeks surgery for an orthopedic condition. A recipient refuses to provide treatment because of a belief that individuals with HIV are responsible for their condition and should thus not receive costly medical resources. This rationale is discriminatory on the basis of disability in this context.[98] Similarly, this paragraph would cover situations where a recipient declines to treat a person with certain disabilities, including psychiatric, intellectual, and developmental disabilities because the treating professional is uncomfortable providing care based on stereotypical beliefs about persons with that disability, or where the recipient declines to treat persons with a substance use disorder based on a belief that these persons are less likely to comply with treatment protocols.

Scope of Discrimination Prohibited

The text of section 504 is clear and broad. Section 504 prohibits discrimination on the basis of disability in programs or activities receiving Federal financial assistance. Section 504's ''program or activity'' language provides no basis for excluding *some* activities in which recipients engage—such as medical treatment—from the statute's facially broad coverage. A recipient's failure to provide treatment to an individual with disabilities who meets all qualifications for the medical treatment results in a denial of health care to a person with disabilities and, barring any applicable limitation, constitutes discrimination in violation of section 504.

The intended breadth of section 504 is reflected in the Civil Rights Restoration Act (CRRA), which made clear that section 504 applies to ''all the operations of an entity that receives Federal financial assistance.'' [99] As amended by the CRRA, section 504's ''program or activity'' language provides no basis for excluding some actions in which recipients engage—such as medical treatment—from the statute's facially broad coverage. In addition, in interpreting the ADA, which is modeled on section 504—the Supreme Court has recognized the law's broad coverage in accordance with its language. In particular, in *Pennsylvania Department of Corrections* v. *Yeskey,* the Supreme Court refused to carve prison conditions cases out of title II's coverage.[100] When the state argued that prison conditions were significantly different than the circumstances that Congress sought to address in the statute, the Court responded, ''the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'' [101]

[96] Am. Acad. of Dev. Med. & Dentistry, People with Intellectual and Developmental Disabilities and the Allocation of Ventilators During the COVID–19 Pandemic (Apr. 2020), *https://static1.squarespace.com/static/5cf7d27396d7760001307a44/t/5ecfb6fff13530766aeae51a/1590671105171/Ventilator+-+Policy+Statement+w+Addendum.pdf.*

[97] U.S. Dep't of Health & Human Servs., Off. for Civil Rts., FAQs for Healthcare Providers during the COVID–19 Public Health Emergency: Federal Civil Rights Protections for Individuals with Disabilities under section 504 and Section 1557 (Feb. 4, 2022), *https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/disabilty-faqs/index.html.*

[98] *See Bragdon* v. *Abbott,* 524 U.S. 624 (1998). HIV is contained in the list of physical or mental impairments in the ADA regulations and it substantially limits major life activities because it affects the immune system and the reproductive system. 35 CFR 35.108. Similarly, under the section 504 regulations that mirror the ADA language, HIV will virtually always be found to be an impairment that substantially limits a major life activity. HIV infection typically leads to a determination of disability. In addition, the patient in this example would be protected under the ''regarded as'' provision based on the recipient's action and justification.

[99] 29 U.S.C. 794(b).

[100] 524 U.S. 206 (1998).

[101] *Id.* at 212 (internal quotation marks omitted).

Indeed, the Supreme Court has itself applied both section 504 and the ADA to medical treatment decisions. In *Bowen* v. *American Hospital Association,* seven justices considered on the merits the argument that section 504 prohibited the withholding of medical care; the plurality found no violation of section 504 on the particular facts of that case because the lack of consent for treatment made the infants at issue not ''otherwise qualified.'' [102] And in *Bragdon* v. *Abbott,* the Court held that title III of the ADA applied to a dentist's refusal to fill the cavity of a patient with HIV, and that the dentist could defeat the lawsuit only if he could show that treating the patient presented ''significant health and safety risks'' based ''on medical or other objective evidence.'' [103]

Some lower Federal courts have questioned the manner and reach of section 504 as applied to medical treatment decisions. In *United States* v. *University Hospital,* the Second Circuit considered the application of section 504 to infants born with multiple birth defects.[104] The court stated that the law's term ''otherwise qualified'' could not ordinarily be applied ''in the comparatively fluid context of medical treatment decisions without distorting its plain meaning.'' [105] Some courts have read this language as broadly suggesting that section 504 does not apply to medical treatment decisions. [106] But that is not the fairest reading of *University Hospital.* The Second Circuit there principally relied on the argument that it will often be difficult to identify discrimination when an individual challenges a covered entity's treatment of the underlying disability itself.[107] The lower court cases following *University Hospital* seem to draw the same line.[108]

Consistent with what we believe to be the correct reading of the statute and the case law, we propose in this rule to draw a distinction between circumstances where individuals are seeking treatment for the underlying disability and those in which individuals are seeking treatment for a separately diagnosable condition or symptom. Compare proposed § 84.56(b)(1) (providing specific, albeit non-exhaustive, circumstances in which forbidden discrimination exists whether or not the individual seeks treatment for a condition or symptom that is separately diagnosable from the underlying disability) with proposed § 84.56(b)(2) (providing a broader general rule of nondiscrimination for cases in which a recipient uses the underlying disability as the basis for discriminating against an individual who seeks treatment for a separately diagnosable symptom or medical condition).

As discussed below, with respect to separately diagnosable conditions, the proposed rule does not require that the condition be entirely unrelated to the underlying disability; it is instead intended to reach circumstances in which the condition for which medical treatment is sought is sufficiently distinct from the underlying disability such that the person with the disability can be considered similarly situated to a person without the disability for treatment purposes. That a separately diagnosable heart condition is related to an underlying disability in some manner is irrelevant under the proposed rule if the underlying disability makes no difference to the ''clinically appropriate treatment'' for the heart condition. This approach is consistent with the mandate that persons with disabilities be accorded equal treatment under section 504.

In circumstances in which an individual is seeking treatment for a condition that is not ''separately diagnosable'' under proposed § 84.56(b)(2), the rule's application is relatively narrow but nonetheless is critical to prevent prohibited discrimination. Consistent with proposed § 84.56(c)(1)(ii), the rule would not apply if the refusal to treat is in circumstances in which the ''recipient typically declines to provide the treatment to any individual, or reasonably determines based on current medical knowledge or the best available objective evidence that such medical treatment is not clinically appropriate for a particular individual.'' The rule, however, specifies in proposed § 84.56(c)(1)(ii) that providers do not make legitimate medical judgments when they base decisions on the criteria contained in § 84.56(b)(1)(i)–(iii): ''[b]ias or stereotypes about a patient's disability,'' ''[j]udgments that the individual will be a burden on others,'' or ''[a] belief that the life of a person with a disability has lesser value than the life of a person without a disability, or that life with a disability is not worth living.''

The recognition of the need to defer to reasonable medical judgment but to prohibit biased decision-making is consistent with *University Hospital* and other lower court cases. Even assuming those cases were correctly decided on their facts, none of them suggest that bias is permissible under section 504 simply because there is a relationship between a sought-after medical treatment and an underlying disability.[109] In such circumstances, the rule ensures that medical judgment is in fact being exercised with respect to the person with a disability's qualification for that treatment. Lower courts have applied section 504 to medical treatment decisions consistent with this approach.[110]

Proposed § 84.56(b) elaborates on the basic requirement in § 84.56(a) by providing a non-exhaustive set of examples of conduct that would violate that requirement.

§ 84.56(b)(1) Denial of Medical Treatment

Proposed § 84.56(b)(1) addresses denial of treatment. It makes explicit that a recipient is prohibited from denying or limiting medical treatment to a qualified individual with a disability

[102] 476 U.S. 610, 624 (1986).

[103] 524 U.S. 624, 649 (1998).

[104] 729 F.2d 144 (2d Cir. 1984).

[105] *Id.* at 156. The lower court cases following *University Hospital* have relied on *University Hospital's* reasoning: ''Where the handicapping condition is related to the conditions to be treated, it will rarely, if ever, be possible to say . . . that a particular decision was 'discriminatory.' '' *Univ. Hosp.* at 157. In *Johnson* v. *Thompson,* one of *University Hospital's* progeny, the court, addressing potential medical interventions for a newborn infant with Spina Bifida, noted that situations exist where individuals with disabilities could be considered ''otherwise qualified'' even under *University Hospital's* view of ''otherwise qualified.'' *Johnson* v. *Thompson,* 971 F.2d 1487,1493 (10th Cir. 1992).

[106] *See, e.g., Schiavo ex rel. Schindler* v. *Schiavo,* 403 F.3d 1289, 1294 (11th Cir. 2005) (''The Rehab Act, like the ADA, was never intended to apply to decisions involving . . . medical treatment.'').

[107] *United States* v. *Univ. Hosp.,* 729 F.3d at 157 (''Where the [disabling] condition is related to the condition(s) to be treated, it will rarely, if ever, be possible to say with certainty that a particular decision was 'discriminatory'.'').

[108] *See Cushing* v. *Moore,* 970 F.2d 1103, 1109 (2d Cir. 1992) (''[A]s we have observed in the past, we must be careful in applying § 504's 'otherwise qualified' language to programs where a patient's [disability] gives rise to the need for the services in question.''); *Johnson by Johnson* v. *Thompson,* 971 F.2d 1487, 1494 n. 3 (10th Cir. 1992) (following *University Hospital* but recognizing that section 504 might be violated where ''the [disability] that forms the basis of the section 504 discrimination bears no relation to the medical treatment sought but denied''); *Schiavo ex rel. Schindler* v. *Schiavo,* 403 F.3d 1289, 1294 (11th Cir. 2005) (following *University Hospital* and *Johnson* based on the conclusion that the plaintiff sought treatment to alleviate the very condition that constituted a disability).

[109] *See, e.g., Lesley* v. *Chie,* 250 F. 3d 47, 55 (1st Cir. 2001) (finding that, for example, ''a plaintiff may argue that her physician's decision was so unreasonable—in the sense of being arbitrary and capricious—as to imply that it was pretext for some discriminatory motive . . .'').

[110] *Id.; see also Glanz* v. *Vernick,* 756 F. Supp. 632, 638 (D. Mass. 1991) (''A strict rule of deference would enable doctors to offer merely pretextual medical opinions to cover up discriminatory decisions.'').

when the denial is based on (i) bias or stereotypes about a patient's disability; (ii) judgments that an individual will be a burden on others due to their disability, including, but not limited to, caregivers, family, or society; or (iii) a belief that the life of a person with a disability has a lesser value than that of a person without a disability, or that life with a disability is not worth living. This paragraph reflects a straightforward application of the prohibition on discriminating against qualified individuals with disabilities on the basis of a disability. Denying, limiting, or withholding treatment for any of the prohibited reasons is discrimination on the basis of disability because the decision is driven by the recipient's perception of disability rather than by consideration of effectiveness of the treatment or other legitimate reasons.

As defined in the proposed rule at § 84.10, a ''qualified individual with a disability'' is ''an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a recipient.'' Proposed § 84.56(b)(1) clarifies that bias, stereotypes, judgments about burden on others, and beliefs that disabled lives have lesser value or worth or are not worth living are not permissible ''essential'' eligibility requirements for medical treatment. As noted by the Supreme Court in *Alexander* v. *Choate,* to treat such discriminatory factors as ''qualifications'' under section 504 would impermissibly allow the ''benefit'' at issue to ''be defined in a way that effectively denies qualified individuals [with disabilities] the meaningful access to which they are entitled.'' [111]

In *School Board of Nassau County* v. *Arline,* the Supreme Court said that in section 504, ''Congress acknowledged that society's accumulated myths and fears about disability and disease are as [disabling] as are the physical limitations that flow from actual impairment.'' [112] The impermissible factors set forth in the proposed rule exemplify the harmful impact of the myths, fears, and stereotypes that Congress targeted in the statute. As discussed above, there is significant evidence that assessments of the impact of a disability on quality of life may lead a provider to make medical decisions that reflect myths, fears, and stereotypes, and tend to screen out individuals with disabilities or classes of individuals with disabilities from fully and equally enjoying the benefits of medical treatment.

Proposed paragraph 84.56(b)(1)(i) confirms the prohibition against denying or limiting medical treatment based on bias or stereotypes. For example, refusing to provide a person with an Opioid Use Disorder (OUD) a referral for Medications for Opioid Use Disorder (MOUD) due to a provider's belief that persons with OUD will not adhere to treatment protocols would be prohibited under this paragraph.

Proposed paragraph (b)(1)(ii) prohibits denying or limiting medical treatment based on judgments that an individual will be a burden on others due to their disability, including but not limited to caregivers, family, or society. For example, § 84.56(b)(1)(ii) would be violated if an individual with a disability needed a medically indicated surgical procedure but it was denied because of a recipient's judgment that the postoperative care the patient would need after the surgery because of the patient's disability would be an unfair burden on the individual's caregivers, family, or society.

Proposed paragraph (b)(1)(iii) prohibits denying or limiting medical treatment based on the provider's belief that the life of a person with a disability has a lesser value than a person without a disability, or that life with a disability is not worth living. For example, determinations that an individual with a disability's life is not worth living because of dependence on others for support or need for mechanical ventilation, intensive care nursing, tracheotomy, or other ongoing medical care rest on judgments that do not properly relate to the individual's ''qualification'' for medical treatment under section 504. Qualification for the service of life-sustaining treatment must be based on whether the treatment would be effective for the medical condition it would be treating, not broader societal judgments as to the relative value of a person's life due to their disability or whether life with a disability is worth living.

Many people with disabilities require these kinds of supports, often on a long-term basis, to survive and thrive. With such supports, individuals with disabilities can and do live many years, enjoying meaningful social, family, and professional relationships. By denying patients with disabilities the opportunity to make their own decisions regarding whether to receive or continue medically effective life-sustaining care, recipients override patient autonomy in favor of their own beliefs regarding the value of the lives of individuals with disabilities who are dependent on others.

For example, a patient with Alzheimer's disease covered as a disability under section 504 has developed pneumonia and is in need of a ventilator to provide assistance breathing. His husband has requested that physicians start the patient on a ventilator, consistent with what the patient's husband believes would be his spouse's wishes. The attending physician, who is a recipient of Federal financial assistance from HHS and works in a hospital that is also a recipient, tells the patient and his husband that the patient should not receive such support, given the poor quality of life the physician believes the patient experiences, because the latter has Alzheimer's disease. This situation occurs even though the attending physician normally would start ventilator support for a patient with pneumonia who needs assistance breathing. The physician believes that the patient's Alzheimer's disease renders the continuation of the patient's life to have no benefit, and therefore the physician declines to put the patient on the ventilator. The physician has denied life-sustaining care for the patient based on judgments that the patient's quality of life renders continued life with a disability not worth living and has failed to provide care that he would have provided to an individual without a disability. In denying access to ventilator support, the doctor has violated proposed § 84.56(b)(1)(iii). If the physician also denied the ventilator support because of a perception that it would be a burden for his husband to care for the patient, the physician would also have violated § 84.56(b)(1)(ii).

As another example, a teenage boy with intellectual and developmental disabilities develops periodic treatable respiratory infections and pneumonia due to a chronic condition. Judging his quality of life to be poor due to cognitive and communication disabilities, his provider decides to withhold antibiotics and other medical care when the boy becomes ill. Instead, his provider—who is a recipient of Federal financial assistance—refers the boy to hospice care and declines to provide life-sustaining treatment. The provider makes this decision not because she anticipates that care would be ineffective, but because she determines that such care would be effective at prolonging the patient's life and that the patient's life would not be

[111] 469 U.S. 287, 301 (1985).

[112] 480 U.S. 273, 284 (1987).

worth living on the basis of the patient's disability. Because the provider has withheld life-sustaining care based on the judgment that the patient's life as an individual with a disability is not worth living, the boy is a qualified individual who has experienced discrimination on the basis of disability in violation of § 84.56(b)(1)(iii).

The Department notes that this provision does not require clinicians or other health care providers to offer medical treatment that is outside their scope of practice. That a treatment is outside the typical scope of practice of a given provider is a legitimate nondiscriminatory reason for the denial or limitation of treatment. However, if the provider would typically provide a referral to another provider for whom a given treatment is within their scope of practice, a refusal to provide such a referral on the basis of disability would likely constitute a violation of this paragraph.

§ 84.56(b)(2) Denial of Treatment for a Separate Symptom or Condition

Proposed § 84.56(b)(2) addresses situations where a person with a disability seeks or consents to treatment for a separately diagnosable symptom or medical condition, whether or not the symptom or condition is itself a disability or is causally connected to the disability that is the basis for coverage under section 504. (In this proposed rule, we use the phrase ''underlying disability'' to refer to a disability that triggers coverage under section 504 and that is different than the separately diagnosable symptom or medical condition for which the patient seeks treatment.) Often individuals with a disability will seek treatment for a separately diagnosable symptom or medical condition. For example, a person with Down syndrome might seek a heart transplant to address a heart condition; a person with spinal muscular atrophy might seek treatment for a severe case of COVID–19; or a person with a spinal cord injury might seek treatment for depression with suicidal ideation. The section makes clear that a recipient may not deny or limit clinically appropriate treatment if it would be offered to a similarly situated individual without an underlying disability, including based on predictions about the long-term impact of the underlying disability on the individual's life expectancy.

Violations of § 84.56(b)(1)(iii) may also violate § 84.56(b)(2). For example, as described above in the discussion of § 84.56(b)(1)(iii), a recipient who denies a ventilator to a patient with severe Alzheimer's disease who has pneumonia because of a belief that the patient's life is not worth living based on their disability has violated § 84.56(b)(1)(iii) if the ventilator would have been offered to a similarly situated individual without an underlying disability, in this case, Alzheimer's disease. In addition, the recipient has also violated § 84.56(b)(2) because of the denial of treatment of a separate condition.

As another example described above in the discussion of § 84.56(b)(1)(iii), a recipient who withholds antibiotics and other medical care from a teenage boy with intellectual and developmental disabilities because of a belief that the boy's life has a lesser value than the life of a person without a disability violates § 84.56(b)(1)(iii) when the antibiotics and medical care would have been offered to a similarly situated individual without an underlying disability . In this situation, § 84.56(b)(2) has also been violated because of the failure to treat a separate condition.

For purposes of proposed paragraph (b)(2), it does not matter whether the symptom or condition for which the individual is seeking treatment is also a disability under section 504. Heart conditions, COVID–19, and depression could all meet the statute's definition of disability in appropriate circumstances, but people who experience discriminatory treatment for these conditions based on an underlying disability are entitled to the protections of this paragraph. Nor does it matter for these purposes whether the condition for which the individual is seeking treatment is in some sense causally related to the underlying disability if the decision to refuse treatment would not be made as to similarly situated individuals without the disability. Individuals with Down syndrome are more likely to experience heart conditions, and a spinal cord injury may be the event that triggers an individual's depression. But a refusal to treat a heart condition because of a judgment regarding the disability of Down syndrome, or a refusal to treat depression because of a patient's underlying spinal cord injury, will violate this paragraph if it is made on the basis of the prohibited grounds.

- *Medical Treatment Question 1: We recognize that the line between disabilities may in some cases be more difficult to draw than in these examples, and we welcome comment on the best way of articulating the relevant distinctions.*

Similarly, a symptom or condition that arises from a common underlying biological mechanism as a patient's underlying disability, such as Kaposi's sarcoma in a person with AIDS, is a separately diagnosable symptom or condition for the purposes of this section. The crucial point is that where a qualified individual or their authorized representative seeks or consents to treatment for a separately diagnosable symptom or condition, a recipient may not deny or limit that treatment if it would offer that treatment to a similarly situated person without the underlying disability. In each of these cases, the recipient will have discriminated against a qualified individual with a disability on the basis of disability in violation of proposed § 84.56(b)(2).

These obligations must be interpreted in light of the rule of construction in proposed § 84.56(c) on professional medical judgment, which indicates that nothing in this section requires the provision of medical treatment where the recipient has a legitimate, nondiscriminatory reason for denying or limiting that service or where the disability renders the individual not qualified for the treatment. For example, under this rule of construction, a recipient may take into account a patient's underlying disability to deny a medical treatment based on their judgment that the treatment would not be effective at accomplishing its intended effect or because an alternative course of treatment to the one that would typically be provided to patients without disabilities would be more likely to be successful in light of a patient's disability.

§ 84.56(b)(3) Provision of Medical Treatment

Proposed § 84.56(b)(3) addresses the discriminatory provision of medical treatment. It states that if a medical professional provides an individual with a disability different treatment than the professional would provide an individual without a disability seeking assistance with the same condition—and there is nothing about the disability that impairs the effectiveness, or ease of administration of the treatment itself or has a medical effect on the condition to which the treatment is directed—proposed § 84.56(b)(3) has been violated. For example, if a woman with an intellectual disability seeks a prescription for contraception but her provider, due to a belief that any children she may have are likely to have an intellectual disability, offers only surgical sterilization, the recipient has violated proposed § 84.56(b)(3) if the provider prescribes contraception for her other patients without disabilities. However, proposed § 84.56(b)(3) does not prohibit a recipient from providing

services or equipment to an individual with an underlying disability that are different than that provided to others with the same condition when necessary to provide an effective service or treatment to the individual with a disability. Where, for example, an individual recovering from a foot or leg injury or surgery has an anatomical loss of an arm and is unable to use crutches as a result, it would not violate § 84.56(b)(3) to recommend or prescribe a knee scooter to the patient even though the recipient recommends crutches to most patients in this situation.

Where an underlying disability would interfere with the efficacy of a particular treatment, a recipient could provide a person with that disability a different treatment than it would provide to similarly situated nondisabled individuals. For example, an underlying health condition that itself is a disability might require an individual to take a medication that is contraindicated with a particularly effective antiviral drug. If that individual contracts COVID–19, it would not violate this section for a recipient to offer a different treatment than the contraindicated antiviral drug, even if it is generally less effective. Because the underlying disability would directly inhibit the utility of the generally more effective drug, the individual would not be qualified for that treatment under this part.

The Department proposes this provision in part to address discriminatory conduct based on the belief that persons with disabilities are entitled to less bodily autonomy than nondisabled persons—a belief that underpins the history of forced sterilization provided as ''medical treatment'' for individuals with intellectual, mental health, and developmental disabilities. In the twentieth century, over thirty states allowed and funded involuntary sterilization of disabled women and men with disabilities. In 1927, the Supreme Court sanctioned such sterilization programs in *Buck* v. *Bell,* ruling that ''society can prevent those who are manifestly unfit from continuing their kind . . . Three generations of imbeciles are enough.'' [113] States continued to use Federal funds for forced sterilizations of institutionalized individuals until 1978, when HEW published regulations requiring the ''institutionalized'' individual's informed consent to the procedure.

Yet, many individuals who were subjected to such involuntary sterilizations experienced and continue to experience trauma and grief because of these State-sanctioned practices. In June 2022, the *New York Times* ran a story about the lingering trauma for three Black sisters with disabilities who were sterilized in 1973 without their or their parents' informed consent because clinic workers judged them ''intellectually inferior.'' [114] Three states—Virginia, North Carolina, and California—offer compensation to victims of State-sanctioned programs.[115]

While State-run sterilization programs have ended, involuntary sterilization continues today. According to a 2021 report, fourteen states allow a judge to order the sterilization of a person with a disability who is not under guardianship.[116] Although specific cases are difficult to identify due to the secrecy surrounding the procedure, the Department believes that this is an important area in which to regulate in order to protect the rights of persons with disabilities.[117] The proposed rule would bar recipients from performing sterilization on the basis of disability to an individual with a disability where they would not provide the same treatment to an individual without a disability, unless it has a medical effect on the condition to which the treatment is directed.[118]

- *Medical Treatment Question 2: The Department seeks comment on other examples of the discriminatory provision of medical treatment to people with disabilities.*

§ 84.56(c) Construction

Proposed § 84.56(c) sets forth a series of principles guiding how § 84.56 should be interpreted.

§ 84.56(c)(1) Professional Judgment in Treatment

Proposed § 84.56(c)(1) specifically addresses professional judgment in treatment and its relationship to the proposed nondiscrimination provisions regarding medical treatment. Paragraph (c)(1)(i) provides that nothing in this section requires the provision of medical treatment where the recipient has a legitimate, nondiscriminatory reason for denying or limiting that service or where the disability renders the individual not qualified for the treatment. For example, it would not violate § 84.56(c)(1)(i) if a recipient declines to provide chemotherapy to a patient with a disability based on a judgment that it would not extend the patient's life or mitigate the symptoms of the patient's cancer. Similarly, a provider who refuses to perform cardiopulmonary resuscitation on a patient with signs of irreversible death or a clinician who refuses to administer antifungals as a treatment for a heart attack would not be in violation of this section where such interventions would not accomplish the intended goal of treatment. Nor would a recipient be in violation of this section if it determined that a patient with a disability would be exceedingly unlikely to survive cardiac surgery and thus judged that it would not be medically appropriate to provide such treatment.

Similarly, a recipient would not be in violation of this section if it determined that an alternative course of treatment to the one that would typically be provided to patients without disabilities would be more likely to be successful in light of a patient's disability. For example, should a recipient determine that the use of an older medication has a lower risk of side effects because of interactions with a patient's disability as compared to a newer medication that is now commonly prescribed, using the older medication would not constitute an impermissible limitation on access to medical treatment. These examples, which are based on individualized, fact-specific inquiries, are legitimate nondiscriminatory reasons for denying or limiting treatment and remain within the appropriate province of medical judgment.

We note that proposed § 84.68(b)(8) permits the imposition of eligibility criteria that screen out people with disabilities from receiving the benefit of medical care only when they are shown to be necessary for the provision of this aid, benefit, or service. The rule does nothing to disturb the ability of physicians to exercise their professional judgment based on the current medical knowledge or the best available objective evidence that a treatment is or is not clinically appropriate.

Paragraph (c)(1)(ii) states that circumstances in which the denial of treatment is permitted include those in which the recipient typically declines to provide the treatment to any individual, and those in which the recipient

[113] *Buck* v. *Bell,* 274 U.S. 200, 207 (1927).

[114] Linda Villarosa, ''*The Long Shadow of Eugenics in America,*'' N.Y. Times (Jun. 8, 2022).

[115] *Id.*

[116] Nat'l Women Law Ctr., *Forced Sterilization of Disabled People in the United States,* 56 (Jan. 2022), *https://nwlc.org/wp-content/uploads/2022/01/%C6%92.NWLC_SterilizationReport_2021.pdf* and the related Appendix, *https://nwlc.org/wp-content/uploads/2022/01/%C6%92.NWLC_SterilizationReport_2022_Appendix.pdf* (referencing laws and court decisions in California, Connecticut, Delaware, Georgia, Idaho, Indiana, Maine, Maryland, New Jersey, New York, North Dakota, South Carolina, and Vermont).

[117] *Id.* at 32.

[118] This provision would not prohibit medical treatment where a person with a disability seeks or consents to sterilization.

reasonably determines based on current medical knowledge or the best available objective evidence that such medical treatment is not clinically appropriate for a particular individual. The regulatory text makes clear that the criteria prohibited in paragraphs (b)(1)(i)–(iii) are not legitimate nondiscriminatory reasons for denying or limiting medical treatment and may not be a basis for a determination that an individual is not qualified for the treatment or that a treatment is not clinically appropriate for a particular individual. Recipients may not judge clinical appropriateness based on bias or stereotypes about a patient's disability; judgments that the individual will be a burden on others due to their disability, including, but not limited to, caregivers, family, or society; or a provider's belief that the life of a person with a disability has lesser value than the life of a person without a disability, or that life with a disability is not worth living.

A provider might also decline to provide a service to any individual if it is outside their scope of practice. For example, an orthopedic surgeon might decline to provide a treatment to children, including children with disabilities, if pediatric surgery is not within her scope of service. However, the provider could not refuse to offer pediatric referrals for children with disabilities when it typically refers children without disabilities to appropriate care.

As another example, assume that a recipient decides to deny a person with an intellectual disability who uses mechanical ventilation access to sought-after life-saving care on the grounds that they believe the presence of a cognitive disability and a need for breathing support together render the patient's quality of life so poor as to render continued life of no benefit to them and not worth living (despite the patient themself or their authorized representative seeking life-saving treatment). This is not a permissible basis for determining that a disability has rendered an individual with a disability unqualified for treatment. Nor is this a legitimate nondiscriminatory reason for denying or limiting a health service on the basis of disability, as the denial is motivated by the provider's belief that a person with a disability has lesser value than a person without a disability and that life with a disability is not worth living, both of which are prohibited under paragraph (b)(1)(iii).

In contrast, a recipient could deny medical treatment to a person with a disability on the grounds that it is not clinically appropriate if it poses substantial added risk to the patient that cannot be ameliorated. For example, for a person with a disability at much higher risk of death from a potential surgery, a recipient's decision not to provide such a surgical intervention in light of that heightened mortality risk would be a legitimate, nondiscriminatory reason to deny the surgery in question even if it was sought by a patient with a disability.

Similarly, if a recipient declines to provide a treatment on the grounds that existing evidence only supports its medical effectiveness for a particular subpopulation that the patient with a disability seeking treatment is not a part of, this might be a legitimate nondiscriminatory reason for denying access to the treatment under some circumstances, provided the recipient generally denies such or similar treatments to patient populations for whom the evidentiary basis is similarly lacking or inconclusive. However, if a recipient generally provides such or similar treatments even in the presence of a similar evidentiary record for their effectiveness (or lack of effectiveness), denying such treatments to a patient with a disability on those grounds may not be a legitimate nondiscriminatory reason.

The Department notes that many types of treatment, such as pharmacological interventions, are often studied on populations that are not completely representative of the general patient population, but these treatments nonetheless are routinely prescribed to patient populations with conditions excluded from participation in the clinical trial without further research. In those circumstances, it would not necessarily be a legitimate nondiscriminatory reason to deny a patient with a disability access to a broadly prescribed heart medication simply because patients with her disability were excluded from the clinical trial that established the medication's effectiveness. However, should a recipient believe based on current medical knowledge or the best available objective evidence that the heart medication is likely to be ineffective, have dangerous side effects, or otherwise be harmful to patients with that disability, this would constitute a legitimate nondiscriminatory reason to deny access. Physicians have substantial discretion to assess mixed or inconclusive evidence regarding effectiveness according to their own judgment.

• *Medical Treatment Question 3: The Department seeks comment, including from health care professionals and people with disabilities, on the examples described in this section, whether additional examples are needed, and on the appropriate balance between prohibiting discriminatory conduct and ensuring legitimate professional judgments.*

§ 84.56(c)(2) Consent

Proposed § 84.56(c)(2) addresses consent. Section 84.56(c)(2)(i) makes clear that this section does not require a recipient to provide medical treatment to an individual where the individual, or the person legally authorized to make medical decisions on behalf of that individual, does not consent to that treatment. This subsection thus adopts the plurality's holding in *Bowen* v. *American Hospital Association* that the denial of treatment to an individual because of a lack of consent to treatment ''cannot violate § 504.'' [119] (The Department conceded that point during the *Bowen* litigation.[120]) In such a case, the *Bowen* plurality said, the lack of consent means that the individual is not ''qualified'' for treatment—because treatment without consent violates deep-rooted common-law principles endorsed in every State—and the denial of treatment would be based on the lack of consent, not on disability.[121]

Another issue arising from the *Bowen* litigation is the extent to which the Department is able to issue regulations concerning newborn infants. The district court in *Bowen* had ''declared invalid and enjoined '[a]ny other actions' of the Secretary 'to regulate treatment involving impaired newborn infants taken under authority of Section 504, including currently pending investigation and other enforcement actions.' '' [122] But the *Bowen* plurality specifically rejected any reading of that injunction as barring ''all possible regulatory and investigative activity that might involve the provision of health care to handicapped infants.'' [123] Instead, the four-justice plurality read the injunction as limited to cases in which the Department sought to require medical treatment despite a lack of parental consent.[124] Indeed, the plurality specifically concluded ''that 'handicapped individual' as used in § 504 includes an infant who is born with a congenital defect,'' and that the statute protects qualified infants against disability-based discrimination in

[119] 476 U.S. 610, 630 (1986).

[120] *Id.*

[121] *See id.*

[122] *Id.* at 626 n.11 (plurality opinion) (quoting the district court's injunction).

[123] *Id.*

[124] *See id.*

medical services.[125] The three *Bowen* dissenters rejected the plurality's narrow reading of the injunction; they believed that the district court did in fact bar the Department from ''issu[ing] any regulations whatsoever that dealt with infants' medical care.'' [126] But they concluded that such a broad injunction was not consistent with the law.[127] In short, of the seven justices who addressed the issue in *Bowen,* not one endorsed an injunction that would entirely bar the Secretary from regulating medical discrimination against disabled newborns.[128] Accordingly, the Department does not believe that the *Bowen* injunction, as affirmed by the Supreme Court, requires us to carve newborns out of this rule. The Department does, however, follow the *Bowen* plurality in declining to require a recipient to provide medical treatment to an individual where the individual, or the person legally authorized to make medical decisions on behalf of that individual, does not consent to that treatment in situations where consent would typically be required regardless of whether the individual had a covered disability.

Denial of treatment is not the only way a recipient can discriminate on the basis of disability in its covered programs or activities. When it enacted the Civil Rights Restoration Act two years after *Bowen,* Congress explicitly provided that section 504 applies to ''all of the operations of'' a covered program or activity.[129] The operations of covered health care providers are not typically limited to providing treatments. They also include the provision of advice and the process of providing information to comply with informed-consent requirements established by state law and otherwise. Proposed paragraph (c)(2)(ii) makes clear that discrimination in obtaining informed consent is prohibited independently of whether that discrimination is followed by a decision to withhold treatment—or whether such a subsequent decision to withhold treatment is itself discriminatory. For example, a covered hospital may not repeatedly request that a patient with a disability (or the patient's legally authorized representative) consent to a do-not-resuscitate order, where it would not make such repeated requests of a similarly situated nondisabled patient. In addition, a recipient may not condition access to treatment on a patient with a disability or their authorized representative agreeing to a particular advanced care planning decision when they would not implement or enforce such a requirement on a similarly situated nondisabled patient.

Numerous reports have demonstrated the existence of this sort of biased treatment. The case of Sarah McSweeney, documented as part of a National Public Radio (NPR) investigation into multiple reports of individuals with disabilities pressured to agree to the withdrawing or withholding of life-sustaining care, offers one example of potential discrimination in access to life-sustaining care.[130] Ms. McSweeney was a 45-year-old woman with multiple disabilities who was admitted to the hospital due to concerns that she may have contracted COVID–19. Shortly after arriving, her guardian received a call from the hospital questioning why her Physician Orders for Life-Sustaining Treatment (POLST) form indicated that Ms. McSweeney should receive life-sustaining treatment if she required it. Over the next several weeks, media reports indicate that hospital personnel pressured Ms. McSweeney's guardian to consent to the withdrawal or withholding of life-sustaining care, often expressing skepticism that a person whose disabilities precluded mobility and speech could be considered to have quality of life. Ultimately, Ms. McSweeney died of sepsis due to aspiration pneumonia, a typically treatable condition, although her guardians repeatedly pushed for full care measures that the doctors declined to administer.[131]

In some cases, patients with disabilities with routine illnesses or their authorized representatives are pressured by their physicians to agree to not be resuscitated, against their desires and wishes,[132] with potentially deadly consequences. For example, a 2012 report from the National Disability Rights Network documented instances of providers steering individuals with disabilities or their family members to agree to decline life-sustaining care or consent to the withdrawal of life-sustaining care.[133] In one instance, family members reported that the patient's doctor informed them that their relative—a 72-year-old patient with a developmental disability—would have poor quality of life based on their disability and, as a result, life-sustaining treatment should no longer be used. [134] Though they initially consented to the withdrawal of treatment, the family eventually withdrew that consent, though they experienced pressure from the clinician when attempting to restore treatment and nutrition.

In its report, *Medical Futility and Disability Bias,* NCD discusses the example of Terrie Lincoln who, at age 19, was in an automobile accident that severed her spinal cord and caused her to become quadriplegic.[135] The report describes that when Terrie ''was in the hospital just following her accident, Terrie's doctors repeatedly tried to influence her family to 'pull the plug,' stating that Terrie was a 'vegetable' and, even if she were to regain consciousness, would have no quality of life.'' [136] When Terrie did regain consciousness, she was pressured by her doctors to forego additional medical treatment that would extend her life due to judgments that life with the disability of quadriplegia was not worth living. This would be a violation of the proposed regulation under both 84.56(b)(1) and (c)(2)(ii). Terrie persisted, later coming off the ventilator, earning degrees in social work and public administration, and becoming a disability rights advocate and mother. It is the Department's intent for the proposed § 84.56(c)(2)(ii) to apply both to instances in which a recipient seeks consent to withdraw care in situations where the withdrawal of care would not be sought from a person without a disability (such as to deny routine care for a treatable medical condition for which the patient has given no indication that they wish to decline treatment) and situations where the manner in which consent is sought is discriminatory in nature (such as by

[125] *Id.* at 624.

[126] *Id.* at 650 (White, J., dissenting).

[127] *See id.* at 656 (''Where a decision regarding medical treatment for a handicapped newborn properly falls within the statutory provision, it should be subject to the constraints set forth in § 504. Consequently, I would reverse the judgment below.'').

[128] Chief Justice Burger concurred in the result without opinion, and therefore expressed no view on the issue, and Justice Rehnquist took no part in the decision.

[129] 29 U.S.C. 794(b).

[130] Joseph Shapiro, ''As Hospitals Fear Being Overwhelmed by COVID–19, Do the Disabled Get the Same Access?'', Nat'l Pub. Radio (Dec. 14, 2020) *https://www.npr.org/2020/12/14/945056176/as-hospitals-fear-being-overwhelmed-by-covid-19-do-the-disabled-get-the-same-acc.*

[131] *Id.*

[132] Lauren Drake, *New Oregon Law Bars Discrimination Against People with Disabilities During Pandemic,* Or. Pub. Broadcasting (Jul. 11, 2020), *https://www.opb.org/news/article/law-bars-disability-discrimination-covid-19/.*

[133] Nat'l Disability Rts. Network, *Devaluing People with Disabilities: Medical Procedures that Violate Civil Rights* (May 2012), *https://www.ndrn.org/wp-content/uploads/2012/05/Devaluing-People-with-Disabilities.pdf.*

[134] *Id.* at 17.

[135] Nat'l Council on Disability, Medical Futility and Disability Bias, 27 (Nov. 20, 2019), *https://ncd.gov/sites/default/files/NCD_Medical_Futility_Report_508.pdf.*

[136] *Id.*

pressuring patients with a disability or their authorized representatives to agree to provide consent to decline or withdraw treatment or to agree to a particular advanced care planning decision authorizing such declining or withdrawal in the future).

§ 84.56(c)(3) Providing Information

Proposed § 84.56(c)(3) addresses the information exchange between the recipient and the patient with a disability concerning the provision of information and potential courses of treatment and their implications, including the option of foregoing treatment. This provision indicates that nothing in this section precludes a provider from providing an individual with a disability or their authorized representative with information regarding the implications of different courses of treatment based on current medical knowledge or the best available objective evidence.[137] The ability of a person with a disability or their authorized representative to understand the available options and to make an informed decision about the medical treatment depends in part on the expertise and candor of the treating professionals. However, as proposed § 84.56(c)(2)(ii) indicates, the recipient is prohibited from discriminating on the basis of disability in seeking consent for the decision to treat or to forego treatment by, for example, unduly pressuring a person with a disability or their authorized representative to conform to the treating professional's position or by relying on the prohibited factors listed in proposed § 84.56(b)(1)(i)–(iii).

The Department realizes that providing regulatory requirements concerning medical treatment requires careful consideration.

• *Medical Treatment Question 4: The Department seeks comment from all stakeholders on the risks and benefits of the proposed regulatory choices that the Department has put forth in this section.*

• *Medical Treatment Question 5: The Department also seeks comment on whether the term ''medical treatment'' adequately encompasses the range of services that should be covered under this nondiscrimination provision.*

§ 84.57 Value Assessment Methods

The proposed rule seeks to address discrimination on the basis of disability in the use of value assessment methods. The Department has been aware of potential disability discrimination in value assessment for some time. For example, in 1992, the Department declined to authorize a demonstration program in Oregon that relied on the use of the Quality Adjusted Life Year (QALY), one specific methodology of value assessment whose application in Oregon (and common application elsewhere in the present day) discounted the value of life extension on the basis of disability, to determine whether certain treatments for people living with certain disabilities would be covered. The Department cited concerns of discrimination in value assessment methods in its response, stating that ''Oregon's plan in substantial part values the life of an individual with a disability less than the life of an individual without a disability. This premise is discriminatory and inconsistent with the Americans with Disabilities Act.'' [138] The Department further noted that this discrimination and inconsistency stemmed, in part, from the approach that ''quantifies stereotypic assumptions about persons with disabilities.'' [139] In 2010, Congress prohibited the use of the QALY in Medicare [140] and within the Patient Centered Outcomes Research Institute created by the ACA.[141] Many disability rights advocates have expressed concerns about disability discrimination in value assessment methods.[142]

Despite this prior history, value assessment methods have been increasingly used by recipients to determine the cost-effectiveness of goods and services. These determinations can inform price negotiations, value-based purchasing arrangements that link provider payment to performance and outcomes, and other things that affect the degree to which individuals can access aids, benefits, or services, as well as the terms or conditions under which they can access them.

Not all methods of value assessment or their uses are discriminatory. Many value assessment methods can play an important role in cost containment and quality improvement efforts. However, the Department is concerned that some value assessment frameworks that have been adopted by recipients may discriminate on the basis of disability, in violation of existing prohibitions against such discrimination in health services.[143] In this rulemaking, the Department seeks to explicitly apply these obligations to the use of value assessment methods and provide relevant information for recipients on their application. The Department has focused on methods that discount the value of life extension for people with disabilities in this proposed rule, as the vast majority of documentation of disability discrimination concerns in value assessment have focused on the discounting of life extension.[144]

Where value assessments use methods for calculating value that place a lower value on life extension for a group of individuals based on disability *and* where such methods are then used to

[137] This requirement with regard to the provision of information is not a new standard and is consistent with similar requirements in the medical ethics context. *See, e.g.,* Am. Med. Ass'n., Code of Med. Ethics, *Chap. 2: Opp. on Consent, Communication and Decision Making* (2019), *https://www.ama-assn.org/system/files/2019-06/code-of-medical-ethics-chapter-2.pdf.*

[138] Letter from Louis Sullivan, Sec'y, U.S. Dep't of Health and Human Servs., to Barbara Roberts, Governor, State of Or. (Aug. 3,1992), reprinted in 1992 CCH Medicare-Medicaid Guide New Devs. 40,406A, HHS Papers Explaining Rejection of Oregon Medicaid Waiver, HHS News Release, Secretarial Letter, and Analysis (Aug. 3, 1992) (the waiver was later approved after significant modification).

[139] *Id.*

[140] 42 U.S.C. 1320e–1(c)(1). In addition, recent legislation has been introduced in the House of Representatives to ban the use of QALYs outright in federally funded health programs. *See* Protecting Health Care for All Patients Act of 2023, H.R. 485, 118th Congress (2023) (Report No. 118–65, Part I).

[141] 42 U.S.C. 1320e–1(e).

[142] *See NCIL Resolution Opposing the Use of QALYs (Quality-Adjusted Life Years),* Not Dead Yet, *http://notdeadyet.org/ncil-resolution-opposing-the-use-of-qalys-quality-adjusted-life-years* (last visited May 22, 2023) (Not Dead Yet and the Autistic Self-Advocacy Network joined in the resolution); *see also* Not Dead Yet, NCIL Membership Adopts Resolution Opposing Health Insurers' Use of QALYs (2020), *https://notdeadyet.org/2020/08/ncil-membership-adopts-resolution-opposing-health-insurers-use-of-qalys.html*; Disability Rts. Educ. and Def. Fund (DREDF), Pharmaceutical Analyses Based on the QALY Violate Disability Nondiscrimination Law (Sept. 21, 2021), *https://dredf.org/2021/09/23/pharmaceutical-analyses-based-on-the-qaly-violate-disability-nondiscrimination-law/* (''[T]he QALY relies on a set of discriminatory assumptions that devalue life with a disability, disadvantaging people with disabilities seeking to access care based on subjective assessments of quality of life.''); *Lives Worth Living: Addressing the Fentanyl Crisis, Protecting Critical Lifelines, and Combatting Discrimination Against Those with Disabilities: Hearing on H.R. 467, H.R. 498, H.R. 501, and H.R. 485 Before the Subcomm. on Health of the H. Comm. on Energy and Commerce,* 118th Cong. (2023) (statement of Kandi Pickard, President & CEO, Nat'l Down Syndrome Society), *https://d1dth6e84htgma.cloudfront.net/Witness_Testimony_Pickard_HE_02_01_2023_065c903370.pdf?updated_at=2023-01-30T21:38:38.787Z* (speaking on her support of Protecting Health Care for All Patients Act, H.R. 485, 118th Cong. (2023)). As discussed elsewhere in this preamble section, value assessment methods that may be discriminatory when used to determine people with disabilities' access to goods and services may not be discriminatory in another context (*i.e.,* their use purely for academic research). Some general statements about QALY, such as the one quoted in this footnote, do not distinguish between various types of QALY calculations or uses of the concept.

[143] *See* 45 CFR 84.52(a).

[144] *See, e.g.,* Disability Rts. Educ. & Def. Fund (DREDF), Pharmaceutical Analyses Based on the QALY Violate Disability Nondiscrimination Law (2021), *https://dredf.org/wp-content/uploads/2021/09/ICER-Analyses-Based-on-the-QALY-Violate-Disability-Nondiscrimination-Law-9-17-2021.pdf.*

deny or afford an unequal opportunity to qualified individuals with disabilities with respect to the eligibility or referral for, or provision or withdrawal of an aid, benefit, or service, a recipient using such value assessment methods for these purposes is in violation of section 504. For example, a recipient that uses a value assessment method that assigns a greater value to extending the life of people without disabilities than to extending the life of people with disabilities to determine whether a particular drug will be subject to additional utilization management controls or placed on a higher tier of a formulary would likely violate section 504. The recipient is using a value assessment that assigns a greater value to extending the life of people without disabilities with respect to the eligibility or referral for, or provision or withdrawal of an aid, benefit, or service—in this instance, to determine the terms or conditions under which they are made available.

An analysis from the Institute for Clinical and Economic Review (ICER)—whose work is often used to inform decision-making by recipients—valued a year of life of a person with multiple sclerosis with a score of eight on the Expanded Disability Status Scale (describing an individual who relies entirely on a wheelchair for mobility but is nonetheless able to be out of bed for much of the day [145]) at 0.0211, representing approximately a 98% reduction in value relative to a year of life for a healthy, nondisabled person.[146] Similarly, another report from ICER valued a year of life with cystic fibrosis with a ppFEV1 (percent predicted forced expiratory volume in one second, an established measure of lung function for cystic fibrosis) between 20–29% at 0.653, representing a 34.7% reduction in value relative to a year of life for a healthy, nondisabled individual.[147] When a recipient uses these life extension valuations with respect to determining eligibility or referral for, or provision or withdrawal of any aid, benefit, or service, including the terms or conditions under which they are made available, it ascribes a lower value to extending the lives of people with specific disabilities relative to extending those without disabilities or with other disabilities.

This remains the case even if the value of extending the lives of people with disabilities is compared to a less discounted population rather than a hypothetical non-disabled, healthy adult. For example, a value assessment calculation using a general population average utility of 0.816 for life extension for persons without cystic fibrosis and a utility of 0.653 for life extension for persons with cystic fibrosis would still assign lower value to extending the lives of persons with cystic fibrosis relative to persons without. The outcome remains the same even if the general population was also receiving a less severe discount to the value of life extension.

Recipients often rely on value assessments to make decisions regarding coverage, cost, and other decisions with serious implications for access for individuals with disabilities. Relying on a measure that discounts the value of extending the lives of people with disabilities relative to people without disabilities raises serious concerns in light of the consequences for access for individuals with disabilities. It is important that recipients do not engage in discriminatory uses of value assessment methods.

In its report, ''Quality-Adjusted Life Years and the Devaluation of Life with Disability,'' NCD discussed the way that the QALY places a lower value on extending the lives of individuals with disabilities and chronic illnesses.[148] NCD notes that a variety of alternative nondiscriminatory methods exist, and provided examples. The Department declines to endorse any specific method in this rulemaking. NCD noted that many payers, including those who receive Federal financial assistance such as State Medicaid agencies, have made use of or planned to make use of value assessments in a discriminatory fashion in order to evaluate particular health care interventions.[149] For example, in April 2018, one State's Medicaid Drug Utilization Review Board made use of a $150,000 per QALY threshold for valuing a treatment for cystic fibrosis, calculated based on an analysis that assigned a lower value to extending the lives of persons with cystic fibrosis than persons without cystic fibrosis.[150]

For the reasons discussed above, the Department proposes to add § 84.57 on value assessment methods, indicating that a recipient shall not, directly or through contractual, licensing, or other arrangements, use any measure, assessment, or tool that discounts the value of life extension on the basis of disability to deny or afford an unequal opportunity to qualified individuals with disabilities with respect to the eligibility or referral for, or provision or withdrawal of any aid, benefit, or service, including the terms or conditions under which they are made available. The proposed provision does not identify the use of any specific method of value assessment but instead prohibits measures that discount the value of life extension on the basis of disability when used to deny or provide an unequal opportunity for a qualified person with a disability to participate in or benefit from an aid, benefit, or service.

We note that the discriminatory *use* of a measure by a recipient constitutes a violation of this provision, not necessarily that the measure itself does. The use of such a measure in a discriminatory fashion could come about through a variety of mechanisms, including, but not limited to: (1) the use of a threshold that uses such a measure (such as a cost-per-QALY threshold) for purposes of determining coverage or the imposition of additional terms or conditions for availability of a intervention, (2) the use of such a measure for ranking interventions relative to each other within or between disease categories, or (3) otherwise making use of such analyses to inform reimbursement or utilization

[145] *Kurtzke Expanded Disability Status Scale (EDSS),* Nat'l Multiple Sclerosis Soc'y, *http://www.nationalmssociety.org/nationalmssociety/media/msnationalfiles/brochures/10-2-3-29-edss_form.pdf* (last visited May 22, 2023).

[146] Inst. for Clinical & Econ. Rev., Siponimod for the Treatment of Secondary Progressive Multiple Sclerosis: Effectiveness and Value, Final Evidence Report, p. 52 (2019), *https://icer.org/wp-content/uploads/2020/10/ICER_MS_Final_Evidence_Report_062019.pdf* (citing Annie Hawton & Colin Green, *Health Utilities for Multiple Sclerosis,* 19 Value Health 460–468 (2016)).

[147] Michael S. Schechter et al., *Inhaled Aztreonam Versus Inhaled Tobramycin in Cystic Fibrosis: An Economic Valuation.* 12 Annals of the Am. Thoracic Soc'y 1030–38 (2015); Inst. for Clinical & Econ. Rev., Modular Treatments for Cystic Fibrosis: Effectiveness and Value: Final Evidence Report and Meeting Summary, p. 66 (2020), *https://icer.org/wp-content/uploads/2020/08/ICER_CF_Final_Report_092320.pdf.*

[148] Nat'l Council on Disability, Quality-Adjusted Life Years and the Devaluation of Life with Disability, p. 39 (2019), *https://ncd.gov/sites/default/files/NCD_Quality_Adjusted_Life_Report_508.pdf.* The NCD Report stated: ''By favoring those with no functional impairments, the protocols implicitly endorse the belief that the lives of individuals without disabilities are more valuable than that of their unfortunate counterparts'' (citing Wendy Hensel et al., *Playing God: The Legality of Plans Denying Scarce Resources to People with Disabilities in Public Health Emergencies,* 63 Fla. L. Rev. 755 (2011)). Note that the discussion of QALY in the NCD report applies to uses of QALY associated with life extension, not to other uses of value assessment that assess effects of a health care intervention on quality of life without discounting the value of life-extension. The concern articulated in the report does not apply to the latter use case.

[149] Nat'l Council on Disability, Quality-Adjusted Life Years and the Devaluation of Life with Disability, 13–14 (2019), *https://ncd.gov/sites/default/files/NCD_Quality_Adjusted_Life_Report_508.pdf.*

[150] N.Y. State Dep't of Health, N.Y. State Medicaid Drug Utilization Review (DUR) Board Meeting Summary (Apr. 26, 2018), *https://www.health.ny.gov/health_care/medicaid/program/dur/meetings/2018/04/summary_durb.pdf.*

management decisions even if they are not by themselves dispositive. In contrast, the proposed provision would permit the use of such measures that were not used to deny or afford an unequal opportunity to qualified individuals with disabilities with respect to the eligibility or referral for, or provision or withdrawal of an aid, benefit, or service; for example, in academic research. Accordingly, the use of a methodology that is discriminatory when applied to determine eligibility, referral for, or provision or withdrawal of an aid, benefit, or service would not be discriminatory if used in academic research to assess the relative contribution of different policy changes or medical innovations on national or global population health. However, a recipient who makes use of such academic research for purposes of determining eligibility, referral for, or provision or withdrawal of an aid, benefit, or service may still violate section 504 if the use of the methodology employed within the research product is discriminatory when applied in the new context.

Similarly, elements of value assessment methods that are discriminatory in some contexts—such as for valuing life extension—may not be discriminatory in other contexts. For example, the use of utility weights for valuing quality of life improvements can be used in a way that is not discriminatory, even if the use of the same utility weights to discount life extension would be discriminatory, if used to restrict or limit access by people with disabilities. For example, if recipients use a measure of value that does not discount the value of life extension on the basis of disability but does use utility weights for valuing quality of life improvements from a treatment in a way that is not discriminatory, such use of utility weights for assessing quality of life improvements likely would not violate this provision. However, using a measure that does discount life-extension to restrict or limit access could violate the proposed provision.

- *Value Assessment Methods Question 1: The Department seeks comment on how value assessment tools and methods may provide unequal opportunities to individuals with disabilities.*
- *Value Assessment Methods Question 2: The Department seeks comment on other types of disability discrimination in value assessment not already specifically addressed within the proposed rulemaking.*
- *Value Assessment Methods Question 3: The proposed value assessment provision applies specifically to contexts in which eligibility, referral for, or provision or withdrawal of an aid, benefit, or service is being determined. The preamble discussion of the provision clarifies that the provision would not apply to academic research alone. However, the Department seeks comment on the extent to which, despite this intended specificity, the provision would have a chilling effect on academic research.*

§ 84.60 Children, Parents, Caregivers, Foster Parents, and Prospective Parents With Disabilities in the Child Welfare System

Children, parents, caregivers, foster parents, and prospective parents with disabilities may encounter a wide range of discriminatory barriers when accessing critical child welfare programs and services that are designed to protect children and strengthen families. These barriers arise in a variety of contexts, including parent-child reunification services; policies or practices that discourage and/or prohibit parents from receiving assistance with childcare responsibilities from professional and natural supports; and safety and risk assessment policies that conflate disability with parental unfitness.

Federally funded child welfare programs and activities are covered social service programs under section 504. As such, the children with disabilities served by the child welfare system, as well as parents, caregivers, foster parents, and prospective parents with disabilities, are within the class of individuals with disabilities to whom section 504 protections extend. The Department proposes to add a new § 84.60 to the section 504 regulation that will more clearly apply the nondiscrimination requirements of section 504, which are consistent with and reflect the requirements of the ADA, to child welfare programs and activities. Additionally, the proposed section adds specific regulatory provisions that illustrate the types of child welfare actions that are prohibited discrimination under section 504.

A 2012 NCD report, ''Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children,'' [151] found that parents with disabilities involved in the child welfare system have experienced disproportionately higher rates of child removals than nondisabled parents [152] and are often presumed to be unfit because of their disabilities.[153] Parents with disabilities have also been inappropriately referred to ''one size fits all'' reunification services.[154] Some jurisdictions, where State law has explicitly allowed courts to consider whether the presence of a disability makes a parent unable to discharge their responsibilities, have denied disabled parents access to reunification services. For example, as of 2015, 33 states' statutes expressly included a parent's disability as an aggravated circumstance [155] that allows a court to bypass the reunification process by deeming that the disability makes the parent unlikely to benefit from reunification services.[156] While most State laws do not allow for an automatic disqualification based on disability, the inclusion of disability as an aggravating circumstance invites unfounded presumptions by the courts and administering State agencies that disability in and of itself, can be disqualifying.

NCD's report provided case studies where children were removed from parents based on the presumption of unfitness due to parental disability. The report includes ten case studies of parents with disabilities with firsthand experience with the child welfare system. The studies provide examples of discriminatory barriers and bias parents with disabilities encounter at key decision points in the child welfare system, including reporting for abuse and neglect, safety and risk assessments, case opening, and permanency decision. One study described the experience of a couple who were presumed to be unfit to care for their two-day-old daughter because both parents were blind. The concerns centered on the parents' visual impairments, the mother's unsuccessful first attempts at breastfeeding, and the parents' lack of specialized parenting training. The infant was held in state custody for 57 days until a court dismissed the child protective action against the parents.[157]

Another case study described the experience of a mother with intellectual disabilities who lived in supported

[151] Nat'l Council on Disability, Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children (Sept. 27, 2012), *www.ncd.gov/publications/2012/Sep272012/*.

[152] *Id.* at 77–78.

[153] *Id.* at 94.

[154] *Id.* at 89.

[155] *See* 42 U.S.C. 671(a)(15)(D)(i). States are not required to provide assistance or services to prevent removal or reunify children when the parent has subjected a child to aggravated circumstances as defined by State law.

[156] Nat'l Council on Disability, *supra* note 152 at 91. *See also* Traci LaLiberte et al., *Child Protection Services and Parents with Intellectual and Developmental Disabilities,* 30 J. Appl. Res Intellectual Disability, 30: 521–532 (2017), *https://pubmed.ncbi.nlm.nih.gov/28000335/*.

[157] *Id.* at 94.

housing with her five-year-old daughter and received ongoing parent-child intervention services. As a result of Intelligence Quotient (IQ) testing, social workers convinced the mother to allow visits between her daughter and her estranged nondisabled father, despite the mother's reluctance.[158] Social workers insisted that visits with the father continue even after the mother reported that her daughter was afraid of the father and had suddenly started wetting herself. The visits terminated after a police investigation and medical examination substantiated allegations of sexual abuse by the father, though the social workers still questioned the mother's parenting ability.[159] The experience of this mother and daughter is an example of how negative assumptions about IQ as an indicator of parenting skills served as a basis to question the mother's ability to safely care for and protect her daughter.

In examining the use of IQ scores to determine a parent's capacity or fitness to safely care for a child, NCD found that, particularly for parents with intellectual disabilities, reliance on the tests results in high rates of removal and loss of child custody. These tests continue to be administered for the purpose of child custody planning despite the research evidence demonstrating that parental IQ is a poor predictor of parenting competence.[160] When norm-referenced assessments are used, (*e.g.,* measures or assessments that compare a person's knowledge or skills to the knowledge or skills of a group considered to be normal), the parenting practices and behaviors of parents with intellectual disability are ''judged subnormal and inadequate rather than simply different.'' [161] IQ tests are some of the best-known examples of such norm-referenced assessments. NCD also found that ''sole reliance on the IQ, resulting in diagnosis of intellectual disability, leads to states having 'bypass' statutes,' '' where child removals may occur simply on a categorical or diagnostic basis, without any individualized assessment or observation of parenting.[162] Similar to the NCD report, a 2017 review of appellate court cases that culminated in termination of parental rights where parents had intellectual and developmental disabilities found a continued uncritical reliance on parental IQ to assess parental fitness. The study found:

[In] a majority of US cases involving a parent with intellectual and developmental disabilities, appealing a termination of their parental rights, parental IQ or intellectual functioning range often was considered and relied upon by the court in upholding the decision. The rate of reversal was far lower than the dependency and general civil bench trial rates of reversal. It is worrying that while every decision was reasoned differently, and all cases had multiple issues, the courts consistently considered parental IQ, rarely reviewed evaluation methods and results and frequently made statements that reflected a view of parental IQ as static, fixed and necessarily undermining of parenting capacity and ability to learn.[163]

Support for protecting the rights of parents, caregivers, foster parents, and prospective parents with disabilities involved in the child welfare system continues to gain momentum. In 2017, the American Bar Association adopted a resolution urging Federal, State, territorial, and tribal governments to enact legislation and implement policies limiting the circumstances when a parent's disability could be a basis for the denial of parental access to their child or termination of parental rights, or when a prospective parent's disability could be a bar in adoption and foster care.[164] Seventeen states have enacted laws prohibiting the use of parental disability as a basis for denial or restriction of parenting responsibilities.[165]

OCR has received over 300 complaints alleging disability discrimination in child welfare services and activities within the last six years. The complaints allege discrimination in a wide range of child welfare services that are subject to nondiscrimination requirements including: child protection investigations; child and family assessments; case plan development; parent-child visitation; child placement decision-making; provision of community-based services; foster and adoptive parent assessments; and determinations to terminate parent-child reunification efforts. OCR's investigations have revealed that some child welfare entities have implemented policies, practices, and procedures that contribute to unnecessary removals of children from parents with disabilities and create barriers to parent-child reunification, permanency planning, and other critical child welfare services. Additionally, as discussed later in this section, OCR has investigated complaints of discrimination against children with disabilities in the child welfare system. As a result of these investigations, child welfare entities and OCR have worked ŧ together to establish Voluntary Resolution Agreements (VRA), some of which are discussed in greater detail below, required child welfare agencies to create, revise, establish, and implement policies, practices, and procedures to prohibit discrimination against parents with disabilities and ensure that the full range of agency programs are accessible to parents with physical and mental disabilities as required by section 504 and title II. These complaints and VRAs are consistent with the 2012 NCD report finding that the ''child welfare system is ill-equipped to support parents with disabilities and their families.'' [166]

According to data submitted to the Administration for Children and Families (ACF) through its Adoption and Foster Care Analysis and Reporting System (AFCARS) as reported in November 2021, more than 216,838 children entered the U.S. foster care system due at least in part to safety concerns related to parental fitness during 2020.[167] Thirteen percent, or

[158] *Id.* at 97.

[159] *Id.* at 97.

[160] *Id.* at 132 (citing David McConnell et al., *Stereotypes, Parents with Intellectual Disability and Child Protection,* 24 J. Soc. Welfare & Fam. L. 3, 297 (2002)).

[161] *Id.*

[162] *Id.* at 133 (citing Teresa Ostler, *Assessment of Parenting Competency in Mothers with Mental Illness,* Univ. of Chicago (2008)).

[163] Ella Callow et al., *Judicial Reliance on Parental IQ in Appellate-Level Child Welfare Cases Involving Parents with Intellectual and Developmental Disabilities,* 30 J. Appl. Res. Intellectual Disabilities 553, 555–56 (2017).

[164] ''RESOLVED, That the American Bar Association urges all federal, state, territorial, and tribal governments to enact legislation and implement public policy providing that custody, visitation, and access shall not be denied or restricted, nor shall a child be removed or parental rights be terminated, based on a parent's disability, absent a showing—supported by clear and convincing evidence—that the disability is causally related to a harm or an imminent risk of harm to the child that cannot be alleviated with appropriate services, supports, and other reasonable modifications . . . FURTHER RESOLVED, That the American Bar Association urges all federal, state, territorial, and tribal governments to enact legislation and implement public policy providing that a prospective parent's disability shall not be a bar to adoption or foster care when the adoption or foster care placement is determined to be in the best interest of the child.'' Am. Bar Ass'n, *ABA Policy Resolution 114: Disabled Parents and Custody, Visitation, and Termination of Parental Rights,* (Feb. 6, 2017), *https://www.americanbar.org/content/dam/aba/administrative/commission-disability-rights/114.pdf.*

[165] Heller Sch. for Soc. Pol'y and Mgmt., Brandeis U., NRCPD, *Map of Current State Legislation Supporting Parents with Disabilities, https://heller.brandeis.edu/parents-with-disabilities/map/index.html* (last updated (Oct. 9, 2020).), *https://heller.brandeis.edu/parents-with-disabilities/map/index.html*).

[166] Nat'l Council on Disability, *supra* note 152 at 18.

[167] The Adoption and Foster Care Analysis and Reporting System (AFCARS) collects case-level information on all children in foster care and those who have been adopted with Title IV–E agency involvement. *See* U.S. Dep't of Health & Hum. Servs., Admin. for Children & Families, AFCARS Report # 28 (Nov. 19, 2021), *https://www.acf.hhs.gov/cb/report/afcars-report-28.*

28,771 children, were removed from a parent or caregiver based, in part, on ''Caretaker Inability to Cope Due to Illness or Other Reasons'' as one of the circumstances associated with child's removal. The AFCARS regulation defines ''caretaker inability to cope due to illness or other reasons'' as a ''a physical or emotional illness, or disabling condition adversely affecting the caretaker's ability to care for the child.'' AFCARS submissions in 2020 on the ''Caretaker Inability to Cope'' out-of-home case data element demonstrate that a caretaker's physical illness, emotional illness, or disabling condition continues to be a factor in child removals. Reporting on this data element from 2015–2020 shows that title IV–E agencies removed fourteen percent of children who entered the U.S. foster care system due in part to safety concerns related to a caretaker's physical illness, emotional illness, or disabling condition, *i.e.,* concerns labeled ''Caretaker Inability to Cope.''

As noted by research published in Children and Youth Services Review, in the 2012 AFCARS data, parental disability was the only parental characteristic based on a parent's physical or mental attributes categorized in State child welfare policies or in Federal data collection tools as a consideration when determining whether to remove a child from their home or to terminate parental rights.[168] In the AFCARS data, ''caretaker inability to cope is the only removal reason that is a parental characteristic based on a physical or mental condition rather than a changeable behavior.'' [169] The data elements reviewed remained in place through 2020.

The University of Minnesota, Center for Advanced Studies in Child Welfare noted in its child welfare policy brief on the use of parental disability as a consideration in removing children and termination of parental rights (TPR), that having parental disability listed as a removal reason or as grounds for TPR ''can lead those involved in the system to believe that parental disabilities lead to abuse, rather than focusing on how to appropriately provide services.'' [170]

In 2015, in response to increased disability-related child welfare complaints and calls from entities such as NCD for the Federal Government to take immediate action to protect the rights of individuals with disabilities, OCR, ACF, and DOJ jointly published ''Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.'' [171] The technical assistance document provides important information to assist child welfare agencies and courts in meeting their obligations under Federal disability rights laws to provide equal access to child welfare services and activities in a nondiscriminatory manner. HHS also published an online video training series to educate child welfare practitioners about the application of Federal disability rights laws to child welfare programs and activities. The series provides an overview of Federal disability rights laws, discusses protections that apply to some individuals in recovery, and promotes awareness of Medication Assisted Treatment and Medications for Opioid Use Disorder (MOUD) as an effective approach to the treatment of substance use disorders.[172]

Despite HHS efforts to raise awareness of Federal disability rights protections, OCR continues to receive new complaints about discrimination against individuals with disabilities in the child welfare system. These cases involve, for example, the removal of children from parents with intellectual disabilities. In the section that follows, we discuss complaints where child welfare agencies allegedly made custody decisions based on stereotypes of disability, failed to offer reasonable modifications in the parental evaluation process, and failed to recognize the need for modifications on the basis of disability as required by section 504. The creation of revised policies and procedures by each of these agencies shows that the many child welfare agencies' current policies do not reflect the longstanding antidiscrimination requirements of section 504. This rulemaking seeks to clarify child welfare agency obligations and alleviate the need to correct agency policies through enforcement actions.

Reasonable Modifications for Parents With Disabilities in the Child Welfare System

In a recent case, OCR investigated allegations involving a State child welfare agency's removal of two infant children from a mother and father with intellectual disabilities. The parents alleged that the State agency acted based in significant part on their IQ scores. OCR's investigation raised concerns that the agency subjected parents with intellectual disabilities to unlawful treatment when it removed the children from their custody, refused to reunify them with their children, limited their visitation rights, and failed to provide them with appropriate reunification services. In response to that investigation, the state agency agreed to update those policies to clarify that it will not make decisions about whether a participant with a disability represents a threat to the safety of a child on the basis of stereotypes or generalizations about persons with disabilities, or on a participant's diagnosis or intelligence measure (*e.g.,* IQ score) alone. The agency also agreed that, as part of its assessment process, participants with actual or suspected disabilities can be referred to appropriate medical, mental health, or other professionals to obtain specific necessary information (such as reasonable modifications).[173]

In another case, an OCR investigation revealed that a State denied a prospective parent with chronic fatigue syndrome and other disabilities the opportunity to become a foster parent. OCR determined that the child welfare agency failed to make an individualized assessment of the applicant's ability to be a foster/adoptive parent and improperly used disability as a criterion to make placement decisions.[174] OCR also found that the agency failed to consider whether support services offered to other foster/adoptive parents would have allowed the applicant to participate in the program if they were made available.[175] In response to OCR's

[168] Sharon DeZelar et al., *Use of Parent Disability as a Removal Reason for Children in Foster Care in the U.S.,* 86 Children & Youth Services Rev. 128–134 (2018).

[169] E. Lightfoot, et al., *Child well-being in Minnesota—Policy strategies for Improving Child Welfare Services for Parents With Disabilities and their Children (Child Welfare Policy Brief No. 10),* Ctr. for Advanced Studies in Child Welfare, Univ. Minn. (Winter 2016).

[170] *Id.*

[171] U.S. Dep't Health & Hum. Servs., U.S. Dep't of Justice, Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and section 504 of the Rehabilitation Act (2015), *https://www.hhs.gov/sites/default/files/disability.pdf* (last visited Aug. 17, 2022).

[172] *See* U.S. Dep't of Health & Hum. Servs., Opioid Use Disorder and Civil Rights Video and Webinar Series, *https://ncsacw.samhsa.gov/topics/medication-assisted-treatment.aspx* (last visited June 22, 2022).

[173] *See* U.S. Dep't of Health & Hum. Servs., Voluntary Resolution Agreement between the U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts. and Oregon Dep't of Human Serv. (Nov. 20, 2019), *https://www.hhs.gov/sites/default/files/odhs-vra.pdf.*

[174] U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., Georgia Enters into Agreement to Ensure Equal Access for Individuals with Disabilities to Foster and Adoption Programs and Services (Jan. 11, 2016), *https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/agreements/georgia-dcfs-bulletin/index.html.*

[175] *Id.*

findings, the State agency agreed to develop and implement standard operating procedures for documenting and assessing foster care and adoption program applicants and participants with disabilities. The agency also agreed to implement a process for maintaining a record of administration and results of assessments and to provide annual training to staff involved in assessing and/or supporting foster care and adoption program applicants and participants.[176]

OCR also investigated a complaint filed by an aunt and uncle who alleged that a State child welfare agency denied their request for emergency custody and placement of their young niece and nephew based on the uncle's being in recovery from Opioid Use Disorder (OUD), and his long-term use of physician-prescribed Suboxone as a medication for opioid use disorder (MOUD). The investigation indicated that the uncle had not tested positive for illegal use of drugs during his treatment and the aunt expected to be the children's primary caregiver as her husband worked full-time. OCR's investigation identified systemic deficiencies regarding the agency's implementation of its policies, practices, and procedures to ensure the civil rights of individuals with disabilities, including individuals in recovery from OUD, in the State child welfare system. To address these concerns, the State agency agreed to update its policies to clarify that section 504 and title II of the ADA protect qualified individuals with substance use disorder from unlawful discrimination. The updated policies reflect that MOUD is not the illegal use of drugs and that an individual's prescribed use of MOUD does not mean that the individual is substituting one addiction for another. The agency also agreed to develop and provide mandatory annual training for its staff on the requirements of Federal civil rights laws and working with people with disabilities, including individuals in recovery from substance use disorder.[177]

After a joint investigation, OCR and DOJ found that a State child welfare agency seeking to terminate parental rights of a mother with a developmental disability violated title II of the ADA and section 504 by denying the mother supports and services provided to nondisabled parents and denying the mother reasonable modifications to accommodate her disability.[178] The mother and her infant were reunified two years after the infant's removal from the hospital. HHS and DOJ reached an agreement with the State agency to take specific actions to resolve violations of section 504 and title II. Among other actions, the agency agreed to revise its child welfare policies that cite disability or any specific disability, impairment, medical condition, intelligence measure (*e.g.,* IQ score), or diagnosis to remove from the policies the mere fact of such disability, impairment, condition, intelligence measure, or diagnosis as a basis for removal of custody (legal, physical, or otherwise). The agency agreed the new policies would reflect key requirements under the ADA and section 504—that individuals with disabilities must be treated on a case-by-case basis consistent with facts and objective evidence and that they may not be treated on the basis of generalizations or stereotypes. The agency agreed to provide notice to individuals involved in the child welfare system of the process to make a request for reasonable modifications and auxiliary aids and services.[179]

Similarly, OCR investigated a complaint alleging a State agency failed to provide modified support services and modifications necessary for a young mother with an intellectual disability to have an effective and meaningful opportunity to reunite with her young child. The investigation led to significant technical assistance to the agency. The State agency revised its nondiscrimination policies, issued an administrative order committing the agency to inclusivity and reasonable modifications in the provision of child welfare services, and implemented new disability rights training for agency staff.[180]

A recent settlement of a Federal lawsuit brought against a State agency which alleged violations of the ADA and section 504 demonstrates the agency's failure to provide required modifications. The plaintiff, a mother with physical disabilities, alleged her newborn son was removed from the hospital, four days after his birth, based on discriminatory assumptions about the parenting abilities of people with disabilities. The State agency and the parent entered into a settlement agreement, which requires that the State agency implement policy changes to protect the rights of people with disabilities from discrimination, to ensure (1) that an individual assessment of a parent's disability is obtained prior to referring the family for services; (2) that the provision of any ''reasonable modification'' needed by a parent with a disability is made in order that the disabled parent can participate in recommended programs and/or services, and (3) that the agency will develop and implement training to address stereotypes about people with disabilities.[181]

The Department's enforcement actions related to disability discrimination, as well as Federal litigation involving child welfare entities under section 504, demonstrate the need for rulemaking to clarify child welfare entities' nondiscrimination obligations under the Rehabilitation Act. The numerous and diverse range of issues raised in complaints received by OCR show that covered child welfare entities need specific articulation of their longstanding obligations under section 504.

Most Integrated Settings in Foster Care

Child welfare agencies must place qualified individuals with disabilities in the most integrated setting appropriate to the needs of the child, consistent with the requirements of existing § 84.4(b)(2) and proposed § 84.68(d), which is identical to 28 CFR 35.130(d) in the ADA title II regulations, and proposed § 84.76. The integration mandate is discussed in depth in the preamble discussion of § 84.76. Pursuant to these requirements, a recipient may not engage in the unnecessary or unjustified segregation of children with disabilities, such as default placement in institutional or other congregate care, and it must work

[176] *See* U.S. Dep't of Health & Hum. Servs., Settlement Agreement between the U.S. Dep't of Health & Hum. Servs., Off. for Civil Rtss and the GA Dep't of Human Res. (Dec. 15, 2015), *https://www.hhs.gov/sites/default/files/dfcs-revised-settlement-agreement.pdf.*

[177] *See* U.S. Dep't of Health & Hum. Servs., Voluntary Resolution Agreement between the U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts. and the W.V. Dep't of Health & Hum. Servs, Bureau for Child. & Families (Apr. 22, 2020), *https://www.hhs.gov/sites/default/files/ocr-agreement-with-wv-dhhr.pdf.*

[178] U.S. Dep't of Health & Hum. Servs., U.S. Dept of Justice, Letter from the U.S. Dep't of Justice, Civil Rts. Division and U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts. to the M.A. Dep't of Children and Families (Jan. 29, 2015), *https://www.hhs.gov/sites/default/files/mass_lof.pdf.*

[179] *See* U.S. Dep't of Health & Hum. Servs., U.S. Dep't of Justice, Settlement between the U.S. Departments of Justice and U.S. Dep't of Health & Hum. Servs. and Massachusetts Department of Children and Families (Nov. 19, 2020), 19, 2020), *https://archive.ada.gov/mdcf_sa.html.*

[180] U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., HHS OCR Provides Technical Assistance to Ensure New Jersey Department of Children and Families Protect Parents with Disabilities from Discrimination (Nov. 13, 2020), *https://public3.pagefreezer.com/content/HHS.gov/31-12-2020T08:51/https://www.hhs.gov/about/news/2020/11/13/hhs-ocr-provides-technical-assistance-ensure-new-jersey-department-children-families-protect-parents-disabilities-from-discrimination.html.*

[181] *Cesaire ex rel. E.B.* v. *Tony,* No. 20–CV–61169 (S.D. Fla. Feb. 1, 2021).

to facilitate family foster home placements consistent with this requirement.

Title IV–E agencies accept billions of dollars from HHS to provide safe foster care placements for children and youth who cannot remain in their homes. As a condition of receiving these funds, child welfare entities must comply with Federal child welfare law and disability rights laws that require agencies to place foster children and youth in the least restrictive and most family-like setting appropriate to their needs. Congregate care should never be considered the most appropriate long-term placement for children, regardless of their level of disability. This stance is reflected in the Federal enforcement of the integration mandate. After investigating one children's mental health system, DOJ found that ''[w]ith access to timely and appropriate services, even children with intensive behavioral health needs and a history of congregate facility placement are able to return to or remain in family homes where they are more likely to have improved clinical and functional outcomes, better school attendance and performance, and increased behavioral and emotional strengths compared to children receiving care in institutions.'' [182] This DOJ finding cited, and is consistent with, research in the field.[183] Yet, despite the recognition that congregate care should not be a default placement for children,[184] many children and older foster care youth continue to face potentially discriminatory barriers to placements in family-like foster home settings that can meet their needs. For example, class action lawsuits have been filed in several jurisdictions challenging the practice of denying foster children, including those with disabilities, placement in the most integrated setting appropriate to children's needs and of placing them in inappropriate settings such as hotels and refurbished juvenile detention centers. In these cases, other State entities, such as Medicaid agencies and other human service or health agencies, may also provide support services to ensure children can be adequately supported in a family foster care home. To meet the integration mandate for foster children's services, State agencies must often coordinate different supports and services to support community placements.

In 2015, a class action was brought on behalf of children under the care and custody of the Arizona Department of Child Safety that alleged the State agency failed, in part, to ensure that foster children with disabilities receive behavioral health services and placements in family-like foster homes. The February 2021 Settlement Agreement requires that the State agency make considerable improvements in providing behavioral health and other necessary services to children in foster care.[185]

In a recent case in Maine, DOJ found that the State of Maine violated the title II integration mandate by unnecessarily segregating children with mental health and developmental disabilities in psychiatric hospitals, residential treatment facilities, and a State-operated juvenile detention facility.[186] The State failed to provide services in community-based settings appropriate to children's needs, in part due to lengthy service waitlists, provider shortages, and under-resourced crisis centers. DOJ also issued a Letter of Findings to West Virginia in 2015, notifying the state that it violated the integration mandate by segregating children with mental health conditions in residential treatment facilities.[187] A settlement agreement was reached in 2019 to expand and improve in-home and community-based mental health services throughout the state to better meet children's needs.[188]

In other lawsuits, plaintiffs' claims have not yet been fully adjudicated. However, the allegations supporting the claims suggest that there may be a need for regulation in this area. For example, there have been other lawsuits relating to the treatment of children with disabilities under State care. In Illinois, the Cook County Public Guardian was sued on behalf of children with disabilities under the care and custody of the Illinois Department of Children and Family Services.[189] The lawsuit alleges that, between 2015 and 2017, more than 800 foster children with disabilities were unnecessarily held in psychiatric hospitals. According to the lawsuit, eighty percent of the more than 800 children were held for ten days or more beyond the time they should have been discharged. More than 40% were confined for a month or longer; 15% had to wait two months or longer. The lawsuit further alleges that the Illinois child welfare agency is aware of the problems yet has failed to ensure that these children are discharged to family-like foster homes or other community-based therapeutic settings. In March 2021, the court ruled that the plaintiffs had pled actionable discrimination under section 504 and the ADA.[190]

In Oregon, two separate class actions were filed on behalf of children with disabilities under the care and custody of Oregon Department of Human Services. The first lawsuit alleged the State agency systematically placed foster children with mental health disabilities in hotel rooms or offices and denied children with disabilities family foster homes and other community-based therapeutic placements. The lawsuit also alleged the children are disproportionately denied, by reason of their disability, the opportunity to benefit from a State program to provide safe, nurturing homes for children and from the mental health services offered by the child welfare agency.[191] A second lawsuit was filed in 2019 alleging children in Oregon's foster care system, including a sub-class of children who have emotional, intellectual, psychological, and physical

[182] U.S. Dep't of Justice, Investigation of the State of Alaska's Behavioral Health System for Children (Dec. 15, 2022) *https://www.justice.gov/opa/press-release/file/1558151/download.*

[183] Carrie W. Rishel, et al., *Preventing the Residential Placement of Young Children: A Multidisciplinary Investigation of Challenges and Opportunities in a Rural State,* 37 W. Va. Univ. Children & Youth Servs. Rev. 9 (2014), *http://dx.doi.org/10.1016/j.childyouth.2013.11.027.*

[184] Based on research finding that family homes improve outcomes for children in foster care, Federal funding policy recognizes that that congregate care placements should be used only when the child's care needs cannot be adequately addressed in a less restrictive environment. *See* Bipartisan Budget Act of 2018, Public Law 115–123, Sec. 50742. Federal funding for congregate care, as a placement setting, may be used only under limited circumstances, when a qualified professional determines that the needs of the child cannot currently be met in a family foster home, and that a residential treatment program offers the appropriate level of care for the child in the least restrictive environment The Family First Prevention Services Act (FFPSA), part of the Bipartisan Budget Act of 2018, imposed restrictions, implemented in October 2019, on the use of title IV–E reimbursement for congregate care placements experienced by children and older youth.

[185] *See B.K* v. *Faust, et al.,* No.1 cv–15–00185 (D. Az. Oct.13, 2020), *https://www.childrensrights.org/wp-content/uploads/2020/10/District-of-Arizona-Court-Order-101320.pdf* and *Tinsley* v. *Faust,* No.1 cv–15–00185 Final Approval Order, (D. Az. Feb. 12, 2021).

[186] U.S. Dep't of Justice, Justice Department Finds Maine in Violation of ADA For Over-Institutionalization of Children with Disabilities (June 22, 2022), *https://www.justice.gov/opa/pr/justice-department-finds-maine-violation-ada-over-institutionalization-children-disabilities.*

[187] U.S. Dep't of Justice, Letter of Findings re: United States' Investigation of the West Virginia Children's Mental Health System Pursuant to the Americans with Disabilities Act (June 1, 2015) *https://www.justice.gov/sites/default/files/crt/legacy/2015/06/01/wv-ada_findings_6-1-15.pdf.*

[188] U.S. Dep't of Justice, Department of Justice Reaches Agreement to Resolve Americans With Disabilities Act Investigation of West Virginia's Children's Mental Health System (May 14, 2019), *https://www.justice.gov/opa/pr/department-justice-reaches-agreement-resolve-americans-disabilities-act-investigation-west.*

[189] *Golbert* v. *Walker,* No. 18 C 8176 (N.D. Ill. Dec. 13, 2018).

[190] *Golbert* v. *Walker,* No. 18 C 8176, 24, Order Denying Motion to Dismiss (N.D. Ill. Mar. 18, 2021).

[191] *A.R.* v. *State of Or.,* No. 3:16–cv–01895, Amended Complaint (D. Or. Sept. 30, 2016).

disabilities, were denied appropriate family home and therapeutic placements.[192] Children with disabilities represent 50% of children currently in Oregon's foster care system. The lawsuit alleges Oregon sends foster children to out-of-state congregate care and other restrictive institutions including repurposed juvenile detention facilities, instead of placing them in family foster homes and therapeutic community-based settings within the State. The suit further alleges that foster children with disabilities are also denied community-based placements and services to ensure access to the least restrictive settings. Similar to the first lawsuit, this class action alleges children are placed in homeless shelters and minimally refurbished juvenile delinquent institutions, and it alleges children are held in hospitals beyond the time when hospitalization is medically necessary. In September 2021, the district court ruled the plaintiffs' allegations sufficient to state a claim for disability discrimination under the integration mandate.[193]

In 2021, lawsuits were filed by advocates on behalf of foster children and youth with disabilities in the custody of the Washington State Department of Children, Youth and Families (DCYF) and the Alabama Department of Human Resources. The Washington complaint alleges that the State agency denies foster children with behavioral and developmental disabilities appropriate services, supports, and stable placements in family-like settings. The action further alleges that foster children with disabilities experience multiple, short-term emergency placements in motels, one-night stay foster care homes, and DCYF offices. It also alleges that some foster children are segregated with other youth with behavioral and developmental disabilities in congregate care settings or are sent to out-of-state institutions away from their families and communities.[194]

The Alabama lawsuit alleges that the State child welfare agency discriminates against youth with mental impairments by unnecessarily segregating them in restrictive, institutional psychiatric facilities. The complaint alleges that a foster youth with a ''mental impairment'' was held unnecessarily in a psychiatric residential treatment facility because the State agency failed to locate a community-based placement with appropriate supports and services. Though the State child welfare agency determined the foster youth was eligible for community-based placement, according to the complaint, she remained in a restricted and segregated placement for more than a year due to the agency's failure to develop an adequate system of community support and recruit and train foster families. The complaint asserts that children placed in institutional settings are less likely to achieve permanency, experience poor child welfare outcomes, and are more likely to age out of foster care without appropriate community-based care to facilitate a successful transition to adulthood.

In 2022, a class action complaint was filed by advocates on behalf of foster children with disabilities in the custody of the North Carolina Department of Health and Human Services (DHHS). The complaint alleges DHHS unnecessarily segregates foster children with disabilities from their home communities and routinely isolates them in restrictive, and often clinically inappropriate, institutional settings, such as psychiatric residential treatment facilities (PRTF).[195] The complaint further alleges that the children of color disproportionately bear the burden of unnecessary and segregated confinement in PRTFs. According to the complaint, some of the named plaintiffs receive heavy cocktails of mind-altering psychotropic medications, are subject to physical restraints, and have suffered bullying by PRTF staff.

- *Child Welfare Question 1: The Department seeks comment on additional examples of the application of the most integrated setting requirement to child welfare programs and welcomes comments on any additional points for consideration regarding integration of children with disabilities in child welfare contexts.*

Discrimination Prohibited in Child Welfare Services

Proposed § 84.60(a) states that no qualified individual with a disability may be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any child welfare program or activity. This section is consistent with the general nondiscrimination provisions contained at § 84.68(a), as well as the general nondiscrimination provisions applicable to health, welfare, and social services programs at § 84.52(a), and applies them directly to child welfare entities who are recipients of Federal funding. This proposed provision does not enlarge the existing protections of section 504, but the foregoing discussion, as well as OCR's own outreach initiatives to child welfare advocates and recipients, strongly indicate that child welfare entities who are recipients of Federal funding are not all aware of their responsibilities under the statute. This section is meant to ensure that individuals with disabilities served by child welfare programs are afforded full and equal opportunities to access and benefit from child welfare programs and activities as required by section 504.

Proposed § 84.60(a)(2)(i) states that discrimination includes decisions based on speculation, stereotypes, or generalizations about a parent, caregiver, foster parent, or prospective parent. Section 84.60(a)(2)(ii) prohibits such discriminatory decisions about a child with a disability.

The term ''parents'' is defined in proposed § 84.10 as biological or adoptive parents or legal guardians, as determined by applicable State law. The definition is consistent with 42 U.S.C. 675(2) in title IV–E of the Social Security Act, the statute governing Federal payments for foster care, adoption assistance, and prevention services. The term ''caregivers'' as used in this section includes relatives and other kinship caregivers who provide for the physical, emotional, and social needs of the child. The term ''foster parents'' means individuals who provide a temporary home and support for children in foster care as defined in 45 CFR 1355.20. This category may include relatives or nonrelatives that are licensed or approved to provide care for foster children. The term ''companion'' as defined in § 84.10 means a family member, friend, or associate of an individual seeking access to a program or activity of a recipient, who, along with such individual, is an appropriate person with whom the recipient should communicate. The term ''prospective parents'' as defined in § 84.10 means individuals who are seeking to become foster or adoptive parents.

The term ''qualified person with a disability'' or ''qualified individual with a disability'' means a person with a disability who meets the essential eligibility requirements of the child welfare program or activity, with or without the provision of reasonable modifications, the provision of appropriate auxiliary aids and services, or the removal of architectural,

[192] *Wyatt B.* v. *Brown,* 6:19–cv–00556, Complaint (D. Or. Apr. 16, 2019).

[193] *Wyatt B.* v. *Brown,* 6:19–cv–00556 (D. Or. Sept. 27, 2021) (denying in part Defendants' motion to dismiss).

[194] *D.S.* v. *Wash. Dep't of Children, Youth & Families,* No. 2:21–cv–00113 (W.D. Wash. Apr. 12, 2021); *AA* v. *Buckner,* No. 2:21CV367 (M.D. Ala Oct. 29, 2021).

[195] *Timothy B.* v. *N.C. Dep't of Health and Human Srvs.,* Complaint, No. 1:22–cv1046 (M.D. N.C. Dec. 6, 2022).

communication, or transportation barriers. ''Program or activity,'' as defined in § 84.10, means all of the operations of any entity, any part of which is extended Federal financial assistance. In the context of child welfare, ''all operations'' includes but is not limited to, child protective services investigations and child removals; safety and risk assessments; in-home skill-based services; case planning and service planning; community-based services including mental health and substance use disorder programs; visitation; reunification; out of home placements and agency placement decisions (*e.g.,* foster care, kinship care, and adoption); services to help current and former foster care youths transition into adulthood and achieve self-sufficiency; and guardianship. A child welfare entity's participation in dependency hearings, child placements, and agency placement decisions and proceedings to terminate parental rights are also ''operations'' within the definition of program or activity in § 84.10.

Proposed paragraph (b) of § 84.60 articulates prohibitions included under paragraph (a) and outlines the types of child welfare actions that are prohibited when they occur based on the fact that a qualified individual who is a parent, caregiver, foster parent, or prospective parent has a disability, including the denial of custody, control, or visitation related to a child; termination of parental rights; and the denial of access to adoption or foster care services;. This list is not exhaustive, but rather, illustrative.

- *Child Welfare Question 2: The Department invites comment on this list of prohibited activities in the child welfare context, especially on whether commenters believe it is complete.*

Proposed paragraph (b)(1) of § 84.60 addresses the denial of custody or control of children from qualified parents with disabilities. This paragraph prohibits child welfare programs from petitioning for the removal of a child from a parent because of speculation, stereotypes, or generalizations about a parent's disability.

Proposed paragraph (b)(2) of § 84.60 requires that recipients ensure that qualified parents with disabilities are not denied the opportunity to preserve their families that is equal to the opportunity that recipients offer to parents without disabilities. Child welfare programs or activities may not limit access to reunification services for parents with disabilities or provide reunification services to parents with disabilities that are inaccessible.

Proposed paragraph (b)(3) of § 84.60 addresses the termination of parental rights or legal guardianship of a qualified parent or legal guardian with a disability. Much like paragraph (b)(1), it means that a child welfare entity may not file a petition to terminate a parent's legal rights over a child because of speculation, stereotypes, or generalizations surrounding the parent's disability.

Proposed paragraph (b)(4) of § 84.60 affirms the right of a qualified caregiver, foster parent, companion, or prospective parent with a disability to be given an opportunity to participate in or benefit from child welfare programs and activities. Child welfare programs must ensure that they provide equal opportunities for caregivers, foster parents, companions, or prospective parents with disabilities to benefit from those programs, including by providing auxiliary aids and services and reasonable modifications.

Pressuring a qualified individual with a disability not to seek, apply, or participate in Federally funded child welfare aids, benefits, or services may also result in a denial of the opportunity to participate in or benefit from child welfare programs and activities under proposed paragraph (b)(4) of § 84.60. For example, child welfare entities may not inappropriately pressure parents with disabilities towards voluntary relinquishment of parental rights or improperly influence a parent's decision to participate in visitation and reunification activities on the basis of the parent's disability. Another example of prohibited conduct under paragraph (b)(4) is using criteria that discriminate on the basis of disability. This includes the use of discriminatory screening processes or requirements for service.

Proposed paragraph (c) of § 84.60 requires recipients to establish procedures for referring qualified parents who, because of disability, need or are believed to need modified or adaptive services (*e.g.,* individualized parenting training) or reasonable modifications and to ensure that tests, assessments, and other evaluation materials are tailored to assess specific areas of disability-related needs. For purposes of this paragraph, the term ''service provider'' refers to individual providers or agencies who evaluate families to determine their need for behavioral health, parenting skills, and other services to address safety concerns and strengthen a parent's protective capacity. This paragraph requires that when referring a parent with an actual or suspected disability for parent evaluations, recipients ensure that service providers use tests and assessment materials that are tailored and adapted to assess parenting capability and functioning. For example, service providers may assess a parent, caregiver, foster parent, or prospective parent's capabilities, functioning, and ability to care for a child by potentially drawing from a wealth of sources. When assessing parenting capabilities, the service provider should use methods that are adapted where necessary to address the parent's disability and that broadly evaluate an individual's strengths, needs, and abilities based on objective evidence, including direct observation, interviews, and medical and social history. For example, this requirement would prevent the use of a single general IQ score to evaluate the parenting capabilities of an individual with an intellectual disability.

- *Child Welfare Question 3: The Department seeks comment on how agencies would implement these referral procedures, ensure that service providers use the methods described, and prohibit the use of IQ alone as the basis for a parenting assessment.*

Section 504 requires that these assessments consider the strengths and needs of a parent, caregiver, foster parent, or prospective parent with a disability and not base decisions on preconceived notions resulting from generalizations and stereotypes about individuals with disabilities. It prohibits child welfare agencies from making decisions about foster parents and prospective foster parents that are based on assumptions or generalizations about people with disabilities. Disabilities rarely manifest in the exact same way from person to person, and decisions about a parent, caregiver, foster parent, or prospective parent's ability to care for a child, must be based on facts regarding each individual.[196]

In some circumstances, the risk of harm to a child may warrant removal, denial of reunification, denial of visitation, or termination of parental rights. Risk of harm to a child may be analyzed through section 504's provision addressing ''direct threat.'' Proposed § 84.75 states that recipients are not required to provide benefits or services to individuals with disabilities if those individuals pose a direct threat to others. In determining whether an

[196] *See* U.S. Dep't of Health & Hum. Servs., U.S. Dep't of Justice, Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and section 504 of the Rehabilitation Act (Aug. 2015). *https://www.ada.gov/doj_hhs_ta/child_welfare_tahttps://www.hhs.gov/sites/default/files/disability.pdf.*

individual poses a direct threat, a recipient must make an individualized assessment based on reasonable judgment from current medical knowledge or the best available objective evidence to ascertain the nature, duration, and severity of the risk to the child; the probability that the potential injury to the child will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk. Where a parent with a disability poses a significant risk to the child's health and safety, recipients would be permitted to delay or deny reunification or delay or deny visitation with a parent.

The Department believes that the proposed regulation furthers the best interests of the children involved in child-welfare matters governed by this section. Basing decisions to remove children from their parents or caretakers, to terminate their parents' rights, or to limit visitation on stereotypes, assumptions, and unsubstantiated beliefs is not in children's best interests. We therefore believe that the proposed rule both implements the plain requirements of section 504 and advances the best interests of children and their caretakers.

Subpart I—Web, Mobile, and Kiosk Accessibility

Introduction

Web content and mobile applications provide increasingly crucial gateways to health and human service programs and activities. Inaccessible technology can cause severe harm, from denials of cancer screenings to limitations in reunification services for parents and children. Current Federal laws and regulations require the accessibility of all programs and activities of recipients of Federal financial assistance, including those provided through web content, mobile applications, and kiosks.[197] Despite these requirements, the Department has received numerous complaints alleging that people with disabilities continue to face barriers to access, including inaccessible recipient websites and mobile applications, in addition to kiosks. To help ensure access for individuals with disabilities and provide additional clarity to recipients, the Department proposes to require specific standards for accessible recipient web content and mobile applications, as well as general accessibility for kiosks used in recipients' programs and activities, in this subpart.

History of Web Interpretation Under Section 504

Section 504 provides that individuals with disabilities shall not, solely by reason of such disability, be excluded from participation in or be denied the benefits of programs or activities of a recipient, or be subjected to discrimination by any such entity.[198] Many recipients now regularly offer many of their programs and activities through web content and mobile apps, and the Department describes in detail some of the ways in which recipients have done so later in this section. To ensure equal access to such programs and activities, the Department is undertaking this rulemaking to provide recipients with more specific information about how to meet their nondiscrimination obligations.

As with many other civil rights statutes, section 504's requirements are broad and its implementing regulations do not include specific standards for every obligation under the statute. This has been the case in the context of web and mobile app content accessibility under section 504. Because the Department has not adopted specific technical requirements for web content through rulemaking, recipients have not had specific direction on how to comply with section 504's general requirements of nondiscrimination and effective communication. However, recipients must still comply with these section 504 obligations with respect to their websites and mobile apps, including before this rule's effective date.

As the use of technology has become more prevalent in health programs and activities, the Department has articulated its position about the ways that Federal civil rights laws that prohibit discrimination on the basis of disability require accessibility for individuals with disabilities. In December of 2016, the Department issued a guidance document titled "Guidance and Resources for Electronic Information Technology: Ensuring Equal Access to All Health Services and Benefits Provided through Electronic Means."[199] This guidance document recognized that health care providers increasingly rely on information and communication technology (ICT),[200] including kiosks and websites, to provide health programs and activities, and that a failure to ensure that the services covered health care entities provide through ICT are accessible to people with disabilities may constitute discrimination under Federal civil rights laws.[201]

Section 1557 of the Affordable Care Act

In 2016, when the Department first issued its implementing regulation for section 1557 of the ACA, it required covered entities to ensure that their health programs or activities provided through electronic and information technology, including web content, mobile applications, and kiosks, were accessible to individuals with disabilities, unless doing so would result in a fundamental alteration in the nature of the health programs or activities or undue financial and administrative burdens.[202] The Department also noted that while it would not adopt specific accessibility standards for electronic and information technology at the time, it would be "difficult to ensure compliance with accessibility requirements without adherence to standards such as the Web Content Accessibility Guidelines (WCAG)[203] 2.0 AA standards or the Section 508 standards," and strongly encouraged recipients to use such standards.[204] While the Department released an updated implementing regulation for section 1557 in 2020, the

[197] *See, e.g.,* 45 CFR 92.104; 45 CFR 84.4, redesignated as 84.68. Note that compliance with these web and mobile accessibility requirements does not remove covered entities' obligations under Title I of the ADA to not discriminate against qualified individuals on the basis of disability in regard to job application procedures; the hiring, advancement, or discharge of employees; employee compensation; job training; or other terms, conditions, and privileges of employment. These obligations include making reasonable accommodation to the known physical or mental limitations of applicants or employees, absent undue hardship.

[198] 29 U.S.C. 794.

[199] U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., Guidance and Resources for Electronic Information Technology: Ensuring Equal Access to All Health Services and Benefits Provided through Electronic Means (Dec. 21, 2016), *https://www.hhs.gov/sites/default/files/ocr-guidance-electronic-information-technology.pdf.*

[200] The guidance document used the term "electronic and information technology (EIT)," which has since been effectively replaced with the term "information and communication technology (ICT)."

[201] U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., Guidance and Resources for Electronic Information Technology: Ensuring Equal Access to All Health Services and Benefits Provided through Electronic Means (Dec. 21, 2016), *https://www.hhs.gov/sites/default/files/ocr-guidance-electronic-information-technology.pdf.*

[202] 81 FR 31376 (May 18, 2016).

[203] Web Content Accessibility Guidelines (WCAG) are developed by the World Wide Web Consortium process in cooperation with individuals and organizations around the world, with a goal of providing a single shared standard for web content accessibility that meets the needs of individuals, organizations, and governments internationally. *See Web Content Accessibility Guidelines (WCAG) Overview,* W3C: Web Accessibility Initiative Mar. 18, 2022), *https://www.w3.org/WAI/standards-guidelines/wcag/*

[204] 81 FR 31376, 31426 (May 18, 2016).

existing regulation still requires that covered entities, many of whom are recipients and subject to the requirements of section 504, ensure that their health programs or activities provided through ICT are accessible to individuals with disabilities, unless doing so would result in a fundamental alteration in the nature of the programs or activities or undue financial and administrative burdens.[205]

DOJ's Previous Web Accessibility-Related Rulemaking Efforts Under the ADA

Title II of the ADA provides that individuals with disabilities shall not, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a State or local government entity, or be subjected to discrimination by any such entity.[206] Title II is modeled on section 504 of the Rehabilitation Act.[207]

Title II of the ADA and section 504 are generally understood to impose similar requirements, given the similar language employed in the ADA and the Rehabilitation Act.[208] The legislative history of the ADA makes clear that title II of the ADA was intended to extend the requirements of section 504 to apply to all state and local governments, regardless of whether they receive Federal funding, demonstrating Congress's intent that title II and section 504 be interpreted consistently.[209]

DOJ first articulated its interpretation that the ADA applies to websites of covered entities in 1996.[210] Under title II, this includes ensuring that individuals with disabilities are not, by reason of such disability, excluded from participation in or denied the benefits of the services, programs and activities offered by state and local government entities, including those offered via the web, such as education services, voting, town meetings, vaccine registration, tax filing systems, and applications for benefits.[211] DOJ has since reiterated this interpretation in a variety of online contexts.[212] Title II of the ADA also applies when public entities use mobile apps to offer their services, programs, and activities.

In June 2003, DOJ published a document titled ''Accessibility of State and Local Government websites to People with Disabilities,'' [213] which provides tips for State and local government entities on ways they can make their websites accessible so that they can better ensure that people with disabilities have equal access to the services, programs, and activities that are provided through those websites. Similar to the Department's 2016 Guidance, the DOJ guidance noted that ''an agency with an inaccessible website may also meet its legal obligations by providing an alternative accessible way for citizens to use the programs or services, such as a staffed telephone information line,'' while also acknowledging that this is unlikely to provide an equal degree of access.[214]

DOJ previously pursued rulemaking efforts regarding website accessibility under title II. On July 26, 2010, DOJ's advance notice of proposed rulemaking (ANPRM) titled ''Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations'' was published in the **Federal Register**.[215] The ANPRM announced that DOJ was considering revising the regulations implementing titles II and III of the ADA to establish specific requirements for state and local government entities and public accommodations to make their websites accessible to individuals with disabilities. In the ANPRM, DOJ sought information regarding what standards, if any, it should adopt for web accessibility; whether DOJ should adopt coverage limitations for certain entities, like small businesses; and what resources and services are available to make existing websites accessible to individuals with disabilities. DOJ also requested comments on the costs of making websites accessible; whether there were effective and reasonable alternatives to make websites accessible that DOJ should consider permitting; and when any web accessibility requirements adopted by DOJ should become effective. DOJ received approximately 400 public comments addressing issues germane to both titles II and III in response to that ANPRM. DOJ later announced that it decided to pursue separate rulemakings addressing website accessibility under titles II and III.[216]

On May 9, 2016, DOJ followed up on its 2010 ANPRM with a detailed Supplemental ANPRM that was published in the **Federal Register**. The Supplemental ANPRM solicited public comment about a variety of issues regarding establishing technical standards for web access under title II.[217] DOJ received more than 200 public comments in response to the title II Supplemental ANPRM.

On December 26, 2017, DOJ published a Notice in the **Federal Register** withdrawing four rulemaking actions, including the titles II and III web rulemakings, stating that it was evaluating whether promulgating specific web accessibility standards through regulations was necessary and appropriate to ensure compliance with the ADA.[218] DOJ has also previously stated that it would continue to review its entire regulatory landscape and associated agenda, pursuant to the regulatory reform provisions of Executive Order 13771 and Executive Order 13777.[219] Those Executive Orders

---

[205] 45 CFR 92.104.

[206] 42 U.S.C. 12132.

[207] *See e.g.,* H. Rep. 101–485 (II) at 84 (May 15, 1990).

[208] *See, e.g.,* 42 U.S.C. 12201(a).

[209] *See* H. Rep. 101–485 (II) at 84 (May 15, 1990).

[210] *See* Letter from Tom Harkin, U.S. Senator, to Deval L. Patrick, Assistant Attorney General, Civil Rights Division, Department of Justice, to Tom Harkin, U.S. Senator (Sept. 9, 1996).

[211] *See* 42 U.S.C. 12132.

[212] *See* U.S. Dep't of Just., *Guidance on Web Accessibility and the ADA, ADA.gov* (March 18, 2022), *https://www.ada.gov/resources/web-guidance/* [*https://perma.cc/WH9E-VTCY*]; Settlement Agreement Between the United States of America and the Champaign-Urbana Mass Transit District Under the Americans with Disabilities Act (Dec. 14, 2021), *https://www.ada.gov/champaign-urbana_sa.pdf* [*https://perma.cc/VZU2-E6FZ*]; Consent Decree, *United States* v. *The Regents of the Univ. of Cal.* (Nov. 20, 2022), *https://www.justice.gov/opa/press-release/file/1553291/download* [*https://perma.cc/9AMQ-GPP3*]; Consent Decree, *Dudley* v. *Miami Univ.* (Oct. 17, 2016), *https://www.ada.gov/miami_university_cd.html* [*https://perma.cc/T3FX-G7RZ*]; Settlement Agreement Between the United States of America and the City and County of Denver, Colorado Under the Americans with Disabilities Act (Jan. 8, 2018), *https://www.ada.gov/denver_pca/denver_sa.html* [*https://perma.cc/U7VE-MBSG*]; Settlement Agreement Between the United States of America and Nueces County, Texas Under the Americans with Disabilities Act (effective Jan. 30, 2015), *https://www.ada.gov/nueces_co_tx_pca/nueces_co_tx_sa.html* [*https://perma.cc/TX66-WQY7*]; Settlement Agreement Between the United States of America, Louisiana Tech University, and the Board of Supervisors for the University of Louisiana System Under the Americans with Disabilities Act (July 22, 2013), *https://www.ada.gov/louisiana-tech.htm* [*https://perma.cc/78ES-4FQR*].

[213] U.S. Dep't of Just., *Accessibility of State and Local Government websites to People with Disabilities, ADA.gov* (June 2003), *https://www.ada.gov/websites2.htm* [*https://perma.cc/Z3X5-NJ64*].

[214] *Id.*

[215] 75 FR 43460 (July 26, 2010).

[216] *See* Department of Justice—Fall 2015 Statement of Regulatory Priorities, *http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201510/Statement_1100.html* [*https://perma.cc/YF2L-FTSK*].

[217] Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities, 81 FR 28658 (May 9, 2016).

[218] Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 FR 60932 (Dec. 26, 2017).

[219] *See* Letter for Charles E. Grassley, U.S. Senator, from Stephen E. Boyd, Assistant Attorney General, Civil Rights Division, Department of Justice (Oct. 11, 2018), *https://www.grassley.senate.gov/imo/media/doc/2018-10-11%20DOJ%20to%20Grassley%20-*

Continued

were revoked by Executive Order 13992 in early 2021. In March 2022, DOJ released guidance addressing web accessibility for people with disabilities.[220] This technical assistance expanded on DOJ's previous ADA guidance by providing practical tips and resources for making websites accessible for both title II and title III entities. It also reiterated DOJ's longstanding interpretation that the ADA applies to all services, programs, and activities of covered entities, including when they are offered via the web.

The guidance did not include 24/7 staffed telephone lines as an alternative to accessible websites as was included in both the Department's 2016 Guidance on Electronic and Information Technology and in DOJ's 2003 guidance. Given the way the modern web has developed, the Department no longer believes that 24/7 staffed telephone lines can realistically provide equal access to people with disabilities. Websites—and often mobile apps—allow the public to get information or request a service within just a few minutes. Getting the same information or requesting the same service using a staffed telephone line takes more steps and may result in wait times or difficulty getting the information.

For example, a health care provider's website may allow members of the public to quickly review large quantities of information, like information about how to schedule an appointment, a certain specialty service, or health tips during a public health emergency. Members of the public can then use recipient websites to promptly act on that information by, for example, scheduling an appointment, attending a virtual telehealth appointment, or requesting a prescription refill through a virtual portal. A member of the public could not realistically accomplish these tasks efficiently over the phone. Additionally, a person with a disability who cannot use an inaccessible online new patient form might have to call to request assistance with filling out either online or mailed forms, which could involve significant delay and may require providing private information such as banking details or Social Security numbers over the phone without the benefit of certain security features available for online transactions. Finally, calling a staffed telephone line lacks the privacy of looking up information on a website. A caller needing public safety resources, for example, might be unable to access a private location to ask for help on the phone, whereas an accessible website would allow users to privately locate resources. For these reasons, the Department does not believe that a staffed telephone line—even if it is offered 24/7—provides equal access in the way that an accessible website can.

DOJ is now reengaging in efforts to promulgate regulations establishing technical standards for web accessibility for public entities and has begun distinct rulemaking to address web access under title II of the ADA.[221]

Need for Department Action

Use of Web Content by Recipients

Recipients regularly use the web to disseminate information and offer programs and activities to the public. Health care providers frequently advertise their services, post health related information, and offer methods to schedule appointments through websites. Additionally, applications for many benefits are available through social service websites.

People also rely on recipients' websites to engage in health and human service programs and activities, particularly when more individuals prefer or need to stay at home following the COVID–19 pandemic. The Department believes that although many public health measures addressing the COVID–19 pandemic are no longer in place, there have been durable changes to recipient operations and public preferences that necessitate greater access to online programs and activities.

Health care provider websites and applications are important platforms for centralizing relevant health information for patients, scheduling appointments and procedures, accessing patient information, and providing contact information. During the COVID–19 Public Health Emergency, websites and applications were often used as the only means to schedule COVID testing and vaccination appointments, making it crucial for those appointment web pages and their navigation paths to be accessible to individuals with disabilities.[222] The Department received numerous complaints alleging that vaccination websites were not compatible with screen-reader software, did not allow individuals unable to use a computer mouse to select necessary boxes, and generally did not allow for individuals with disabilities to schedule vaccine appointments despite being eligible for vaccines.[223] Additionally, the Department is aware of allegations that electronic health records, including those available through patient portals on provider websites and applications, such as text-based reports describing x-rays and MRI results, are not readable with a screen reader, making them inaccessible to some individuals with vision disabilities.

Telehealth has been increasing in popularity, availability, and reliability among providers and patients, with the COVID–19 pandemic coinciding with a marked increase in telehealth capacity and use.[224] The ability to access telehealth through a variety of devices, including laptops, smart phones, and tablets, wherever a high-speed internet connection is available, has expanded health care opportunities for rural communities, individuals at increased risk of negative outcomes from infectious diseases, individuals without reliable forms of transportation, and individuals needing to access specialists in rare diseases, among others.[225]

%20ADA%20website%20Accessibility.pdf [*https://perma.cc/8JHS-FK2Q*].

[220] U.S. Dep't of Just., *Guidance on Web Accessibility and the ADA, ADA.gov* (March 18, 2022), *https://www.ada.gov/resources/web-guidance/* [*https://perma.cc/874V-JK5Z*] (last visited Aug. 8, 2022).

[221] 88 FR 51948 (Aug. 4, 2023), to be codified at 28 CFR part 35.

[222] The HHS Office for Civil Rights released guidance on April 13, 2021, reminding recipients that vaccine scheduling and registration provided online must be accessible to individuals with disabilities. This was based in part on complaints OCR received alleging that recipients were requiring individuals to register for vaccine appointments using inaccessible websites. *See* U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., Guidance on Federal Legal Standards Prohibiting Disability Discrimination in COVID–19 Vaccination Programs (Apr. 13, 2021), *https://www.hhs.gov/sites/default/files/federal-legal-standards-prohibiting-disability-discrimination-covid-19-vaccination.pdf.*

[223] *See also* John Hopkins Univ. Disability Health Res. Ctr., Vaccine website Accessibility Tables (May 19, 2021), *https://disabilityhealth.jhu.edu/vaccinedashboard/webaccess/* (Dashboard that tracked accessibility of state websites with vaccine information).

[224] According to CDC Health Center Program Data, approximately 43% of providers were capable of providing telehealth in 2019 while approximately 95% of providers reported using telehealth during the COVID–19 pandemic. U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control, Trends in Use of Telehealth Among Health Centers During the COVID–19 Pandemic—United States, June 26-November 26, 2020 (Feb. 19, 2021), *https://www.cdc.gov/mmwr/volumes/70/wr/mm7007a3.htm.*

[225] *See, e.g.,* Letter from Am. Ass'n of People with Disabilities et al., to the Department (Feb. 24, 2022), *https://autisticadvocacy.org/wp-content/uploads/2022/02/HHS_Disability-Advocates-Memo-02.24.22.pdf* (noting that increased use of telehealth has led to some accessibility challenges for individuals with disabilities and requesting that the Department provide clear guidance on telehealth accessibility requirements); *Kathleen Bogart et al., Healthcare Access, Satisfaction, and Health-related Quality of Life Among Children and Adults with Rare Diseases, 17 Orphanet J. of Rare Diseases 196 (May 12, 2022); JF Scherr et al., Utilizing Telehealth to Create a Clinical Model of Care for Patients with Batten Disease and other Rare Diseases, Therapeutic Advances in Rare Disease (Aug. 18, 2021).*

Unfortunately, these increased opportunities have also exposed accessibility shortcomings in the web content and applications used by some recipients to provide telehealth. Individuals with hearing disabilities may require real-time captioning.[226] Individuals with vision disabilities may require online portals to be accessible using assistive technology such as screen readers.

The Department is aware of numerous allegations that existing telehealth platforms are not accessible to individuals with disabilities, resulting in ineffective services. Even if the United States returns to pre-pandemic levels of in-person health care visits, telehealth will remain an integral part of health care and give a lifeline to individuals in rural communities and others who cannot access timely in-person health care or choose not to visit in person. Recently, the Department released joint guidance with DOJ on ensuring the accessibility of telehealth.[227] The guidance document lists specific Federal nondiscrimination laws that apply to telehealth and includes examples of the protections for individuals with disabilities.

Similar to its use in health programs and activities, web content has become a common method to disseminate information on and deliver human service programs and activities. If an individual with a disability is unable to access web content that a recipient uses for its programs or activities, they may be denied access to critical benefits they are entitled to receive. For example, a human service program that requires applicants to fill out an online application for benefits that is incompatible with screen readers, voice dictation, or hands-free devices will likely deny certain individuals with disabilities an equal opportunity to apply for those benefits. Even situations where application forms are also available in other formats, such as paper copies at a single physical location, may still result in unequal access and a delay in benefits if online forms are inaccessible.

As noted previously, access to the web has become increasingly important as a result of the COVID–19 pandemic, which shut down workplaces, schools, and in-person services, and has forced millions of Americans to stay home for extended periods.[228] In response, the American public has turned to the web for work, activities, and learning.[229] In fact, a study conducted in April 2021 found that 90 percent of adults say the web ''has been at least important to them personally during the pandemic.'' Fifty-eight percent say it has been *essential*.[230]

Currently, a large number of Americans interact with recipients remotely and many recipients provide vital information and services for the general public online. Access to web-based information and services, while important for everyone during the pandemic, took on heightened importance for people with disabilities, many of whom face a greater risk of COVID–19 exposure, serious illness, and death.[231]

According to the CDC, some people with disabilities ''might be more likely to get infected or have severe illness because of underlying medical conditions, congregate living settings, or systemic health and social inequities.[232] All people with serious underlying chronic medical conditions like chronic lung disease, a serious heart condition, or a weakened immune system seem to be more likely to get severely ill from COVID–19.'' [233] A report by the National Council on Disability indicated that COVID–19 has a disproportionately negative impact on people with disabilities' access to healthcare, education, and employment, among other areas, making remote access to these opportunities via the web even more important.[234]

Individuals with disabilities can often be denied equal access to programs and activities because many recipients' web content is not fully accessible. Thus, there is a digital divide between the ability of people with certain types of disabilities and people without those disabilities to access the programs and activities of recipients.

The Department is also proposing that recipients make their mobile apps accessible under proposed § 84.84, because recipients also use mobile apps to offer their programs and activities to the public. As discussed in the proposed definition, a mobile app is a software application that is downloaded and designed to run on mobile devices such as smartphones and tablets. Mobile apps are distinct from a website that can be accessed by a mobile device because, in part, mobile apps are not directly accessible on the web—they are often downloaded on a mobile device.[235] A mobile website, on the other hand, is a website that can be accessed by a mobile device similarly to how it can be accessed on a desktop computer.[236]

Recipients use mobile apps to provide services and reach the public in various ways. For example, some recipients use mobile apps as a method to access a patient portal and engage in a number of activities related to that patient, such as scheduling appointments, messaging physicians, and requesting medical records.

Although many individuals access web content, including telehealth platforms, on desktop computers and laptops, many others rely on mobile applications used on mobile devices such as smart phones and tablets. As of 2021, 15% of American adults relied on smartphones for internet access, *i.e.*, owned a smartphone but did not have

[226] *See* Nat'l Council on Disability, 2021 Progress Report: The Impact of COVID–19 on People with Disabilities (Oct. 29, 2021), *https://ncd.gov/sites/default/files/NCD_COVID-19_Progress_Report_508.pdf* (urging the Department to require that telehealth providers ensure their platforms are compatible with screen-readers and allow for third-party interpreters.).

[227] *See* U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., U.S. Dep't of Justice, Civil Rights Division, Guidance on Nondiscrimination in Telehealth: Federal Protections to Ensure Accessibility to People with Disabilities and Limited English Proficient Persons (July 29, 2022), *https://www.hhs.gov/sites/default/files/guidance-on-nondiscrimination-in-telehealth.pdf.*

[228] *See* Colleen McClain, Emily A. Vogels, Andrew Perrin, Stella Sechopoulos, and Lee Rainie, *The internet and the Pandemic,* Pew Research Center (Sep. 1, 2021), *https://www.pewresearch.org/internet/2021/09/01/the-internet-and-the-pandemic/* [*https://perma.cc/4WVA-FQ9P*].

[229] *See* Kerry Dobransky and Eszter Hargittai, *Piercing the Pandemic Social Bubble: Disability and Social Media Use About COVID–19,* American Behavioral Scientist (Mar. 29, 2021), *https://doi.org/10.1177/00027642211003146.*

[230] *See* McClain, Vogels, Perrin, Sechopoulos, *The Internet and the Pandemic,* at 3.

[231] *See* Hannah Eichner, *The Time is Now to Vaccinate High-Risk People with Disabilities,* National Health Law Program (Mar. 15, 2021), *https://healthlaw.org/the-time-is-now-to-vaccinate-high-risk-people-with-disabilities/* [*https://perma.cc/8CM8-9UC4*].

[232] *See* U.S. Dep't of Health and Hum. Servs., Centers for Disease Control and Prevention, Underlying Medical Conditions Associated with Higher Risk for Severe COVID–19: Information for Healthcare Professionals (Feb. 9. 2023), *https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-care/underlyingconditions.html.*

[233] *See People with Disabilities,* Centers for Disease Control and Prevention, *https://www.cdc.gov/ncbddd/humandevelopment/covid-19/people-with-disabilities.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fpeople-with-disabilities.html* [*https://perma.cc/WZ7U-2EQE*] (last visited, Aug. 2, 2022).

[234] *See 2021 Progress Report: The Impact of COVID–19 on People with Disabilities,* National Council on Disability (Oct. 29, 2021), *https://ncd.gov/progressreport/2021/2021-progress-report* [*https://perma.cc/96L7-XMKZ*].

[235] Mona Bushnell, *What Is the Difference Between an App and a Mobile website?,* Business News Daily (Nov. 19, 2021), *https://www.businessnewsdaily.com/6783-mobile-website-vs-mobile-app.html* [*https://perma.cc/9LKC-GUEM*] *https://www.businessnewsdaily.com/6783-mobile-website-vs-mobile-app.html* (last visited Aug. 8, 2022).

[236] *Id.*

a traditional home broadband service.[237] Specific issues that arise when individuals with disabilities attempt to access web content on mobile devices include but are not limited to: actions (such as resizing) that require specific manual operations, cancellation functions that cannot be terminated, and orientation requirements. Any standards to ensure accessibility of web content and mobile applications must consider how that web content will be viewed and used on mobile devices.

The Department is aware that some recipients, including doctors' offices, hospitals, and social service offices, use kiosks or similar self-service transaction machines for members of the public to perform a number of tasks including checking in for appointments, providing information for the receipt of services, procuring services, measuring vitals, and performing other services without interacting directly with recipient staff.

While these kiosks may be convenient in certain instances, they may also be inaccessible to individuals with certain disabilities, especially when they were not designed with the needs of individuals with disabilities in mind. The use of inaccessible kiosks that result in delays checking in, privacy concerns, and even the complete inability of people with disabilities to check in for their appointments results in avoidable lack of access to health and human services.

The Department is also aware that some recipients, including health care providers, regularly use mobile devices and applications to coordinate check-in procedures, gather information, and communicate between patients, providers, and third parties, such as pharmacies and other clinicians. In some instances, recipients have begun to provide mobile devices, such as iOS or Android tablets, in waiting rooms so that individuals may fill out forms or questionnaires prior to an appointment, or during the process of interacting with the recipient, while others provide the tablets for check-in and other informational purposes. Much like with kiosks, the use of mobile devices for check-in and other purposes may present barriers to services if they are not accessible to individuals with disabilities.

Barriers to Web, Mobile App, and Kiosk Accessibility

Millions of individuals in the United States have disabilities that can affect their use of the web and mobile apps. Many of these individuals use assistive technology to enable them to navigate websites or access information contained on those sites. For example, individuals who are unable to use their hands may use speech recognition software to navigate a website, while individuals who are blind may rely on a screen reader to convert the visual information on a website into speech. Many websites and mobile apps fail to incorporate or activate features that enable users with certain types of disabilities to access all of the information or elements on the website or app. For instance, individuals who are deaf may be unable to access information in web videos and other multimedia presentations that do not have captions. Individuals with low vision may be unable to read websites or mobile apps that do not allow text to be resized or do not provide enough contrast. Individuals with limited manual dexterity or vision disabilities who use assistive technology that enables them to interact with websites may be unable to access sites that do not support keyboard alternatives for mouse commands. These same individuals, along with individuals with cognitive and vision disabilities, often experience difficulty using portions of websites that require timed responses from users but do not give users the opportunity to indicate that they need more time to respond.

Individuals who are blind or have low vision often face significant barriers attempting to access websites and mobile apps. For example, a study from the University of Washington analyzed approximately 10,000 mobile apps and found that many are highly inaccessible to people with disabilities.[238] The study found that 23 percent of the mobile apps reviewed did not provide content description of images for most of their image-based buttons. As a result, the functionality of those buttons is not accessible for people who use screen readers.[239] Additionally, other mobile apps may be inaccessible if they do not allow text resizing, which can provide larger text for persons with vision disabilities.[240]

Furthermore, many websites provide information visually, without features that allow screen readers or other assistive technology to retrieve information on the website so it can be presented in an accessible manner. A common barrier to website accessibility is an image or photograph without corresponding text describing the image. A screen reader or similar assistive technology cannot "read" an image without corresponding text, leaving individuals who are blind with no way of independently knowing what information the image conveys (*e.g.,* a simple icon or a detailed graph). Similarly, if websites lack navigational headings or links that facilitate navigation using a screen reader it will be difficult or impossible for a someone using a screen reader to understand.[241] Additionally, these websites may fail to present tables in a way that allows the information in the table to be interpreted or accessed by someone who is using a screen reader.[242]

Web-based forms, which are an essential part of accessing certain health and human services, are often inaccessible to individuals with disabilities who use screen readers. For example, field elements on forms, which are the empty boxes on forms that hold specific pieces of information, such as a last name or telephone number, may lack clear labels that can be read by assistive technology. Inaccessible form fields make it difficult for persons using screen readers to fill out online forms, pay fees, submit inquiries, or otherwise participate in recipient programs or activities using a website. Some recipients use inaccessible third-party websites to accept online payments, while others request patients check in through their own inaccessible websites. These barriers greatly impede the ability of individuals with disabilities to access the programs and activities offered by recipients on the web. In many instances, removing certain website barriers is neither difficult nor especially costly. For example, the addition of invisible attributes known as alternative (alt) text or alt tags to an image helps orient an individual using a screen reader and allows them to gain access to the information on the website. This can be done without any specialized equipment.[243] Similarly, adding headings, which facilitate page

[237] Mobile Fact Sheet, Pew Research Center (Apr. 7, 2021), *https://www.pewresearch.org/internet/fact-sheet/mobile/.*

[238] *See Large-Scale Analysis Finds Many Mobile Apps Are Inaccessible,* University of Wisconsin CREATE, *https://create.uw.edu/initiatives/large-scale-analysis-finds-many-mobile-apps-are-inaccessible/* [*https://perma.cc/442K-SBCG*] (last visited Aug. 8, 2022).

[239] *Id.*

[240] *See* Chase DiBenedetto, *4 ways mobile apps could be a lot more accessible,* Mashable (Dec. 19, 2021), *https://mashable.com/article/mobile-apps-accessibility-fixes* [*https://perma.cc/WC6M-2EUL*].

[241] *See, e.g.,* W3C®, *Easy Checks—A First Review of Web Accessibility,* (updated Jan. 31, 2023), *https://www.w3.org/WAI/test-evaluate/preliminary/* [*https://perma.cc/N4DZ-3ZB8*].

[242] W3C®, *Tables Tutorial* (updated Feb. 16, 2023), *https://www.w3.org/WAI/tutorials/tables/* [*https://perma.cc/FMG2-33C4*].

[243] W3C®, *Images Tutorial* (Feb. 08, 2022), *https://www.w3.org/WAI/tutorials/images/* [*https://perma.cc/G6TL-W7ZC*].

navigation for those using screen readers, can often be done easily as well.

Beyond web and mobile content, kiosks may contain a host of barriers that limit accessibility. The Department has received information from individuals with physical disabilities who have experienced difficulty reaching the controls on kiosks, or operating controls that require tight grasping, pinching, or twisting. Individuals with hearing loss may not be able to operate a kiosk effectively if audio commands or information are not provided in an alternative format. The Department is aware of the barriers created by inaccessible kiosks, particularly in health care, so the proposed rule includes a provision specifically addressing recipients' existing obligations with respect to kiosks. Of course, the existing general nondiscrimination provision in § 84.4 (which this NPRM proposes to redesignate as § 84.68) continues to apply to all HHS-funded programs and activities, including those provided via technology.

Voluntary Compliance With Technical Standards for Web Accessibility Has Been Insufficient in Providing Access

The web has changed significantly and its use has become far more prevalent since Congress enacted the Rehabilitation Act in 1973 and the ADA in 1990. Neither of the laws specifically addressed recipients' or public entities' use of websites, mobile apps, or kiosks to provide their programs and activities.

A variety of voluntary standards and structures have been developed for the web through nonprofit organizations using multinational collaborative efforts. For example, domain names are issued and administered through the Internet Corporation for Assigned Names and Numbers (ICANN), the Internet Society (ISOC) publishes computer security policies and procedures for websites, and the World Wide Web Consortium (W3C®) develops a variety of technical standards and guidelines ranging from issues related to mobile devices and privacy to internationalization of technology. In the area of accessibility, the Web Accessibility Initiative (WAI) of the W3C® created the Web Content Accessibility Guidelines (WCAG).

Many organizations, however, have indicated that voluntary compliance with these accessibility guidelines has not resulted in equal access for people with disabilities; accordingly, they have urged the Department and its Federal partners to take regulatory action to ensure web and mobile app accessibility.[244] The National Council on Disability, an independent Federal agency that advises the President, Congress, and other agencies about programs, policies, practices, and procedures affecting people with disabilities, has similarly emphasized the need for regulatory action on this issue.[245]

Recent research documents the digital inaccessibility of the websites of more than 100 top hospitals across the United States, finding that only 4.9 percent are compliant with Web Content Accessibility Guidelines (WCAG) 2.1.[246] In general, as technology continues to advance, the methods for ensuring programs and activities are as effective for people with disabilities as those provided to others may need to change, as well.[247]

Despite the availability of voluntary web and mobile app accessibility standards; the Department's position that programs and activities of recipients, including those available on websites, must be accessible; and case law supporting that position, individuals with disabilities continue to struggle to obtain access to the websites of recipients.[248] In addition to the Department's guidance and enforcement, DOJ has brought enforcement actions to address web access, resulting in a significant number of settlement agreements with state and local government entities as well as public entities.[249]

[244] *See, e.g.,* Letter from Am. Ass'n of People with Disabilities et al. to the Department (Feb. 24, 2022), *https://www.aapd.com/wp-content/uploads/2022/03/HHS_Disability-Advocates-Memo-02.24.22.pdf* (noting that increased use of telehealth has led to some accessibility challenges for individuals with disabilities and requesting that the Department provide clear guidance on telehealth accessibility requirements); Letter from American Council of the Blind et al. to U.S. Dep't of Just. (Feb. 28, 2022), *https://acb.org/accessibility-standards-joint-letter-2-28-22* [*https://perma.cc/R77M-VPH9*] (citing research showing persistent barriers in digital accessibility); Letter from Consortium for Citizens with Disabilities to U.S. Dep't of Just. (Mar. 23, 2022), *https://www.c-c-d.org/fichiers/CCD-Web-Accessibility-Letter-to-DOJ-03232022.pdf* [*https://perma.cc/Q7YB-UNKV*].

[245] National Council on Disability, *The Need for Federal Legislation and Regulation Prohibiting Telecommunications and Information Services Discrimination* (Dec. 19, 2006), *https://www.ncd.gov/publications/2006/Dec282006* [*https://perma.cc/7HW5-NF7P*] (discussing how competitive market forces have not proven sufficient to provide individuals with disabilities access to telecommunications and information services); *see also, e.g.,* National Council on Disability, *National Disability Policy: A Progress Report* (Oct. 7, 2016), *https://ncd.gov/progressreport/2016/progress-report-october-2016* [*https://perma.cc/J82G-6UU8*] (urging the Department to adopt a web accessibility regulation).

[246] Amanda Krupa et al., American Health Information Management Association (AHIMA) Foundation, The Critical Role of Web Accessibility in Health Information Access, Understanding, and Use (2022), *https://mathematica.org/publications/the-critical-role-of-web-accessibility-in-health-information-access-understanding-and-use.*

[247] *See, e.g., Enyart* v. *Nat'l Conference,* 630 F. 3d 1153, 1163 (9th Cir. 2011)(an ADA title II case, in which the defendant refused to permit the plaintiff to take the Bar exam using a computer equipped with the assistive technology software JAWS and ZoomText. The court held that the software must be permitted, stating that ''assistive technology is not frozen in time: as technology advances, testing accommodations should as well.''); *See also California Council of the Blind* v. *Cnty of Alameda,* 985 F. Supp. 2d 1229, 1241 (N.D. Cal. 2013) (the plaintiffs alleged a violation of section 504 and the ADA because of defendant's failure to provide electronic voting machines with electronic ballots including an audio ballot feature that can read aloud instructions and voting options. In denying the defendant's motion to dismiss, the court noted that ''while the Social Security Administration's practice of reading notices to blind individual was once sufficient, reading letters over the phone no longer constituted meaningful access because 'great strides have been made in computer-aided assistance for the blind . . .' ''); *Argenyi* v. *Creighton Univ.,* 703 F. 3d 441 (8th Cir. 2013) (the court held that the University's failure to provide a system which transcribes spoken words into text on a computer screen violated section 504 and the ADA.).

[248] *See, e.g., Meyer* v. *Walthall,* 528 F. Supp. 3d 928, 959 (S.D. Ind. 2021) (''[T]he Court finds that Defendants' websites constitute services or activities within the purview of Title II and section 504, requiring Defendants to provide effective access to qualified individuals with a disability.''); *Price* v. *City of Ocala, Fla.,* 375 F. Supp. 3d 1264, 1271 (M.D. Fla. 2019) (''Title II undoubtedly applies to websites . . . .''); *Payan* v. *Los Angeles Cmty. Coll. Dist.,* No. 2:17–CV–01697–SVW–SK, 2019 WL 9047062, at *12 (C.D. Cal. Apr. 23, 2019) (''[T]he ability to sign up for classes on the website and to view important enrollment information is itself a 'service' warranting protection under Title II and section 504.''); *Eason* v. *New York State Bd. of Elections,* No. 16–CV–4292 (KBF), 2017 WL 6514837 (S.D.N.Y. Dec. 20, 2017) (stating, in a case involving a State's website, that ''section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act . . . , long ago provided that the disabled are entitled to meaningful access to a recipient's programs and services. Just as buildings have architecture that can prevent meaningful access, so too can software.''); *Hindel* v. *Husted,* No. 2:15–CV–3061, 2017 WL 432839, at *5 (S.D. Ohio Feb. 1, 2017) (''The Court finds that Plaintiffs have sufficiently established that Secretary Husted's website violates Title II of the ADA because it is not formatted in a way that is accessible to all individuals, especially blind individuals like the Individual Plaintiffs whose screen access software cannot be used on the website.'').

[249] *See, e.g.,* Settlement Agreement Under the Americans With Disabilities Act Between the United States of America and Rite Aid Corporation (Nov. 1, 2021), *https://www.justice.gov/opa/pr/justice-department-secures-agreement-rite-aid-corporation-make-its-online-covid-19-vaccine;* Settlement Agreement Under the Americans With Disabilities Act Between the United States of America and Hy-Vee, Inc. (Dec. 1, 2021), *https://www.justice.gov/crt/case-document/file/1493151/download;* Settlement Agreement Between the United States of America and the Champaign-Urbana Mass Transit District Under the Americans with Disabilities Act (Dec. 14, 2021), *https://www.ada.gov/champaign-urbana_sa.pdf* [*https://perma.cc/VZU2-E6FZ*]; Consent Decree, *United States* v. *The Regents of the Univ. of Cal.* (Nov. 20, 2022), *https://www.justice.gov/opa/press-release/file/1553291/download* [*https://perma.cc/9AMQ-GPP3*]; Consent Decree, *Dudley* v. *Miami Univ.* (Oct.

Continued

Moreover, other Federal agencies have also taken enforcement action against public entities regarding the lack of accessible websites for people with disabilities. In December 2017, for example, the U.S. Department of Education entered into a resolution agreement with the Alaska Department of Education and Early Development for violating Federal statutes, including section 504 and title II of the ADA, by denying people with disabilities an equal opportunity to participate in Alaska Department of Education and Early Development's services, programs, and activities, due to website inaccessibility.[250] Similarly, the U.S. Department of Housing and Urban Development took action against the City of Los Angeles, and its subrecipient housing providers, to ensure that it maintained an accessible housing website concerning housing opportunities.[251]

The Department believes that adopting technical standards for web and mobile app accessibility will provide clarity to recipients regarding how to make the programs and activities they offer the public via the web and mobile apps accessible. Adopting specific technical standards for web and mobile app accessibility will also provide individuals with disabilities with consistent and predictable access to the websites and mobile apps of recipients.

Section-by-Section Analysis

This section details the Department's proposed changes to the section 504 regulation, including the reasoning behind the proposals, and poses questions for public comment.

Definitions

The Department proposes to add to § 84.10, the Definitions section, the following terms applicable to this subpart: ''Archived web content,'' ''Conventional electronic documents,'' ''Kiosks,'' ''Mobile applications (apps),'' ''WCAG 2.1,'' and ''Web content.'' Each term is explained in the preamble discussion for § 84.10.

The Department poses questions for feedback about its proposed approach. Comments on all aspects of this proposed rule, including these proposed definitions, are invited. Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 1: The Department's definition of ''conventional electronic documents'' consists of an exhaustive list of specific file types. Should the Department instead craft a more flexible definition that generally describes the types of documents that are covered or otherwise change the proposed definition, such as by including other file types (e.g., images or movies), or removing some of the listed file types?*
- *Web Accessibility Question 2: The Department requests comment on whether a definition of ''kiosks'' is necessary, and if so, requests comment on the Department's proposed definition in § 84.10 and any suggested revisions to it.*
- *Web Accessibility Question 3: Are there refinements to the definition of ''web content'' the Department should consider? Consider, for example, WCAG 2.1's definition of ''web content'' as ''information and sensory experience to be communicated to the user by means of a user agent, including code or markup that defines the content's structure, presentation, and interactions.''* [252]

The Department is proposing to create a new subpart to its section 504 regulation. Subpart I will address the accessibility of recipients' web content, mobile apps, and kiosks.

§ 84.82 Application

This proposed section states that this subpart applies to all programs or activities that receive Federal financial assistance from the Department.

§ 84.83 Accessibility of Kiosks

This section provides general nondiscrimination requirements for programs or activities that recipients provide through or with the use of kiosks. It provides that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity of a recipient provided through or with the use of kiosks.

The Department proposes this section in light of the increasingly common use of kiosks in health care settings for purposes of checking in patients, gathering information from them, and taking vital signs. The Department is not proposing specific technical requirements for kiosks, but proposes to include general language recognizing that section 504 prohibits recipients from discriminating on the basis of disability in their programs or activities provided through kiosks because of the inaccessibility of those devices. This language also aligns with DOJ's view that the ADA's protections apply when a covered entity uses kiosks to deliver its programs, services, or activities.[253] The Department believes the inclusion of this language is important to ensure that recipients are aware of their existing obligations to ensure that their programs and activities provided through kiosks are nondiscriminatory.

Recipients that use kiosks may make their programs accessible by instituting procedures that would allow persons with disabilities who cannot use kiosks because of their inaccessible features to access the program without using kiosks.[254] For example, a clinic or a social services office may allow persons with disabilities to go directly to the personnel at the main desk to register for necessary services. Such work-around procedures must afford persons with disabilities the same access, the same convenience, and the same confidentiality that the kiosk system provides.

In instances where kiosks are closed functionality devices that do not rely on web content or mobile apps, the proposed technical standards in § 84.84 will not apply. Under these circumstances, recipients are still obligated to ensure that individuals with disabilities are not excluded from participation in, denied the benefits of, or otherwise subjected to discrimination in any program or activity of the recipient, including the information exchange that would occur at the kiosk.

17, 2016), *https://www.ada.gov/miami_university_cd.html* [*https://perma.cc/T3FX-G7RZ*]; Settlement Agreement Between the United States of America and the City and County of Denver, Colorado Under the Americans with Disabilities Act (Jan. 8, 2018), *https://www.ada.gov/denver_pca/denver_sa.html* [*https://perma.cc/U7VE-MBSG*]; Settlement Agreement Between the United States of American and Nueces County, Texas Under the Americans with Disabilities Act (effective Jan. 30, 2015), *https://www.ada.gov/nueces_co_tx_pca/nueces_co_tx_sa.html* [*https://perma.cc/TX66-WQY7*]; Settlement Agreement Between the United States of American, Louisiana Tech University, and the Board of Supervisors for the University of Louisiana System Under the Americans with Disabilities Act (July 22, 2013), *https://www.ada.gov/louisiana-tech.htm* [*https://perma.cc/78ES-4FQR*].

[250] *In re Alaska Dep't. of Educ. and Early Dev.,* OCR Reference No. 10161093 (U.S. Dep't of Educ. Dec. 11, 2017) (resolution agreement), *https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/10161093-b.pdf* [*https://perma.cc/DUS4-HVZJ*].

[251] *See* Voluntary Compliance Agreement Between the U.S. Department of Housing and Urban Development and the City of Los Angeles, California, (Aug. 2, 2019), *https://www.hud.gov/sites/dfiles/Main/documents/HUD-City-of-Los-Angeles-VCA.pdf* [*https://perma.cc/X5RN-AJ5K*].

[252] W3C®, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), *https://www.w3.org/TR/WCAG21/* [*https://perma.cc/UB8A-GG2F*].

[253] *See* Statement of Interest of the United States of America in *Vargas* v. *Quest Diagnostics Clinical Laboratories, Inc. et al.,* No. 2:19–cv–08108 (C.D. Cal. filed Sept. 20, 2021).

[254] 45 CFR 84.22(b).

This may require the recipient to provide reasonable modifications to policies, practices, or procedures, as required by § 84.68(b)(7), and take appropriate steps to ensure effective communication, including through the provision of appropriate auxiliary aids and services, which include accessible electronic and information technology, as required by subpart H.

The Department is aware that the U.S. Access Board is working on a rulemaking to amend the ADA Accessibility Guidelines to address the accessibility of fixed self-service transaction machines, self-service kiosks, information transaction machines, and point-of-sale devices. The Access Board issued an advance notice of proposed rulemaking on these issues in September 2022 and heard from more than 70 commenters.[255] The Board is now in the process of developing a notice of proposed rulemaking, which may be issued by December 2023.[256] Once these guidelines are final, to be enforceable, DOJ and the U.S. Department of Transportation would have to adopt them, via separate rulemakings, before they would become enforceable standards for devices and equipment covered by the ADA. Similarly, HHS will consider adopting these guidelines under section 504 once they are finalized.

§ 84.84 Requirements for Web and Mobile Accessibility

General

Proposed § 84.84 sets forth specific requirements for the accessibility of web content and mobile apps of recipients. Proposed § 84.84(a) requires a recipient to ''ensure the following are readily accessible to and usable by individuals with disabilities: (1) web content that a recipient makes available to members of the public or uses to offer programs or activities to members of the public; and (2) mobile apps that a recipient makes available to members of the public or uses to offer programs and activities to members of the public.'' As detailed below, the remainder of proposed § 84.84 sets forth the specific standards that recipients are required to meet to make their web content and mobile apps accessible and the proposed timelines for compliance.

On August 4, 2023, DOJ published an NPRM in the **Federal Register**, 88 FR 51948, addressing the accessibility of websites and mobile applications for entities covered by title II of the ADA. The Department has closely coordinated this subpart with DOJ and much of this Department's preamble and its regulatory text are the same as the language in the DOJ NPRM. The Department will continue to work closely with DOJ as each agency reviews comments in response to their individual NPRMs and develops their rules in final form.

Background on Accessibility Standards for Websites and Web Content

Since 1994, the World Wide Web Consortium (W3C®) has been the principal international organization involved in developing protocols and guidelines for the web.[257] The W3C® develops a variety of voluntary technical standards and guidelines, including ones relating to privacy, internationalization of technology, and, relevant to this rulemaking, accessibility. The Web Accessibility Initiative (WAI) of theW3C® has developed voluntary guidelines for web accessibility, known as the Web Content Accessibility Guidelines (WCAG), to help web developers create web content that is accessible to individuals with disabilities.

The first version of WCAG, WCAG 1.0, was published in 1999. WCAG 2.0 was published in December 2008.[258] WCAG 2.0 was approved as an international standard by the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC) in October 2012.[259] WCAG 2.1, the most recent and updated recommendation of WCAG, was published in June 2018.[260]

WCAG 2.1 contains four principles that provide the foundation for web accessibility: perceivable, operable, understandable, and robust.[261] Testable success criteria (*i.e.,* requirements for web accessibility that are measurable) are provided ''to be used where requirements and conformance testing are necessary such as in design specification, purchasing, *regulation* and contractual agreements.'' [262] Thus, WCAG 2.1 contemplates establishing testable success criteria that could be used in regulatory efforts such as this one.

Proposed WCAG Version

The Department is proposing to adopt WCAG 2.1 as the technical standard for web and mobile app accessibility under section 504. WCAG 2.1 represents the most recent and updated published recommendation of WCAG. WCAG 2.1 incorporates and builds upon WCAG 2.0—meaning that WCAG 2.1 includes all of the WCAG 2.0 success criteria, in addition to success criteria that were developed under WCAG 2.1.[263] Specifically, WCAG 2.1 added 12 Level A and AA success criteria to the 38 success criteria contained in WCAG 2.0 AA.[264] The additional criteria provide important accessibility benefits, especially for people with low vision, manual dexterity disabilities, and cognitive and learning disabilities.[265] The additional criteria are intended to improve accessibility for mobile web content and mobile apps.[266] The Department anticipates that WCAG 2.1 is familiar to web developers as it comprises WCAG 2.0's requirements—which have been in existence since 2008—and 12 new Level A and AA requirements that have been in existence since 2018.

The Department expects that adopting WCAG 2.1 as the technical standard will have benefits that are important to ensuring access for people with disabilities to recipients' programs and activities. For example, WCAG 2.1 requires that text be formatted so that it is easier to read when magnified.[267]

[255] U.S. Access Board, Self Service Transaction Machines, *https://www.access-board.gov/sstms/.*

[256] U.S. Off. of Mgmt. & Budget, Off. of Information & Reg. Affs, Accessibility Guidelines for Self-Service Transaction Machines, *https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=3014-AA44* (last visited Aug. 8, 2023).

[257] W3C®, *About Us, https://www.w3.org/about/* [*https://perma.cc/TQ2W-T377*].

[258] W3C®, Web Content Accessibility Guidelines 2.0 (Dec., 2008), *http://www.w3.org/TR/2008/REC-WCAG20-20081211/[https://perma.cc/L2NH-VLCR].*

[259] W3C®, *Web Accessibility Guidelines 2.0 Approved as ISO/IEC International Standard* (Oct. 15, 2012), *https://www.w3.org/press-releases/2012/wcag2pas/* [*https://perma.cc/JQ39-HGKQ*].

[260] W3C®, Web Content Accessibility Guidelines 2.1 (June 2018), *https://www.w3.org/TR/WCAG21/* [*https://perma.cc/UB8A-GG2F*]. Additionally, in May 2021, WAI published a working draft for WCAG 2.2, which has yet to be finalized. W3C®, Web Content Accessibility Guidelines 2.2 (May 21, 2021), *https://www.w3.org/TR/WCAG22/* [*https://perma.cc/M4G8-Z2GY*]. The WAI also published a working draft of WCAG 3.0 in December 2021. W3C®, Web Content Accessibility Guidelines 3.0 (Dec. 7, 2021), *https://www.w3.org/TR/wcag-3.0/* [*https://perma.cc/7FPQ-EEJ7*].

[261] *See* W3C®, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), *https://www.w3.org/TR/WCAG21/* [*https://perma.cc/UB8A-GG2F*].

[262] *See* W3C®, *Web Content Accessibility Guidelines 2.1, WCAG 2 Layers of Guidance* (June 5, 2018), *https://www.w3.org/TR/WCAG21/#wcag-2-layers-of-guidance* [*https://perma.cc/5PDG-ZTJE*] (emphasis added).

[263] W3C®, *What's New in WCAG 2.1* (Aug. 13, 2020), *https://www.w3.org/WAI/standards-guidelines/wcag/new-in-21/* [*https://perma.cc/W8HK-Z5QK*].

[264] *Id.*

[265] *Id.*

[266] *See id.*

[267] *See* W3C®, *Web Content Accessibility Guidelines 2.1, Reflow* (June 5, 2018), *https://www.w3.org/TR/WCAG21/#reflow* [*https://perma.cc/YRP5-M599*].

This is important, for example, for people with low vision who use magnifying tools. Without the formatting that WCAG 2.1 requires, a person magnifying the text might find reading the text disorienting because they could have to scroll horizontally on every line.[268]

WCAG 2.1 also has new success criteria addressing the accessibility of mobile apps or web content viewed on a mobile device. For example, WCAG 2.1 Success Criterion 1.3.4 requires that page orientation (*i.e.,* portrait or landscape) not be restricted to just one orientation unless a specific display orientation is essential.[269] This feature is important, for example, for someone who uses a wheelchair with a tablet attached to it such that the tablet cannot be rotated.[270] If content only works in one orientation (*i.e.,* portrait or landscape) it will not always work for this individual depending on how the tablet is oriented and could render that content or app unusable for the person.[271] Another WCAG 2.1 success criterion requires, in part, that if a device can be operated by motion—for example, shaking the device to undo typing—that there be an option to turn off that motion sensitivity.[272] This could be important, for example, for someone who has tremors so that they do not accidentally undo their typing.[273]

Such accessibility features are critical for people with disabilities to have equal access to recipients' programs and activities. This is particularly true given that using mobile devices to access government services is commonplace. For example, in August 2022, about 54 percent of visits to Federal Government websites over the previous 90 days were from mobile devices.[274] In addition, WCAG 2.1's incorporation of mobile-related criteria is important because of recipients' increasing use of mobile apps in offering their programs and activities via mobile apps. As discussed in more detail later, recipients are using mobile apps to offer a range of critical services.

Because WCAG 2.1 is the most recent recommended version of WCAG and generally familiar to web professionals, the Department expects it is well-positioned to continue to be relevant even as technology inevitably evolves. In fact, the W3C® advises using WCAG 2.1 over WCAG 2.0 when possible because WCAG 2.1 incorporates more forward-looking accessibility needs.[275] The WCAG standards were designed to be ''technology neutral.'' This means that they are designed to be broadly applicable to current and future technologies.[276] Thus, WCAG 2.1 also allows web and mobile app developers flexibility and potential for innovation.

The Department also expects that recipients are likely already familiar with WCAG 2.1 or will be able to become familiar quickly. This is because WCAG 2.1 has been available since 2018, and it builds upon WCAG 2.0, which has been in existence since 2008 and has been established for years as a benchmark for accessibility. In other words, the Department expects that web developers and professionals who work for or with recipients are likely to be familiar with WCAG 2.1, and if they are not already familiar with WCAG 2.1, the Department expects that they are at least likely to be familiar with WCAG 2.0 and will be able to become acquainted quickly with WCAG 2.1's 12 additional Level A and AA success criteria. The Department also believes that resources exist to help recipients implement or understand how to implement not only WCAG 2.0 Level AA, but also WCAG 2.1 Level AA. Additionally, recipients will have two or three years to come into compliance with a final rule, which should also provide sufficient time to get acquainted with and implement WCAG 2.1.

According to the Department's research, WCAG 2.1 is also being increasingly used by members of the public and recipients. In fact, DOJ recently included WCAG 2.1 in several settlement agreements with covered entities addressing inaccessible websites.[277]

In evaluating what technical standard to propose, the Department also considered WCAG 2.0. In addition, the Department considered the standards set forth under section 508 of the Rehabilitation Act, which governs the accessibility of the Federal Government's web content and is harmonized with WCAG 2.0.[278] In 2017, when the United States Access Board adopted WCAG 2.0 as the technical standard for the Federal Government's web content under section 508, WCAG 2.1 had not been finalized.[279] The Department ultimately decided to propose WCAG 2.1 as the appropriate standard. A number of countries that have adopted WCAG 2.0 as their standard are now making efforts to move or have moved to WCAG 2.1.[280] In countries that are part of the European Union, public sector websites and mobile apps generally must meet a technical standard that requires conformance with the WCAG 2.1 Level AA success criteria.[281] And although WCAG 2.0 is the standard adopted by the Department of Transportation in its rule implementing the Air Carrier Access Act, which covers airlines' websites and kiosks,[282] that rule—like the section 508 rule—was promulgated before WCAG 2.1 was published.

The Department expects that the wide usage of WCAG 2.0 lays a solid foundation for recipients to become familiar with and implement WCAG 2.1's additional Level A and AA criteria. According to the Department's research, approximately 48 States either use or strive to use a WCAG 2.0 standard or

[268] *Id.*

[269] *See* W3C®, *Web Content Accessibility Guidelines 2.1, Orientation* (June 5, 2018), *https://www.w3.org/TR/WCAG21/#orientation* [*https://perma.cc/FC3E-FRYK*].

[270] *Id.*

[271] *See id.*

[272] *See* W3C®, *Web Content Accessibility Guidelines 2.1, Motion Actuation* (June 5, 2018), *https://www.w3.org/TR/WCAG21/#motion-actuation* [*https://perma.cc/6S93-VX58*].

[273] *Id.*

[274] General Services Administration Digital Analytics Program, *https://analytics.usa.gov/* [*https://perma.cc/2YZP-KCMG*] (last visited Aug. 8, 2022).

[275] W3C®, *WCAG 2.0 Overview* (June 30, 2022), *https://www.w3.org/WAI/standards-guidelines/wcag/* [*https://perma.cc/L7NX-8XW3*].

[276] W3C®, *Understanding WCAG 2.1* (July 7, 2022), *https://www.w3.org/WAI/WCAG21/Understanding/intro* [*https://perma.cc/4TZQ-USCJ*].

[277] *See, e.g.,* Settlement Agreement with CVS Pharmacy, Inc. (Apr. 11, 2022), *https://archive.ada.gov/cvs_sa.pdf* [*https://perma.cc/H5KZdocuments/attachments/2021/12/14/champaign-urbana_sa.pdf* [*https://perma.cc/66XY-QGA8*]; Settlement Agreement with Hy-Vee, Inc. (Dec. 1, 2021) *https://archive.ada.gov/hy-vee_sa.pdf* [*https://perma.cc/GFY6-BJNE*]; Settlement Agreement with Rite Aid Corp. (Nov. 1, 2021), *https://archive.ada.gov/rite_aid_sa.pdf* [*https://perma.cc/4HBF-RBK2*].-*4VVF*]; Settlement Agreement with Meijer, Inc. (Feb. 2, 2022), *https://archive.ada.gov/meijer_sa.pdf* [*https://perma.cc/5FGD-FK42*]; Settlement Agreement with The Kroger Co. (Jan. 28, 2022), *https://archive.ada.gov/kroger_co_sa.pdf* [*https://perma.cc/6ASX-U7FQ*]; Settlement Agreement with Champaign-Urbana Mass Transit Dist. (Dec. 14, 2021), *https://www.justice.gov/d9/case-.*

[278] 36 CFR 1194, app. A.

[279] *See* Information and Communication Technology (''ICT'') Standards and Guidelines, 82 FR 5790, 5791 (Jan. 18, 2017); W3C®, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), *https://www.w3.org/TR/WCAG21/* [*https://perma.cc/UB8A-GG2F*].

[280] *See e.g., Exploring WCAG 2.1 for Australian government services,* Australian Government Digital Transformation Agency (Aug. 22, 2018), *https://www.dta.gov.au/blogs/exploring-wcag-21-australian-government-services.*

[281] *Web Accessibility,* European Commission (July 13, 2022), *https://digital-strategy.ec.europa.eu/en/policies/web-accessibility* [*https://perma.cc/LSG9-XW7L*]; *Accessibility Requirements for ICT Products and Services,* European Telecommunications Standards Institute, 45–51, 64–78 (Mar. 2021), *https://www.etsi.org/deliver/etsi_en/301500_301599/301549/03.02.01_60/en_301549v030201p.pdf* [*https://perma.cc/5TEZ-9GC6*].

[282] *See* 14 CFR 382.

greater for at least some of their state web content. It appears that at least four of these States—Louisiana, Maryland, Nebraska, and Washington—already either use WCAG 2.1 or strive to use WCAG 2.1 for at least some of their web content.

WCAG 2.1 represents the most up-to-date recommendation and is generally familiar to web professionals. It offers important accessibility benefits for people with disabilities that affect manual dexterity, adds some criteria to reduce barriers for those with low vision and cognitive disabilities, and expands coverage of mobile content. Given that recipients will have two or three years to comply, the Department views WCAG 2.1 as the appropriate technical standard to propose at this time.

The Department is aware that a working draft for WCAG 2.2 was published in May 2021 with a newer draft published in July of 2023.[283] Several subsequent drafts have also been published.[284] All of the WCAG 2.0 and WCAG 2.1 success criteria except for one are included in WCAG 2.2.[285] But WCAG 2.2 also includes six additional Level A and AA success criteria beyond those included in WCAG 2.1.[286] Like WCAG 2.1, WCAG 2.2 offers benefits for individuals with low vision, limited manual dexterity, and cognitive disabilities. For example, Success Criterion 3.3.8, which is a new criterion under the working draft of WCAG 2.2, improves access for people with cognitive disabilities by limiting the use of cognitive function tests, like solving puzzles, in authentication processes.[287] Because WCAG 2.2 has not yet been finalized and is subject to change, and web professionals have had less time to become familiar with the additional success criteria that have been incorporated into the working draft of WCAG 2.2, the Department does not believe it is appropriate to adopt WCAG 2.2 as the technical standard at this time.

The Department is seeking feedback from the public about its proposal to use WCAG 2.1 as the standard under this rule and its assumptions underlying this decision. Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 4: Are there technical standards or performance standards other than WCAG 2.1 that the Department should consider? For example, if WCAG 2.2 is finalized before the Department issues a final rule, should the Department consider adopting that standard? If so, what is a reasonable time frame for recipient conformance with WCAG 2.2 and why? Is there any other standard that the Department should consider, especially in light of the rapid pace at which technology changes?*

Proposed WCAG Conformance Level

For a web page to conform to WCAG 2.1, the web page must satisfy the success criteria under one of three levels of conformance: A, AA, or AAA. The three levels of conformance indicate a measure of accessibility and feasibility. Level A, which is the minimum level of accessibility, contains criteria that provide basic web accessibility and are the least difficult to achieve for web developers.[288] Level AA, which is the intermediate level of accessibility, includes all of the Level A criteria and contains enhanced criteria that provide more comprehensive web accessibility and yet, are still achievable for most web developers.[289] Level AAA, which is the highest level of conformance, includes all of the Level A and Level AA criteria and contains additional criteria that can provide a more enriched user experience, but are the most difficult to achieve for web developers.[290] The W3C® does not recommend that Level AAA conformance be required as a general policy for entire websites because it is not possible to satisfy all Level AAA criteria for some content.[291]

Based on review of previous public feedback and independent research, the Department believes that WCAG 2.1 Level AA is an appropriate conformance level because it includes criteria that provide web accessibility to individuals with disabilities—including those with visual, auditory, physical, speech, cognitive, and neurological disabilities—and yet is feasible for recipients' web developers to implement. In addition, Level AA conformance is widely used, making it more likely that web developers are already familiar with its requirements. While many of the entities that conform to Level AA do so under WCAG 2.0, not 2.1, this still suggests a widespread familiarity with most of the Level AA success criteria, given that 38 of the 50 Level A and AA success criteria in WCAG 2.1 are also included in WCAG 2.0. The Department believes that Level A conformance alone is not appropriate for recipients because it does not include criteria for providing web accessibility that the Department understands are critical, such as minimum level of color contrast so that items like text boxes or icons are easier to see, which is important for people with vision disabilities. Also, while Level AAA conformance provides a richer user experience, it is the most difficult to achieve for many entities. Therefore, the Department is proposing Level AA conformance for public feedback as to whether it strikes the right balance between accessibility for individuals with disabilities and achievability for recipients.

Adopting a WCAG 2.1 Level AA conformance level would make the ADA requirements consistent with a standard that has been widely accepted internationally. Many nations have selected Level AA conformance as their standard for web accessibility.[292] The web content of Federal agencies that are governed by section 508 also need to comply with Level AA.[293]

In its proposed regulatory text in § 84.84(b)(1) and (2), the Department provides that recipients must "comply with Level A and Level AA success criteria and conformance requirements specified in WCAG 2.1." WCAG 2.1 provides that for "Level AA conformance, the web page [must] satisf[y] all the Level A and Level AA Success Criteria. . . ."[294] However, individual success criteria in WCAG 2.1 are labeled only as Level A or Level AA. Therefore, a person reviewing individual requirements in WCAG 2.1 may not understand that both Level A and Level AA success criteria must be

[283] W3C®, *Web Content Accessibility Guidelines 2.2* (July 20, 2023), *https://www.w3.org/TR/WCAG22/.*

[284] *See, e.g.,* W3C®, *Web Content Accessibility Guidelines 2.2* (May 17, 2023), *https://www.w3.org/TR/WCAG22/* [*https://perma.cc/SXA7-RF32*].

[285] W3C®, *What's New in WCAG 2.2 Draft* (May 17, 2023), *https://www.w3.org/WAI/standards-guidelines/wcag/new-in-22/* [*https://perma.cc/Y67R-SFSE*].

[286] *Id.*

[287] *Id.*

[288] W3C®, *Web Content Accessibility Guidelines (WCAG) 2 Level A Conformance* (July 13, 2020), *https://www.w3.org/WAI/WCAG2A-Conformance* [*https://perma.cc/KT74-JNHG*].

[289] *Id.*

[290] *Id.*

[291] *See* W3C®, *Understanding Conformance, Understanding Requirement 1* (last updated Aug. 19, 2022), *https://www.w3.org/WAI/WCAG21/Understanding/conformance* [*https://perma.cc/9ZG9-G5N8*].

[292] *See* W3C®, *Web Accessibility Laws & Policies* (Mar. 21, 2018), *https://www.w3.org/WAI/policies/* [*https://perma.cc/5EBY-3WX4*].

[293] *See Information and Communication Technology ("ICT") Standards and Guidelines, 82 FR 5790, 5791 (Jan. 18, 2017).*

[294] *See* W3C®, *Conformance Requirements, Web Content Accessibility Guidelines (WCAG) 2.1* (June 5, 2018), *https://www.w3.org/TR/WCAG21/#cc1* [*https://perma.cc/ZL6N-VQX4*]. WCAG 2.1 also states that a Level AA conforming alternate version may be provided. The Department has adopted a slightly different approach to conforming alternate versions, which is discussed below.

met in order to attain Level AA. Accordingly, the Department has made explicit in its proposed regulation that both Level A and Level AA success criteria and conformance requirements must be met in order to comply with the proposed web accessibility requirements.

Conformance Level for Small Recipients

The Department considered proposing another population threshold of very small recipients that would be subject to a lower conformance level or WCAG version, to reduce the burden of compliance on those recipients. However, the Department decided against this proposal due to a variety of factors. First, this would make for inconsistent levels of WCAG conformance across recipients, and a universal standard for consistency in implementation would promote predictability. A universal level of conformance would reduce confusion about which standard applies, and it would create a basic level of compliance for all recipients to follow. It would also allow for people with disabilities to know what they can expect when navigating a recipient's website; for example, it will be helpful for people with disabilities to know that they can expect to be able to navigate a recipient's website independently using their assistive technology. Finally, for the reasons discussed above, the Department believes that WCAG 2.1 Level AA contains criteria that are critical to accessing programs and activities of recipients, which may not be included under a lower standard. However, the Department recognizes that small recipients—those with fewer than fifteen employees—might initially face more technical and resource challenges in complying than larger recipients. Therefore, as discussed below, the Department has decided to propose different compliance dates according to a recipient's size to reduce burdens on small recipients.

Possible Alternative Standards for Compliance

The Department considered proposing to adopt the section 508 standards for ICT, but decided not to take this approach. The section 508 standards are harmonized with WCAG 2.0 for web content and certain other ICT, and for the reasons discussed above, the Department believes WCAG 2.1—which had not been finalized at the time the section 508 standards were promulgated—is the more appropriate recommendation for this proposed rule. Moreover, by adopting WCAG on its own rather than adopting it through the section 508 standards, the Department can then tailor the rules to recipients as it does in this proposed rule.

The Department also considered adopting performance standards instead of specific technical standards for accessibility of web content. Performance standards establish general expectations or goals for web accessibility and allow for compliance via a variety of unspecified methods. Performance standards could provide greater flexibility in ensuring accessibility as web technologies change. However, based on what the Department has heard previously from the public and its own knowledge of this area, the Department understands that performance standards might be too vague and subjective and could prove insufficient in providing consistent and testable requirements for web accessibility. Additionally, the Department expects that performance standards would likely not result in predictability for either recipients or people with disabilities in the way that a more specific technical standard would. Further, similar to a performance standard, WCAG has been designed to allow for flexibility and innovation in the evolving web environment. The Department recognizes the importance of adopting a standard for web accessibility that provides not only specific and testable requirements, but also sufficient flexibility to develop accessibility solutions for new web technologies. The Department believes that WCAG achieves this balance because it provides flexibility similar to a performance standard, but it also provides more clarity, consistency, predictability, and objectivity. Using WCAG also enables recipients to know precisely what is expected of them under section 504, which may be of particular benefit to jurisdictions with less technological experience. This will assist recipients in targeting accessibility errors, which may reduce costs they would incur without clear expectations.

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 5: What compliance costs and challenges might small recipients face in conforming with this rule? How accessible are small recipients' current web content and mobile apps? Do small recipients have internal staff to modify their web content and mobile apps, or do they use outside consulting staff to modify and maintain their web content and mobile apps? If small recipients have recently, for example in the past three years, modified their web content and mobile apps to make them accessible, what costs were associated with those changes?*
- *Web Accessibility Question 6: Should the Department adopt a different WCAG version or conformance level for small recipients or a subset of small recipients?*

Recipients' Use of Social Media Platforms

Recipients are increasingly using social media platforms to provide information and communicate with the public about their programs and activities in lieu of or in addition to engaging the public on their own websites. The Department is using the term "social media platforms" to refer to websites or mobile apps of third parties whose primary purpose is to enable users to create and share content in order to participate in social networking (*i.e.,* the creation and maintenance of personal and business relationships online through websites and mobile apps like Facebook, Instagram, Twitter, and LinkedIn).

The Department is proposing to require that web content that recipients make available to members of the public or use to offer programs and activities to members of the public be accessible within the meaning of proposed § 84.84. This requirement would apply regardless of whether that web content is located on the recipient's own website, or elsewhere on the web. It therefore covers web content that a recipient offers via a social media platform. Even where a social media platform is not fully accessible, a recipient can generally take actions to ensure that the web content that it posts is accessible and in conformance with WCAG 2.1.[295] The Department understands that social media platforms often make available certain accessibility features like the ability to add captions or alt text. It is, however, the recipients' responsibility to use these features when they make web content available on social media sites. For example, if a recipient posts an image to a social media site that allows users to post alt text, the recipient needs to ensure that appropriate alt text accompanies that image so that screen reader users can access the information.

[295] *See Federal Social Media Accessibility Toolkit Hackpad, Digital.gov* (June 21, 2022), *https://digital.gov/resources/federal-social-media-accessibility-toolkit-hackpad/* [*https://perma.cc/DJ8X-UCHA*].

At this time, the Department is not proposing any regulatory text specific to the web content that recipients offer the public via social media platforms because content posted on social media platforms will be treated the same as any other content recipients post on the web. However, the Department is considering creating an exception from coverage under the rule for social media posts if they were posted before the effective date of the rule. This exception would recognize that making preexisting social media content accessible may be impossible at this time or result in a significant burden. Many recipients have posted social media content for several years, often numbering thousands of posts, which may not all be accessible. The benefits of making all preexisting social media posts accessible might also be limited as these posts are intended to provide current updates on platforms that are frequently refreshed with new information. The Department is considering this exception in recognition of the fact that for many recipients their resources may be better spent ensuring that current web content is accessible, rather than reviewing all preexisting social media content for compliance or possibly deleting their previous posts. The Department is looking for input on whether this approach would make sense and whether any limitations to this approach are necessary, such as providing that the exception does not apply when preexisting social media content is currently used to offer a program or activity, or possibly limiting this exception when the public requests certain social media content to be made accessible.

The Department is also weighing whether recipients' preexisting videos posted to social media platforms such as YouTube should be excepted from coverage due to these same concerns or otherwise be treated differently.

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 7: How do recipients use social media platforms and how do members of the public use content made available by recipients on social media platforms? What kinds of barriers do people with disabilities encounter when attempting to access recipients' services via social media platforms?*

Mobile Applications

The Department is proposing to adopt the same technical standard for mobile app accessibility as it is for web content—WCAG 2.1 Level AA. As discussed earlier, WCAG 2.1 was published in June 2018 and was developed, in part, to address mobile accessibility.[296]

The Department considered applying WCAG 2.0 Level AA to mobile apps, which is a similar approach to the requirements in the final rule promulgated by the United States Access Board in its update to the section 508 Standards.[297] WCAG 2.1 was not finalized when the Access Board adopted the section 508 Standards. When WCAG 2.0 was originally drafted in 2008, mobile apps were not as widely used or developed. Further, the technology has grown considerably since that time. Accordingly, WCAG 2.1 provides 12 additional Level A and AA success criteria not included in WCAG 2.0 to ensure, among other things, that mobile apps are more accessible to individuals with disabilities using mobile devices.[298] For example, WCAG 2.1 includes Success Criterion 1.4.12, which ensures that text spacing (*e.g.,* letter spacing, line spacing, word spacing) meets certain requirements to ensure accessibility; Success Criterion 2.5.4, which enables the user to disable motion actuation (*e.g.,* disable the ability to activate a device's function by shaking it) to prevent such things as accidental deletion of text; and Success Criterion 1.3.5, which allows a user to input information such as a name or address automatically.[299]

The Access Board's section 508 Standards include additional requirements applicable to mobile apps that are not in WCAG 2.1, and the Department is requesting feedback on whether to adopt those requirements as well. For example, the Section 508 Standards apply the following requirements not found in WCAG 2.1 to mobile apps: interoperability requirements to ensure that a mobile app does not disrupt a device's assistive technology for persons with disabilities (*e.g.,* screen readers for persons who are blind or have low vision); requirements for mobile apps to follow preferences on a user's phone such as settings for color, contrast, and font size; and requirements for caption controls and audio description controls that enable users to adjust caption and audio control functions.[300]

Adopting WCAG 2.1 Level AA for mobile apps will help ensure this rule's accessibility standards for mobile apps are consistent with this rule's accessibility standards for web content. We seek comments on this approach below. Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 8: How do recipients use mobile apps to make information and services available to the public? What kinds of barriers do people with disabilities encounter when attempting to access recipients' programs and activities via mobile apps? Are there any accessibility features unique to mobile apps that the Department should be aware of?*
- *Web Accessibility Question 9: Is WCAG 2.1 Level AA the appropriate accessibility standard for mobile apps? Should the Department instead adopt another accessibility standard or alternatives for mobile apps, such as the requirements from Section 508 discussed above?*

Requirements by Recipient Size

Section 84.84(b) sets forth the proposed specific standard with which the web content and mobile apps that recipients make available to member of the public or use to offer programs and activities to members of the public must comply, and also proposes time frames for compliance. The proposed requirements of § 84.84(b) are generally delineated by the size of the recipient.

Section 84.84(b)(1): Larger Recipients

Section 84.84(b)(1) sets forth the proposed web and mobile app accessibility requirements for recipients with fifteen or more employees. The requirements of § 84.84(b)(1) are meant to apply to larger recipients.[301] Under the Department's proposal, the number of employees is used to determine a

[296] W3C®, *What's New in WCAG 2.1* (Aug. 13, 2020), *https://www.w3.org/WAI/standards-guidelines/wcag/new-in-21/* [*https://perma.cc/W8HK-Z5QK*].

[297] *See* 82 FR 5790, 5815 (Jan. 18, 2017).

[298] W3C®, *What's New in WCAG 2.1* (Aug. 13, 2020), *https://www.w3.org/WAI/standards-guidelines/wcag/new-in-21/* [*https://perma.cc/W8HK-Z5QK*].

[299] W3C®, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), *https://www.w3.org/TR/WCAG21/* [*https://perma.cc/UB8A-GG2F*].

[300] 36 CFR part 1194, app. C (sections 502.1, 502.2.2, 503.2, 503.4.1, and 503.4.2).

[301] Section 504 commonly differentiates between small and large recipients by measuring whether a recipient employs fifteen or more employees, and the Department will use that standard to determine whether a recipient is large or small for the purpose of this section. *See, e.g.,* 45 CFR 84.9 (defining recipients with fewer than fifteen employees as ''small recipients'' and discussing administrative requirements).

recipient's compliance time frame. Each recipient should be able to easily determine whether it has fifteen or more employees.

Proposed § 84.84(b)(1) requires that a recipient with fifteen or more employees shall ensure that the web content and mobile apps it makes available to members of the public or uses to offer programs or activities to members of the public, comply with Level A and Level AA success criteria and conformance requirements specified in WCAG 2.1. Recipients subject to § 84.84(b)(1) have two years after the publication of a final rule to make their web content and mobile apps accessible, unless they can demonstrate that compliance with § 84.84(b)(1) would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens. The limitations on a recipient's obligation to comply with the proposed requirements are discussed in more detail below.

The Department is aware that members of the public have differing views on an appropriate time frame for requiring compliance with technical web accessibility standards. Individuals with disabilities or disability advocacy organizations tended to prefer a shorter time frame, often arguing that web accessibility has long been required by section 504 and that extending the deadline for compliance rewards recipients that have not made efforts to make their websites accessible. Some recipients have asked for more time to comply. Some recipients have been particularly concerned about shorter compliance deadlines, often citing budgets and staffing as major limitations. In the past, some recipients stated that they lacked qualified personnel to implement the web accessibility requirements of WCAG 2.0, which was relatively new at the time. Those recipients asserted that in addition to needing time to implement the changes to their websites, they also needed time to train staff or contract with professionals who are proficient in developing accessible websites.

Considering all these factors, the Department is proposing a two-year implementation time frame for recipients with 15 or more employees. Regulated entities and the community of web developers have had over a decade to familiarize themselves with WCAG 2.0, which was published in 2008 and serves as the foundation for WCAG 2.1, and five years to familiarize themselves with the additional 12 success criteria of WCAG 2.1. Though the Department is now proposing requiring recipients to conform with WCAG 2.1 instead of WCAG 2.0, the Department believes the time allowed to come into compliance is appropriate. As discussed above, WCAG 2.1 Level AA only adds 12 Level A and AA success criteria that were not included in WCAG 2.0. The Department believes these additional success criteria will not significantly increase the time or resources that it will take for a recipient to come into compliance with the proposed rule, beyond what would have already been required to conform with WCAG 2.0, though the Department seeks the public's input on this belief. The Department therefore believes this proposal balances the resource challenges reported by recipients with the interests of individuals with disabilities in accessing the multitude of programs and activities that recipients now offer via the web and mobile apps.

Section 84.84(b)(2): Small Recipients

The Department is also aware that some recipients believe there should be different compliance requirements or a different compliance date for small recipients in order to take into account the impact on small entities as required by the Regulatory Flexibility Act of 1980 and Executive Order 13272.[302] Many disability organizations and individuals have opposed having a different timetable or accessibility requirements for smaller recipients, stating that many small recipients have smaller websites with fewer web pages, which would make compliance easier. The Department is also aware that other members of the public oppose different timetables or accessibility requirements for smaller recipients. These commenters note that small recipients are protected from excessive burdens deriving from rigorous compliance dates or stringent accessibility standards by the ADA's ''undue burdens'' compliance limitations. It is also the Department's understanding that many web accessibility professionals may operate online and could be available to assist recipients with compliance regardless of their location.

Many of those expressing concerns about compliance dates, including web developers, have stated that compliance in incremental levels would help recipients allocate resources—both financial and personnel—to bring their websites into compliance. The Department is aware that many small recipients do not have a dedicated web developer or staff. The Department is also aware that when these small recipients develop or maintain their own websites, they often do so with staff who have only a cursory knowledge of web design and use manufactured web templates or software, which may create inaccessible web pages. Some small recipients have expressed concern that even when they do use outside help, there is likely to be a shortage of professionals who are proficient in web accessibility and can assist all recipients in bringing their websites into compliance.

In light of these concerns, § 84.84(b)(2) sets forth the Department's proposed web and mobile app accessibility requirements for small recipients. Specifically, proposed § 84.84(b)(2) covers those recipients with fewer than fifteen employees. Section 84.84(b)(2) would require these recipients to ensure that the web content and mobile apps they make available to the public or use to offer programs and activities to members of the public comply with Level A and Level AA success criteria and conformance requirements specified in WCAG 2.1, unless they can demonstrate that compliance would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens. This is the same substantive standard that applies to larger recipients. However, the Department is proposing to give these small recipients additional time to bring their web content and mobile apps into compliance with § 84.84(b)(2). Specifically, small recipients covered by § 84.84(b)(2) will have three years after the publication of a final rule to make their web content and mobile apps compliant with the Department's proposed requirements. The Department believes this longer phase-in period would be prudent to allow small recipients to properly allocate their personnel and financial resources in order to bring their web content and mobile apps into compliance with the Department's proposed requirements.

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 10: How will the proposed compliance date affect small recipients? Are there technical or budget constraints that small recipients would face in complying with this rule, such that a longer phase-in period is appropriate?*
- *Web Accessibility Question 11: How will the proposed compliance date affect people with disabilities, particularly in rural areas?*
- *Web Accessibility Question 12: How should the Department define ''small recipient''? Should categories of small*

[302] *See* 75 FR 43460, 43467 (July 26, 2010).

recipients other than those already delineated in this proposed rule be subject to a different WCAG 2.1 conformance level or compliance date?

• *Web Accessibility Question 13: Should the Department consider factors other than the number of employees, such as annual budget, when establishing different or tiered compliance requirements? If so, what should those factors be, why are they more appropriate than the number of employees, and how should they be used to determine regulatory requirements?*

Limitations

The proposed rule sets forth the limitations on recipients' obligations to comply with the specific requirements of this proposed rule. For example, where it would impose an undue financial and administrative burden to conform with WCAG 2.1 (or part of WCAG 2.1), recipients would not be required to remove their web content and mobile apps, forfeit their web presence, or otherwise undertake changes that would be unduly burdensome. Further, as proposed in § 84.84(b), the web and mobile app accessibility requirements would not require any recipient to take actions that would result in a fundamental alteration in the nature of a program or activity.

In circumstances where officials of a recipient believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, a recipient has the burden of proving that compliance would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the recipient or their designee after considering all resources available for use in the funding and operation of the program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with proposed § 84.84(b) would result in such an alteration or such burdens, a recipient must take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the recipient. For more information, see the discussion below regarding limitations on obligations under proposed § 84.85.

Entities Covered by Both Section 504 and Title II of the ADA

Compliance with this regulation does not necessarily ensure compliance with other statutes and their implementing regulations. For example, the Department is aware that DOJ is pursuing rulemaking regarding web and mobile application standards under title II of the ADA, and that some recipients under section 504 are also public entities covered by title II of the ADA. Because this regulation does not affect recipients' obligations under other laws, recipients who are subject to both section 504 and title II of the ADA must comply with both regulations.

• *Web Accessibility Question 14: Should the Department consider other methods to ensure that a recipient that is also a public entity under title II of the ADA has a single compliance period to come into conformance with WCAG 2.1 AA? If so, what should those methods be?*

Captions for Live-Audio Content

WCAG 2.1 Level AA Success Criterion 1.2.4 requires synchronized captions for live-audio content. The intent of this success criterion is to ''enable people who are deaf or hard of hearing to watch *real-time* presentations. Captions provide the part of the content available via the audio track. Captions not only include dialogue, but also identify who is speaking and notate sound effects and other significant audio.'' [303] Modern live captioning often can be created with the assistance of technology, such as by assigning captioners through Zoom or other conferencing software, which integrates captioning with live meetings.

The Department proposes to apply the same compliance date to all of the WCAG 2.1 Level AA success criteria, including live-audio captioning requirements. As noted above, this would allow for three years after publication of the final rule for small recipients to comply, and two years for large recipients. The Department believes this approach is appropriate for several reasons. First, the Department understands that technology utilizing live-audio captioning has developed in recent years and continues to develop. In addition, the COVID–19 pandemic moved a significant number of formerly in-person appointments, meetings, activities, and other gatherings to online settings, many of which incorporated live-audio captioning. As a result of these developments, live-audio captioning has become even more critical for individuals with certain types of disabilities to participate fully in health and human service programs and activities. And while the Department believes that the two and three-year periods described above afford a sufficient amount of time for recipients to allocate resources towards live-audio captioning, recipients have the option to demonstrate that compliance with any success criterion would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens.

While at least one country that has adopted WCAG 2.0 Level AA as its standard for web accessibility has exempted entities from having to comply with the live-audio captioning requirements,[304] the Department does not believe this approach is appropriate or necessary under the current circumstances, given the current state of live-audio captioning technology and the critical need for live-audio captioning for people with certain types of disabilities to participate more fully in civic life. Further, the Department believes that the state of live-audio captioning technology has advanced since 2016 when Canada made the decision to exempt entities from the live-audio captioning requirements.[305] However, the Department is interested in learning more about compliance capabilities. Accordingly, the Department poses several questions for commenters about the development of live-audio captioning technology and the Department's proposed requirement.

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

• *Web Accessibility Question 15: Should the Department consider a different compliance date for the captioning of live-audio content in synchronized media or exclude some recipients from the requirement? If so, when should compliance with this success criterion be required and why? Should there be a different compliance date for different types or sizes of recipients?*

• *Web Accessibility Question 16: What types of live-audio content do small recipients post? What has been the cost for providing live-audio captioning?*

[303] *See* W3C®, *Captions (Live), Understanding WCAG 2.0: A Guide to Understanding and Implementing WCAG 2.0, http://www.w3.org/TR/UNDERSTANDING-WCAG20/media-equiv-real-time-captions.html* [*https://perma.cc/NV74-U77R*] (last visited Aug. 10, 2022) (emphasis in original).

[304] *See* W3C®, *Canada* (last updated Feb. 9, 2017), *https://www.w3.org/WAI/policies/canada/* [*https://perma.cc/W2DS-FAE9*].

[305] *See id.*

§ 84.85 Exceptions

This rule would require recipients to make their web content and mobile apps accessible. However, the Department believes it may be appropriate in some situations for certain content to be excepted from compliance with the technical requirements of this proposed rule. The Department is aware of a range of views on this issue, including that a section 504 regulation should not include any exceptions because the compliance limitations for undue financial and administrative burdens would protect recipients from any unrealistic requirements. On the other hand, the Department has also heard that exceptions are necessary to avoid substantial burdens on recipients. The Department also expects that such exceptions may help recipients avoid uncertainty about whether they need to ensure accessibility in situations where it might be extremely difficult. After consideration of the public's views and after its independent assessment, the Department is proposing the following exceptions and poses questions for public feedback. The Department is interested in feedback about whether these proposed exceptions would relieve the burden on public entities, and also how these proposed exceptions would impact people with disabilities.

The Department is proposing exceptions from coverage—subject to certain limitations—for the following seven categories of web content: (1) archived web content; (2) preexisting conventional electronic documents; (3) web content posted by third parties on a recipient's website; (4) third-party web content linked from a recipient's website; (5) course content on a recipient's password-protected or otherwise secured website for admitted students enrolled in a specific course offered by a public postsecondary institution; (6) class or course content on a recipient's password-protected or otherwise secured website for students enrolled, or parents of students enrolled, in a specific class or course at an elementary or secondary school; and (7) conventional electronic documents that are about a specific individual, their property, or their account and that are password-protected or otherwise secured. Additionally, there are certain limitations to these exceptions—situations in which the otherwise excepted content still must be made accessible. This proposed rule's exceptions as well as the limitations on those exceptions are explained below.

Archived Web Content

Recipients' websites can often include a significant amount of archived web content, which may contain information that is outdated, superfluous, or replicated elsewhere. The Department's impression is that generally, this historic information is of interest to only a small segment of the general population. Still, the information may be of interest to some members of the public, including some individuals with disabilities, who are conducting research or are otherwise interested in these historic documents. The Department is aware and concerned, however, that recipients would need to expend considerable resources to retroactively make accessible the large quantity of historic or otherwise outdated information available on recipients' websites. Thus, proposed § 84.85(a) provides an exception from the web access requirements of § 84.84 for web content that meets the definition of ''archived web content'' in § 84.10. As mentioned previously, § 84.10 defines ''archived web content'' as ''web content that (1) is maintained exclusively for reference, research, or recordkeeping; (2) is not altered or updated after the date of archiving; and (3) is organized and stored in a dedicated area or areas clearly identified as being archived.'' The archived web content exception allows recipients to keep and maintain historic web content, while utilizing their resources to make accessible the many up-to-date materials that people need to currently access public services or to participate in civic life.

The Department notes that under this exception, recipients may not circumvent their accessibility obligations by merely labeling their web content as ''archived'' or by refusing to make accessible any content that is old. The exception focuses narrowly on content that satisfies all three of the criteria necessary to qualify as ''archived web content,'' namely content that is maintained exclusively for reference, research, or recordkeeping; is not altered or updated after the date of archiving; and is organized and stored in a dedicated area or areas clearly identified as being archived. If any one of those criteria is not met, the content does not qualify as ''archived web content.'' For example, if a recipient maintains content for any purpose other than reference, research, or recordkeeping—such as for purposes of offering a current program or activity—then that content would not fall within the exception, even if a recipient labeled it as ''archived.'' Similarly, a recipient would not be able to circumvent its accessibility obligations by rapidly moving newly posted content that is maintained for a purpose other than reference, research, or recordkeeping, or that the recipient continues to update, from a non-archived section of its website to an archived section.

Though the Department proposes that archived web content be excepted from coverage under this rule, if an individual with a disability requests that certain archived web content be made accessible, recipients generally have an existing obligation to make these materials accessible in a timely manner and free of charge.[306]

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 17: How do recipients manage content that is maintained for reference, research, or recordkeeping?*
- *Web Accessibility Question 18: What would the impact of this exception be on people with disabilities?*
- *Web Accessibility Question 19: Are there alternatives to this exception that the Department should consider, or additional limitations that should be placed on this exception? How would foreseeable advances in technology affect the need for this exception?*

Preexisting Conventional Electronic Documents

As discussed in the section-by-section analysis for § 84.5 above, the Department is proposing to add a definition for ''conventional electronic documents.'' Specifically, the proposed definition provides that the term conventional electronic documents ''means web content or content in mobile apps that is in the following electronic file formats: portable document formats (PDF), word processor file formats, presentation file formats, spreadsheet file formats, and database file formats.'' This list of conventional electronic documents is intended to be an exhaustive list of file formats, rather than an open-ended list.

Proposed § 84.85(b) provides that ''conventional electronic documents created by or for a recipient that are available on a recipient's website or mobile app before the date the recipient is required to comply with this rule'' do not have to comply with the web accessibility requirements of § 84.84, ''unless such documents are currently

[306] *See, e.g.,* 28 CFR 35.130(b)(7); 28 CFR 35.160(b)(2); 45 CFR 84.4, now appearing in 84.68.

used by members of the public to apply for, gain access to, or participate in a recipient's programs or activities.''

The Department is aware that many websites of recipients contain conventional electronic documents. The Department expects that many of these conventional electronic documents are in PDF format, but many conventional electronic documents are formatted as word processor files (*e.g.,* Microsoft Word files), presentation files (*e.g.,* Apple Keynote or Microsoft PowerPoint files), spreadsheet files (*e.g.,* Microsoft Excel files), and database files (*e.g.,* FileMaker Pro or Microsoft Access files).

Because of the presence of conventional electronic documents on recipient websites and mobile apps, and because of the difficulty of remediating some complex types of information and data to make them accessible after-the-fact, the Department believes recipients should generally focus their personnel and financial resources on developing new conventional electronic documents that are accessible and remediating existing conventional electronic documents that are currently used by members of the public to access the recipient's programs or activities. For example, if before the date a recipient is required to comply with this rule, the recipient's website contains a series of out-of-date PDF reports on local COVID–19 statistics, those reports need not conform with WCAG 2.1. Similarly, if a recipient maintains decades' worth of influenza infection reports in conventional electronic documents on the same web page as its current influenza infection report, the historic reports that were posted before the date the recipient was required to comply with this rule generally do not need to comply with WCAG 2.1. As the recipient posts new reports going forward, however, those reports must be accessible under WCAG 2.1. This approach is expected to reduce the burdens on recipients.

This exception is subject to a limitation: it does not apply to any existing documents that are currently used by members of the public to apply for, access, or participate in the recipient's programs or activities. In referencing ''documents that are currently used,'' the Department intends to cover documents that are used by members of the public at any given point in the future, not just at the moment in time when this rule is published. This limitation includes documents that provide instructions or guidance. For example, a recipient must not only make a new patient form accessible, but it must also make accessible other materials that may be needed to complete the form, understand the process, or otherwise take part in the program.

The Department notes that a recipient may not rely on this ''preexisting conventional electronic documents'' exception to circumvent its accessibility obligations by, for example, converting all of its web content to conventional electronic document formats and posting those documents before the date the recipient must comply with this rule. As noted above, any documents that are currently used by members of the public to access the recipient's programs or activities would need to be accessible as defined under this rule, even if those documents were posted before the date the recipient was required to comply with the rule. And if a recipient updates a conventional electronic document after the date the recipient must comply with this rule, that document would no longer qualify as ''preexisting,'' and would thus need to be made accessible as defined under this rule.

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 20: Where do recipients make conventional electronic documents available to the public? Do recipients post conventional electronic documents anywhere else on the web besides their own websites?*
- *Web Accessibility Question 21: Would this ''preexisting conventional electronic documents'' exception reach content that is not already excepted under the proposed archived web content exception? If so, what kinds of additional content would it reach?*
- *Web Accessibility Question 22: What would the impact of this exception be on people with disabilities? Are there alternatives to this exception that the Department should consider, or additional limitations that should be placed on this exception? How would foreseeable advances in technology affect the need for this exception?*

Third-Party Web Content

Recipients' websites can include or link to many different types of third-party content (*i.e.,* content that is created by someone other than the recipient). For example, many recipients' websites contain third-party web content like maps, calendars, weather forecasts, news feeds, scheduling tools, reservations systems, or payment systems. Third-party web content may also be posted by members of the public on a recipient's online message board or other sections of their website that allow public comment. In addition to third-party content that is posted on the recipient's own website, recipients frequently provide links to third-party content (*i.e.,* links on the recipient's website to content that has been posted on another website that does not belong to the recipient), including links to outside resources and information.

The Department has heard a variety of views regarding whether or not recipients should be responsible for ensuring that third-party content on their websites and linked third-party content are accessible. Some maintain that recipients cannot be held accountable for third-party content on their websites, and without such an exception, recipients may have to remove the content altogether. Others have suggested that recipients should not be responsible for third-party content and linked content unless that content is necessary for individuals to access recipients' programs or activities. The Department has also previously heard the view, however, that recipients should be responsible for third-party content because an entity's reliance on inaccessible third-party content can prevent people with disabilities from having equal access to the recipient's own programs and activities. Furthermore, boundaries between web content generated by a recipient and a third party are often difficult to discern.

At this time, the Department is proposing the following two limited exceptions related to third-party content in § 84.85(c)–(d) and is posing questions for public comment:

Section 84.85(c): Web Content Posted by a Third Party on a Recipient's Website

Proposed § 84.85(c) provides an exception to the web accessibility requirements of § 84.84 for ''web content posted by a third party that is available on a recipient's website.''

The Department is proposing this exception in recognition of the fact that individuals other than a recipient's agents sometimes post content on a recipient's website. For example, members of the public may sometimes post on a recipient's online message boards, wikis, social media, or other web forums, many of which are unregulated, interactive spaces designed to promote the sharing of information and ideas. Members of the public may post frequently, at all hours of the day or night, and a recipient may have little or no control over the content posted. In some cases, a recipient's website may include posts from third parties dating back many years, which are likely of

limited, if any, relevance today. Because recipients often lack control over this third-party content, it may be challenging (or impossible) for them to make it accessible. Moreover, because this third-party content may be outdated or unrelated to a recipient's programs and activities, there may be only limited benefit to requiring recipients to make this content accessible. Accordingly, the Department believes it is appropriate to create an exception for this content from complying with the technical standard articulated in this rule. However, while this exception applies to web content posted by third parties, it does not apply to the tools or platforms used to post third-party content on a recipient's website such as message boards—these tools and platforms are subject to the rule's technical standard.

This exception applies to, among other third-party content, documents filed by third parties in administrative, judicial, and other legal proceedings that are available on a recipient's website. This example helps to illustrate why the Department believes this exception is necessary. Many recipients have either implemented or are in the process of developing an automated process for electronic filing of documents in administrative, judicial, or legal proceedings in order to improve efficiency in the collection and management of these documents. Courts and other recipients receive high volumes of filings in these sorts of proceedings each year. The majority of these documents are submitted by third parties—such as a private attorney in a legal case or other members of the public—and often include appendices, exhibits, or other similar supplementary materials that may be difficult to make accessible.

However, the Department notes that recipients have existing obligations under section 504 and title II of the ADA to ensure the accessibility of their programs and activities.[307] Accordingly, for example, if a person with a disability is a party to a case and requests access to inaccessible filings submitted by a third party in a judicial proceeding that are available on a State court's website, the court may need to timely provide those filings in an accessible format. Similarly, recipients may need to provide reasonable modifications to ensure that people with disabilities have access to their programs and activities. For example, if a hearing had been scheduled in the proceeding referenced above, the court might need to postpone the hearing if it did not provide the filings in an accessible format to the requestor in sufficient time for the requestor to review the documents before the scheduled hearing.

Sometimes a recipient itself chooses to post content created by a third party on its website. This exception does not apply to content posted by the recipient itself, even if the content was originally created by a third party. For example, many recipients post third-party content on their websites, such as calendars, scheduling tools, maps, reservations systems, and payment systems that were developed by an outside technology company. To the extent a recipient chooses to rely on third-party content on its website, it must select third-party content that meets the requirements of § 84.84.

Moreover, a recipient may not delegate away its obligations under section 504.[308] Accordingly, if a recipient relies on a contractor or another third party to post content on the entity's behalf, the recipient retains responsibility for ensuring the accessibility of that content.

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 23: What types of third-party web content can be found on websites of recipients? How would foreseeable advances in technology affect the need for creating an exception for this content? To what extent is this content posted by the recipients themselves, as opposed to third parties? To what extent do recipients delegate to third parties to post on their behalf? What degree of control do recipients have over content posted by third parties, and what steps can recipients take to make sure this content is accessible?*
- *Web Accessibility Question 24: What would the impact of this exception be on people with disabilities?*

Section 84.85(d): Third-Party Content Linked From a Recipient's Website

Proposed § 84.85(d) provides that a recipient is not responsible for the accessibility of third-party web content linked from the recipient's website ''unless the recipient uses the third-party web content to allow members of the public to participate in or benefit from the recipient's programs or activities.'' Many recipients' websites include links to other websites that contain information or resources in the community offered by third parties that are not affiliated with the recipient. Clicking on one of these links will take an individual away from the recipient's website to the website of a third party. Typically, the recipient has no control over or responsibility for the web content or the operation of the third party's website. Accordingly, the recipient has no obligation to make the content on a third party's website accessible. For example, if for purely informational or reference purposes, a university posts a series of links to restaurants and tourist attractions in the surrounding area, the recipient is not responsible for ensuring the websites of those restaurants and tourist attractions are accessible.

Proposed § 84.85(d) generally allows recipients to provide relevant links to third-party web content that may be helpful without making them responsible for the third party's web content. However, because the Department's section 504 regulation prohibits discrimination in the provision of any aid, benefit, or service provided by recipients directly or through contractual, licensing, or other arrangements, if the recipient uses the linked third-party web content to allow members of the public to participate in or benefit from the recipient's programs or activities, then the recipient must ensure it links only to third-party web content that complies with the web accessibility requirements of § 84.84. This approach is consistent with recipients' obligation to make all of their programs or activities accessible to the public, including those they provide through third parties.[309] For example, a recipient that links to online payment processing websites offered by third parties to accept the payment of fees must ensure that the third-party web content it links to in order for members of the public to pay for the recipient's programs or activities complies with the web accessibility requirements of § 84.84. In other words, if a recipient links to a website for a third-party payment service that the recipient allows the public to use to pay fees, the recipient would be using that third-party website to allow members of the public to participate in its program, and the linked third-party website would

[307] 45 CFR 84.4, now appearing in 84.68, 84.52; 28 CFR 35.130, 35.160.

[308] *See* 45 CFR 84.4, now appearing in 84.68(b)(1) (prohibiting discrimination directly or through a contractual, licensing, or other arrangement that would provide an aid, benefit, or service to a qualified individual with a disability that is not equal to that afforded others).

[309] *See* 28 CFR 35.130(b)(1); *see also* 45 CFR 84.4(b)(1), redesignated as 84.68(1) (prohibiting discrimination directly or through a contractual, licensing, or other arrangement that would provide an aid, benefit, or service to a qualified individual with a disability that is not equal to that afforded others).

need to comply with this rule. Otherwise, the recipient's program would not be equally accessible to people with disabilities. Similarly, if a recipient links to a third-party website that processes applications for benefits or requests to sign up to participate in classes or attend programs the recipient offers, the recipient is using the third party's linked web content to allow members of the public to participate in the recipient's programs or activities, and the recipient must thus ensure that it links to only third-party web content that complies with the requirements of § 84.84.

The Department believes this approach strikes the appropriate balance between acknowledging that recipients may not have the ability to make third parties' websites accessible and recognizing that recipients do have the ability to choose to use only third-party content that is accessible when that content is used to allow members of the public to participate in or benefit from the recipient's programs or activities.

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

• *Web Accessibility Question 25: Do recipients link to third-party web content to allow members of the public to participate in or benefit from the entities' programs or activities? If so, to what extent does the third-party web content that recipients use for that purpose conform with WCAG 2.1 Level AA?*

• *Web Accessibility Question 26: What would the impact of this exception be on people with disabilities, and how would foreseeable advances in technology affect the need for this exception?*

External Mobile Apps

Many recipients use mobile apps that are developed, owned, and operated by third parties, such as private companies, to allow the public to access the entity's programs or activities. We will refer to these mobile apps as ''external mobile apps.'' [310] One example of an external mobile app is the ''MyChart'' app, a private company's website and app that some recipients use to allow patients to view their medications, test results, appointments, and bills, and interact with their health care providers.[311]

At this time, the Department is not proposing to create an exception for recipients' use of external mobile apps (*e.g.,* mobile apps operated by a third party) from proposed § 84.84. We expect that recipients are using these mobile apps mostly to provide access to the entities' programs and activities, such that excepting them would not be appropriate.

Accordingly, the Department is seeking comment and additional information on external mobile apps that recipients use to offer their programs and activities. Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

• *Web Accessibility Question 27: What types of external mobile apps, if any, do recipients use to provide access to their programs and activities to members of the public, and how accessible are these apps? While the Department has not proposed an exception to the requirements proposed in § 84.84 for recipients' use of external mobile apps, should the Department propose such an exception? If so, should this exception expire after a certain time, and how would this exception impact persons with disabilities?*

Password-Protected Class or Course Content of Educational Institutions

Proposed § 84.85(e) and (f) provide exceptions for educational institutions' password-protected class or course content where there is no student with a disability enrolled in the class or course (or, in the elementary and secondary school context, where there is no student enrolled in the class or course who has a parent with a disability) who needs the password-protected content to be made accessible.

Educational institutions, like many other recipients, use their websites to provide a variety of programs and activities to members of the public. Many of the programs and activities on these websites are available to anyone. The content on these websites can include such general information as the academic calendar, enrollment process, admission requirements, school lunch menus, school policies and procedures, and contact information. Under the proposed regulation, all such programs or activities available to the public on the websites of public educational institutions must comply with the requirements of § 84.84 unless the content is subject to a proposed exception.

In addition to the information available to the general public on the websites of educational institutions, the websites of many schools, colleges, and universities also make certain programs and activities available to a discrete and targeted audience of individuals (*e.g.,* students taking particular classes or courses or, in the elementary or secondary school context, parents of students enrolled in a particular class or course). This information is often provided using a Learning Management System (LMS) or similar platform that can provide secure online access and allow the exchange of educational and administrative information in real time. LMSs allow educational institutions and their faculty and staff to exchange and share information with students and parents about courses and students' progress. For example, faculty and staff can create and collect assignments, post grades, provide real-time feedback, and share subject-specific media, documents, and other resources to supplement and enrich the curriculum. Parents can track their children's attendance, assignments, grades, and upcoming class events. To access the information available on these platforms, students (and parents in the elementary and secondary school context) generally must obtain a password, login credentials, or some equivalent from the educational institution. The discrete population that has access to this content may not always include a person with a disability. For example, a student who is blind may not have enrolled in a psychology course, or a parent who is deaf may not have a child enrolled in a particular ninth-grade world history class.

The Department's regulatory proposal would require that the LMS platforms that recipient elementary and secondary schools, colleges, and universities use comply with § 84.84. However, subject to limitations, the Department is proposing an exception for password-protected class or course content. Thus, while the LMS platform would need to be accessible, class or course content (such as syllabi and assigned readings) posted on the password-protected LMS

[310] In this document, we refer to web content that is created by someone other than a public entity as ''third-party web content.'' We note that we do not use ''third-party'' to describe mobile apps here to avoid confusion. It is our understanding that the term ''third-party mobile app'' appears to have a different meaning in the technology industry and some understand ''a third-party app'' as an application that is provided by a vendor other than the manufacturer of the device or operating system provider. *See* Alice Musyoka, *Third-Party Apps, Webopedia* (Aug. 4, 2022) *https://www.webopedia.com/definitions/third-party-apps/ [https://perma.cc/SBW3-RRGN]. See* Renée Lynn Midrack, *What is a Third Party App?,* Lifewire (updated Sept. 12, 2021), *https://www.lifewire.com/what-is-a-third-party-app-4154068 [https://perma.cc/F7X7-6K59].*

[311] *See What You Can Do With MyChart, https://www.mychart.org/Features* (last visited June 27, 2023).

platform would not need to be, except in specified circumstances. Specifically, the content available on password-protected websites for specific classes or courses would generally be excepted from the requirements of proposed § 84.84 unless a student is enrolled in that particular class or course and the student (or the parent [312] in the elementary and secondary school context) would be unable, because of a disability, to access the content posted on the password-protected website for that class or course. Thus, once a student with a disability (or a student in an elementary or secondary school with a parent with a disability) is enrolled in a particular class or course, the content available on the password-protected website for the specific class or course would need to be made accessible in accordance with certain compliance dates discussed below. This may include scenarios in which a student with a disability (or, in the elementary and secondary school context, a student whose parent has a disability) preregisters, enrolls, or transfers into a class or course or acquires a disability during the term, or when a school otherwise identifies a student in a class or course (or their parent in the elementary and secondary school context) as having a disability. The educational institution would generally be required to make the course content for that class or course fully compliant with all WCAG 2.1 Level AA success criteria, not merely the criteria related to that student or parent's disability. This will ensure that course content becomes more accessible to all students over time. In addition, the Department expects that it will be more straightforward and cost-effective for recipients to comply with WCAG 2.1 Level AA as a whole, rather than attempting to identify and isolate the WCAG 2.1 success criteria that relate to a specific student, and then repeating that process for a subsequent student with a different disability.

The Department proposes this exception for class and course content based on its understanding that it would be burdensome to require educational institutions to make all of the documents, videos, and other content that many instructors upload and assign via LMS websites accessible. For instance, instructors may scan hard-copy documents and then upload them to LMS sites as conventional electronic documents. In some instances, these documents comprise multiple chapters from books and may be hundreds of pages long. Similarly, instructors may upload videos or other multimedia content for students to review. The Department believes that making all of this content accessible when students with disabilities (or their parents in the elementary and secondary context) are not enrolled in the course may be onerous for educational institutions, but the Department also understands that it is critical for students and parents with disabilities to have access to needed course content.

The Department believes its proposal provides a balanced approach by ensuring access to students with disabilities (or, in primary and secondary education settings, parents with disabilities) enrolled in the educational institution, while recognizing that there are large amounts of class or course content that may not immediately need to be accessed by individuals with disabilities because they have not enrolled in a particular class or course.

By way of analogy and as an example, under the Department's existing section 504 regulations, educational institutions are not required to proactively provide accessible course handouts to all students in a course, but they are required to do so for a student with a disability who needs them to access the course content. The Department envisions the requirements proposed here as an online analogue: while educational institutions are not required to proactively make all password-protected course handouts accessible, for example, once an institution knows that a student with a disability is enrolled in a course and, accordingly, needs the content to be made accessible, the institution must do so. The institution must also comply with its obligations to provide accessible course content under all other applicable laws, including the IDEA.

The Department appreciates that some educational institutions may find it preferable or more effective to make all class or course content accessible from the outset without waiting for a student with a disability (or, in the elementary and secondary school context, a student with a parent with a disability) to enroll in a particular class or course, and nothing in this rule would prevent educational institutions from taking that approach. Even if educational institutions do not take this approach, the Department expects that those institutions will likely need to take steps in advance so that they are prepared to make all class or course content for a particular course accessible within the required time frames discussed below when there is an enrolled student with a disability (or, in the elementary and secondary school context, an enrolled student with a parent with a disability) who needs access to that content.

Because the nature, operation, and structure of elementary and secondary schools are different from those of public colleges and universities, the proposed regulation sets forth separate requirements for the two types of institutions.

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following question.

- *Web Accessibility Question 28: Are there particular issues relating to the accessibility of digital books and textbooks that the Department should consider in finalizing this rule? Are there particular issues that the Department should consider regarding the impact of this rule on libraries?*

Postsecondary Institutions: Password-Protected Web Content

In proposed § 84.85(e), the Department is considering an exception to the requirements proposed in § 84.84 for public postsecondary institutions, subject to two limitations. This exception would provide that ''course content available on a recipient's password-protected or otherwise secured website for admitted students enrolled in a specific course offered by a public postsecondary institution'' would not need to comply with the web accessibility requirements of § 84.84 unless one of the two limitations described below applies. As used in this context, ''admitted students'' refers to students who have applied to, been accepted by, and are enrolled in a particular educational institution. These students include both matriculated students (*i.e.,* students seeking a degree) and non-matriculated students (*i.e.,* continuing education students or non-degree-seeking students). As noted above, this exception applies only to password-protected or otherwise secured content. Content may be otherwise secured if it requires some process of authentication or login to access the content.

The exception is not intended to apply to password-protected content for classes or courses that are made available to the general public, or a subset thereof, without enrolling at a particular educational institution. Such classes or courses generally only require

[312] The Department notes that the term ''parent'' as used throughout proposed § 84.85(f) is intended to include biological, adoptive, step-, or foster parents, legal guardians, or other individuals recognized under Federal and state law as having parental rights.

limited, if any, registration to participate. These types of classes or courses may sometimes be referred to as Massive Open Online Courses (MOOCs). Because access to the content on these password-protected websites is not limited to a discrete student population within an educational institution, but is instead widely available to the general public—sometimes without limits as to enrollment—any individual, including one with a disability, may enroll or participate at almost any time. Under these circumstances, the recipient must make such class or course content accessible from the outset of the class or course regardless of whether a student with a disability is known to be participating. The Department is interested in the public's feedback on this exception, and in particular the impact it may have on recipients' continued use of MOOCs.

The phrase ''enrolled in a specific course'' as used in § 84.85(f) limits the exception to password-protected web content for a particular course, at a particular time, during a particular term. For example, if a university offers a 20th Century Irish Literature course at 10 a.m. that meets on Mondays, Wednesdays, and Fridays for the fall semester of the 2029–2030 academic year, the exception would apply to the password-protected web content for that course, subject to the limitations discussed below.

The proposed exception in § 84.85(e) would not apply to non-course content on the recipient's password-protected website that is generally available to all admitted students. For example, content available on the recipient's password-protected website that is available to all admitted students, such as forms for registering for class, applications for meal plans or housing, academic calendars, and announcements generally made available to all students enrolled in the postsecondary institution would all be required to comply with § 84.84. In addition, if a postsecondary institution makes course content for specific courses available to all admitted students on a password-protected website, regardless of whether students had enrolled in that specific course, the exception would not apply, even if such content was only made available for a limited time, such as within a set time frame for course shopping.

Sections 84.85(e)(1)–(2): Limitations to the Exception for Password-Protected Web Content for Specific Courses

As noted previously, there are two important limitations to the general exception for course content on password-protected websites of postsecondary institutions in proposed § 84.85(e); both limitations apply to situations in which an admitted student with a disability is enrolled in a particular course at a postsecondary institution and the student, because of a disability, would be unable to access the content on the password-protected website for the specific course. The phrase ''the student, because of a disability, would be unable to access'' is meant to make clear that these limitations are not triggered merely by the enrollment of a student with a disability, but instead they are triggered by the enrollment of a student whose disability would make them unable to access the content on the password-protected course website. These limitations would also be triggered by the development or identification of such a disability while a student is enrolled, or the realization that a student's disability makes them unable to access the course content during the time that they are enrolled. The phrase ''unable to access'' does not necessarily mean a student has no access at all. Instead, the phrase ''unable to access'' is intended to cover situations in which a student's disability would limit or prevent their ability to equally access the relevant content.

The provisions set forth in the limitations to the exception are consistent with longstanding obligations of recipients under section 504 and title II of the ADA. Recipients are already required to make appropriate reasonable modifications and ensure effective communication, including by providing the necessary auxiliary aids and services to students with disabilities. It is the educational institution, not the student, that is responsible for ensuring that it is meeting these obligations. Such institutions, therefore, should be proactive in addressing the access needs of admitted students with disabilities, including those who would be unable to access inaccessible course content on the web. This also means that when an institution knows that a student with a disability is unable to access inaccessible content, the institution should not expect or require that the student first attempt to access the information and be unable to do so before the institution's obligation to make the content accessible arises.

Correspondingly, when an institution has notice that such a student is enrolled in a course, all of the content available on the password-protected website for that course must be made accessible in compliance with the accessibility requirements of proposed § 84.84. The difference between the two limitations to the exception to § 84.85(e) is the date that triggers compliance. The triggering event is based on when the institution knew, or should have known, that such a student with a disability would be enrolled in a specific course and would be unable to access the content available on the password-protected website.

The application of the limitation in proposed § 84.85(e)(1) and (2), discussed in detail below, is contingent upon the institution having notice both that a student with a disability is enrolled in a specific course and that the student cannot access the course content because of their disability. Once an institution is on notice that a student with a disability is enrolled in a specific course and that the student's disability would render the student unable to access the content available on the password-protected website for the specific course, the password-protected web content for that course must be made accessible within the time frames set forth in proposed § 84.85(e)(1) and (2), which are described in greater detail below.

The first proposed limitation to the exception for postsecondary institutions, proposed § 84.85(e)(1), would require that ''if a recipient is on notice that an admitted student with a disability is pre-registered in a specific course offered by a postsecondary institution and that the student, because of a disability, would be unable to access the content available on the recipient's password-protected or otherwise secured website for the specific course,'' then ''all content available on the recipient's password-protected or otherwise secured website for the specific course must comply with the requirements of § 84.84 by the date the academic term begins for that course offering. New content added throughout the term for the course must also comply with the requirements of § 84.84 at the time it is added to the website.'' Students may register for classes and make accessibility requests ahead of the start of the term—often during the previous term. The institution therefore knows, or should know, that a student with a disability has registered for a particular course or notified the school that content must be made accessible for a particular course. This provision would ensure that students with disabilities have timely access to and equal opportunity to benefit from content available on a password-protected website for their particular courses.

The second proposed limitation to the exception for postsecondary institutions, § 84.85(e)(2), applies to

situations in which ''a recipient is on notice that an admitted student with a disability is enrolled in a specific course offered by a postsecondary institution after the start of the academic term, and the student, because of a disability, would be unable to access the content available on the recipient's password-protected or otherwise secured website for the specific course.'' In this instance, unlike § 84.85(e)(1), the postsecondary institution is not on notice until after the start of the academic term that a student is enrolled in a particular course and that the student, because of a disability, would be unable to access the content on the password-protected course website. In such circumstances, all content available on the recipient's password-protected website for the specific course must comply with the requirements of § 84.84 within five business days of such notice. This second limitation would apply to situations in which students have not pre-registered in a class, such as when students enroll in a class during the add/drop period, or where waitlisted or transfer students enroll in a class at the start of, or during, the academic term. This second limitation to the exception for postsecondary institutions would also apply to situations in which the institution was not on notice that the enrolled student had a disability and would be unable to access online course content until after the academic term began—because, for example, the student newly enrolled at the institution or was recently diagnosed with a disability.

In proposing the five-day remediation requirement in this limitation, the Department is attempting to strike the appropriate balance between providing postsecondary institutions with a reasonable opportunity to make the content on the password-protected or otherwise secured website accessible and providing individuals with disabilities full and timely access to this information that has been made available to all other students in the course. The Department believes five days provides a reasonable opportunity to make the relevant content accessible in most cases, subject to the general limitations under proposed § 84.88. However, the Department is interested in the public's feedback and data on whether this remediation requirement provides a reasonable opportunity to make the relevant content accessible, and whether a shorter or longer period would be more appropriate in most cases.

If, for example, a college offers a specific fall semester course, a student with a disability pre-registers for it and, because of disability, that student would be unable to access the content available on the password-protected website for that course, all content available on the institution's password-protected website for that specific course must comply with the requirements of § 84.84 by the date the academic semester begins for the fall semester (according to the first limitation). If, instead, that same student does not enroll in that particular course until two days after the start of the fall semester, all content available on the institution's password-protected or otherwise secured website for that specific course must comply with the requirements of § 84.84 within five business days of notice that a student with a disability is enrolled in that particular course and, because of disability, would be unable to access the content (according to the second limitation).

The exception applies to course content such as conventional electronic documents, multimedia content, or other course material ''available'' on a recipient's password-protected or otherwise secured website. As such, the two limitations apply when that content is made ''available'' to students with disabilities enrolled in a specific course who are unable to access course content. Although a professor may load all of their course content on the password-protected website at one time, they may also stagger the release of particular content to their students at various points in time during the term. It is when this content is made available to students that it must be made accessible in compliance with proposed § 84.84.

The two limitations to the exception for password-protected course content state that the limitations apply whenever ''the student, because of a disability, would be unable to access the content available on the recipient's password-protected website for the specific course.'' Pursuant to longstanding obligations of recipients under section 504, the postsecondary institution must continue to take other steps necessary to timely make inaccessible course content accessible to an admitted student with a disability during the five-day period proposed in the second limitation, unless doing so would result in a fundamental alteration or undue financial and administrative burdens. This could include timely providing alternative formats, a reader, or a notetaker for the student with a disability, or providing other auxiliary aids and services that enable the student with a disability to participate in and benefit from the programs and activities of the recipient while the recipient is making the course content on the password-protected website accessible.

Once the obligation is triggered to make password-protected web content accessible for a specific course, the obligation is ongoing for the duration of the course (*i.e.,* the obligation is not limited to course content available at the beginning of the term). Rather, all web content newly added throughout the remainder of the student's enrollment in the course must also be accessible at the time it is made available to students. Furthermore, once a postsecondary institution makes conventional electronic documents, multimedia content, or other course material accessible in accordance with the requirements of § 84.85(e)(1) or (2), the institution must maintain the accessibility of that specific content as long as that content is available to students on the password-protected course website, in compliance with the general accessibility requirement set forth in proposed § 84.84. However, new content added later, when there is no longer a student with a disability who is unable to access inaccessible web content enrolled in that specific course, would not need to be made accessible because that course-specific web content would once again be subject to the exception, unless and until another student with a disability is enrolled in that course.

With regard to third-party content linked to from a password-protected or otherwise secured website for a specific course, the exception and limitations set forth in proposed § 84.85(d) apply to this content, even when a limitation under proposed § 84.85(e)(1) or (2) has been triggered requiring all the content available to students on a password-protected website for a specific course to be accessible. Accordingly, third-party web content to which a recipient provides links for informational or resource purposes is not required to be accessible; however, if the postsecondary institution uses the third-party web content to allow members of the public to participate in or benefit from the institution's programs or activities, then the postsecondary institution must ensure it links to third-party web content that complies with the web accessibility requirements of § 84.84. For example, if a postsecondary institution requires students to use a third-party website it links to on its password-protected course website to complete coursework, then the third-party web content must be accessible.

The Department believes that this approach strikes a proper balance of providing necessary and timely access to course content, while not imposing

burdens where web content is currently only utilized by a population of students without relevant disabilities, but it welcomes public feedback on whether alternative approaches might strike a more appropriate balance.

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 29: How difficult would it be for postsecondary institutions to comply with this rule in the absence of this exception?*
- *Web Accessibility Question 30: What would the impact of this exception be on people with disabilities?*
- *Web Accessibility Question 31: How do postsecondary institutions communicate general information and course-specific information to their students?*
- *Web Accessibility Question 32: Do postsecondary institutions commonly provide parents access to password-protected course content?*
- *Web Accessibility Question 33: The proposed exception and its limitations are confined to content on a password-protected or otherwise secured website for students enrolled in a specific course. Do postsecondary institutions combine and make available content for particular groups of students (e.g., newly admitted students or graduating seniors) using a single password-protected website and, if so, should such content be included in the exception?*
- *Web Accessibility Question 34: On average, how much content and what type of content do password-protected course websites of postsecondary institutions contain? Is there content posted by students or parents? Should content posted by students or parents be required to be accessible and, if so, how long would it take a postsecondary institution to make it accessible?*
- *Web Accessibility Question 35: How long would it take to make course content available on a recipient's password-protected or otherwise secured website for a particular course accessible, and does this vary based on the type of course? Do students need access to course content before the first day of class? How much delay in accessing online course content can a student reasonably overcome in order to have an equal opportunity to succeed in a course, and does the answer change depending on the point in the academic term that the delay occurs?*
- *Web Accessibility Question 36: To what extent do educational institutions use or offer students mobile apps to enable access to password protected course content? Should the Department apply the same exceptions and limitations to the exceptions under proposed § 84.85(e) and (e)(1)–(2), respectively, to mobile apps?*
- *Web Accessibility Question 37: Should the Department consider an alternative approach, such as requiring that all newly posted course content be made accessible on an expedited time frame, while adopting a later compliance date for remediating existing content?*

Elementary and Secondary Schools: Password-Protected Web Content

In proposed § 84.85(f), the Department is considering an exception to the requirements proposed in § 84.84 for elementary and secondary schools that would provide, subject to four limitations, that ''class- or course content available on a recipient's password-protected or otherwise secured website for students enrolled, or parents of students enrolled, in a specific class or course at an elementary or secondary school'' would not need to comply with the web accessibility requirements of § 84.84.

Because parents of students in elementary and secondary schools have greater rights, roles, and responsibilities with regard to their children and their children's education than in the postsecondary education setting, and because these parents typically interact with such schools much more often and in much greater depth and detail, parents are expressly included in both the general exception for password-protected web content in § 84.85(f) and its limitations.[313] Parents use password-protected websites to access progress reports and grades, track homework and long-term project assignments, and interact regularly with their children's teachers and administrators.

Proposed exception § 84.85(f) provides that ''class or course content available on a recipient's password-protected or otherwise secured website for students enrolled, or parents of students enrolled, in a specific class or course offered by an elementary or secondary school'' does not need to comply with the accessibility requirements of § 84.84 unless and until a student is enrolled in that particular class or course and either the student or the parent would be unable, because of a disability, to access the content available on the password-protected website. As used in this context, ''enrolled . . . in a specific class or course'' limits the exception to password-protected class or course content for a particular class or course during a particular academic term. For example, content on a password-protected website for students, and parents of students, in a specific fifth-grade class would not need to be made accessible unless a student enrolled, or the parent of a student enrolled, in the class that term would be unable, because of a disability, to access the content on the password-protected website.

The proposed exception in § 84.85(f) is not intended to apply to password-protected content that is available to all students or their parents in an elementary or secondary school. Content on password-protected websites that is not limited to students enrolled, or parents of students enrolled, in a specific class or course, but instead is available to all students or their parents at the elementary or secondary school is not subject to the exception. For example, a school calendar available on a password-protected website to which all students or parents at a particular elementary school are given a password would not be subject to the exception for password-protected web content for a specific class or course. It would, therefore, need to comply with the requirements of proposed § 84.84.

Section 84.85(f)(1)–(4): Limitations to the Exception for Password-Protected Class or Course Content

There are four critical limitations to the general exception in § 84.85(f) for elementary and secondary schools' class or course content. These limitations are identical to those discussed above in the postsecondary context, except that they arise not only when a school is on notice that a student with a disability is enrolled in a particular class or course and cannot access content on the class or course's password-protected website because of their disability, but also when the same situation arises for a parent with a disability. The discussion above of the limitations in the postsecondary context applies with equal force here. A shorter discussion of the limitations in the elementary and secondary context follows. However, the Department acknowledges that there are existing legal frameworks specific to the public elementary and secondary education context which are described further in this section.

The first limitation, in proposed § 84.85(f)(1), addresses situations in which the recipient is on notice before the beginning of the academic term that

[313] The Department notes that the term ''parent'' as used throughout § 84.85(f) is intended to include biological, adoptive, step, or foster parents; legal guardians; or other individuals recognized under Federal or State law as having parental rights.

a student with a disability is pre-registered in a specific class or course offered by an elementary or secondary school, and the student, because of a disability, would be unable to access the content available on the recipient's password-protected or otherwise secured website for the specific class or course. In such circumstances, all content available on the recipient's password-protected website for the specific class or course must comply with the requirements of § 84.84 by the date the term begins for that class or course. New content added throughout the term for the class or course must also comply with the requirements of proposed § 84.84 at the time it is added to the website.

Similarly, the second limitation, proposed § 84.85(f)(2), addresses situations in which the pre-registered student's parent has a disability. Section 84.85(f)(2) applies when the recipient is on notice that a student is pre-registered in an elementary or secondary school's class or course, and that the student's parent needs the content to be accessible because of a disability that inhibits access to the content available on the password-protected website for the specific class or course. In such circumstances, all content available on the recipient's password-protected website for the specific class or course must comply with the requirements of § 84.84 by the date the school term begins for that class or course. New content added throughout the term for the class or course must also comply with the requirements of proposed § 84.84 at the time it is added to the website.

The third and fourth limitations to the exception for class or course content on password-protected websites for particular classes or courses at elementary and secondary schools are similar to the first and second limitations, but have different triggering events. These limitations apply to situations in which a student is enrolled in an elementary or secondary school's class or course after the term begins, or when a school is otherwise not on notice until after the term begins that there is a student or parent with a disability who is unable to access class or course content because of their disability. The third limitation, in proposed § 84.85(f)(3) would apply once a recipient is on notice that ''a student with a disability is enrolled in an elementary or secondary school's class or course after the term begins, and the student, because of a disability, would be unable to access the content available on the recipient's password-protected or otherwise secured website for the specific class or course.'' In such circumstances, all content available on the recipient's password-protected or otherwise secured website for the specific class or course must comply with the requirements of § 84.84 within five business days of such notice. New content added throughout the term for the class or course must also comply with the requirements of proposed § 84.84 at the time it is added to the website.

Proposed § 84.85(f)(4), the fourth limitation, applies the same triggering event as in § 84.85(f)(3) to situations in which the student's parent has a disability. Proposed § 84.85(f)(4) would apply once a recipient is on notice that a student is enrolled in an elementary or secondary school's class or course after the term begins, and that the student's parent needs the content to be accessible because of a disability that would inhibit access to the content available on the recipient's password-protected website for the specific class or course. In such circumstances, all content available on the recipient's password-protected or otherwise secured website for the specific class or course must comply with the requirements of § 84.84 within five business days of such notice. New content added throughout the term for the class or course must also comply with the requirements of proposed § 84.84 at the time it is added to the website.

The procedures for enrollment in the elementary or secondary school context likely vary from the postsecondary context. Unlike in postsecondary institutions, elementary and secondary schools generally have more autonomy and authority regarding student placement in a particular class or course. The student or parent generally does not control placement in a particular class or course. To the extent a parent or student has such autonomy or authority, the application of the limitations in § 84.85(f)(1) through (4) is contingent on whether the elementary or secondary school knows, or should know, that a student with a disability is enrolled, or a parent with a disability has a child enrolled, in a particular class or course, and that the student or parent would be unable to access the class or course content because of their disability.

Regardless of what process a school follows for notification of enrollment, accessibility obligations for password-protected class or course content come into effect once a school is on notice that materials need to be made accessible under these provisions. For example, some schools that allow students to self-select the class or course in which they enroll may require students with disabilities to notify their guidance counselor or the special education coordinator each time they have enrolled in a class or course. With respect to parents, some schools may have a form that parents fill out as part of the process for enrolling a student in a school, or in a particular class or course in that school, indicating that they (the parent) are an individual with a disability who, because of their disability, needs auxiliary aids or services. Other schools may publicize the schools' responsibility to make class or course content accessible to parents with disabilities and explain the process for informing the school that they cannot access inaccessible websites. Under this rule, regardless of the process a school follows, once the elementary or secondary school is on notice, the password-protected class or course content for that class or course must be made accessible within the time frames set forth in § 84.85(f)(1) through (4). We note that section 504 would prohibit limiting assignment of students with disabilities only to classes for which the content has already been made accessible.[314]

The Department emphasizes that in the public elementary and secondary school context a variety of Federal laws include robust protections for students with disabilities, and this rule is intended to build on, but not to supplant those protections for students with disabilities. Public schools that receive Federal financial assistance already must ensure they comply with obligations under other statutes such as the IDEA and section 504 of the Rehabilitation Act, including the Department of Education's regulations implementing those statutes. The IDEA and section 504 already include affirmative obligations that covered schools work to identify children with disabilities, regardless of whether the schools receive notice from a parent that a student has a disability, and provide a Free Appropriate Public Education (FAPE).[315] The Department acknowledges that educational entities likely already employ procedures under those frameworks to identify children with disabilities and assess their educational needs. Under the IDEA and section 504, schools have obligations to identify students with the relevant disabilities that would trigger the limitations in proposed § 84.85(f)(1) through (4). The proposed rule would add to and would not supplant the

[314] *See* 45 CFR 84.4, now appearing in 84.68.

[315] *See* 20 U.S.C. 1412; 34 CFR 104.32–104.33.

already robust framework for identifying children with disabilities and making materials accessible. The language used in the educational exceptions and their limitations is not intended to replace or conflict with those existing procedures. In other words, regardless of the means by which schools identify students with the relevant disabilities here, including procedures developed to comply with the IDEA and section 504 regulations, once a school is on notice that either the student or the parent has a disability and requires access because of that disability, the limitation is triggered. Further, schools should not alter their existing practices to wait for notice because of this rule—this rule does not modify existing requirements that schools must follow under other statutes such as the IDEA.

Federal and state laws may have a process for students who are newly enrolled in a school and those who are returning to have their educational program or plan reviewed and revised annually. This generally would include a determination of the special education, related services, supplementary aids and services, program modifications, and supports from school personnel that the student needs. However, once the school is on notice that the student has a disability and requires access because of the disability, those processes and procedures cannot be used to delay or avoid compliance with the time frames set forth in § 84.85(f)(1) through (4). For example, if a school knows that a student who is blind is enrolled at the school for the first time over the summer, the school is then on notice that, in accordance with § 84.85(f)(1), the content on the school's password-protected website for the class to which the school assigns the student must be accessible in compliance with the requirements of § 84.84 by the date the term begins, regardless of the time frames for evaluation or the review or development of an Individualized Education Program or section 504 plan.

As in the postsecondary context, the Department believes that these exceptions and limitations strike a proper balance of providing necessary and timely access to class or course content, while not imposing burdens where class or course content is currently only utilized by a population of students and parents without relevant disabilities, but it welcomes public feedback on whether alternative approaches might strike a more appropriate balance.

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 38: How difficult would it be for elementary and secondary schools to comply with this rule in the absence of this exception?*
- *Web Accessibility Question 39: What would the impact of this exception be on people with disabilities?*
- *Web Accessibility Question 40: How do elementary and secondary schools communicate general information and class- or course-specific information to students and parents?*
- *Web Accessibility Question 41: The proposed exception and its limitations are confined to content on a password-protected or otherwise secured website for students enrolled, or parents of students enrolled, in a specific class or course. Do elementary or secondary schools combine and make available content for all students in a particular grade or certain classes (e.g., all 10th graders in a school taking chemistry in the same semester) using a single password-protected website and, if so, should such content be included in the exception?*
- *Web Accessibility Question 42: Do elementary and secondary schools have a system allowing a parent with a disability to provide notice of their need for accessible course content?*
- *Web Accessibility Question 43: On average, how much content and what type of content do password-protected course websites of elementary or secondary schools contain? Is there content posted by students or parents? Should content posted by students or parents be required to be accessible and, if so, how long would it take an elementary or secondary school to make it accessible?*
- *Web Accessibility Question 44: How long would it take to make class- or course content available on a recipient's password-protected or otherwise secured website for the particular class or course accessible, and does this vary based on the type of course? Do parents and students need access to class or course content before the first day of class? How much delay in accessing online course content can a student reasonably overcome in order to have an equal opportunity to succeed in a course, and does the answer change depending on the point in the academic term that the delay occurs?*
- *Web Accessibility Question 45: To what extent do elementary or secondary schools use or offer students or parents mobile apps to enable access to password-protected course content? Should the Department apply the same exceptions and limitations to the exceptions under § 84.85(f) and (f)(1)–(4), respectively, to mobile apps?*
- *Web Accessibility Question 46: Should the Department consider an alternative approach, such as requiring that all newly posted course content be made accessible on an expedited time frame, while adopting a later compliance date for remediating existing content?*

Individualized, Password-Protected Documents

In proposed § 84.85(g), the Department is considering an exception to the accessibility requirements of § 84.84 for web-based ''conventional electronic documents that are: (1) about a specific individual, their property, or their account; and (2) password-protected or otherwise secured.''

Many recipients use the web to provide access to digital versions of documents for their customers, constituents, and other members of the public. For example, many hospitals offer a virtual platform where health care providers can send digital versions of test results and scanned documents to their patients. The Department anticipates that a recipient could have many such documents. The Department also anticipates that making conventional electronic documents accessible in this context may be difficult for recipients, and that in many instances, the individuals who are entitled to view a particular individualized document will not need an accessible version. However, some recipients might be able to make some types of documents accessible relatively easily after they make the template they use to generate these individualized documents accessible. To help better understand whether these assumptions are accurate, the Department asks questions for public comment below about what kinds of individualized, conventional electronic documents recipients make available, how recipients make these documents available to individuals, and what experiences individuals have had in accessing these documents.

This proposed exception is expected to reduce the burdens on recipients. The Department expects that making such documents accessible for every individual, regardless of whether they need such access, could be too burdensome and would not deliver the same benefit to the public as a whole as if the recipient were to focus on making other types of web content accessible. The Department expects that it would generally be more impactful for recipients to focus resources on making documents accessible for those

individuals who actually need the documents to be accessible. It is the Department's understanding that making conventional electronic documents accessible is generally a more time and resource intensive process than making other types of web content accessible. As discussed below, recipients must still provide accessible versions of individualized, password-protected conventional electronic documents in a timely manner when those documents pertain to individuals with disabilities. This approach is consistent with the broader section 504 regulatory framework. For example, hospitals are not required to provide accessible bills to all customers. Instead, hospitals need only provide accessible bills to those customers who need them because of a disability.

This exception is limited to ''conventional electronic documents'' as defined in § 84.10. This exception would, therefore, not apply in a case where a recipient makes individualized information available in formats other than a conventional electronic document. For example, if a hospital makes individualized bills available on a password-protected web platform as HTML content (rather than a PDF), that content would not be subject to this exception. Such bills, therefore, would need to be made accessible in accordance with proposed § 84.84. On the other hand, if a recipient makes individualized bills available on a password-protected web platform in PDF form, that content would be excepted from the accessibility requirements of § 84.84, subject to the limitation discussed in further detail below.

This exception also only applies when the content is individualized for a specific person or their property or account. Examples of individualized documents include medical records or notes about a specific patient or receipts for purchases. Content that is broadly applicable or otherwise for the general public (*i.e.,* not individualized) is not subject to this exception. For instance, a PDF notice that explains an upcoming rate increase for all utility customers and is not addressed to a specific customer would not be subject to this exception. Such a general notice would not be subject to this exception even if it were attached to or sent with an individualized letter, like a bill, that is addressed to a specific customer.

Finally, this exception applies only to password-protected or otherwise secured content. Content may be otherwise secured if it requires some process of authentication or login to access the content. Unless subject to another exception, conventional electronic documents that are on a recipient's general, public web platform would not be excepted.

This proposed exception for individualized, password-protected conventional electronic documents has certain limitations. While the exception is meant to alleviate the burden on recipients of making all individualized, password-protected or otherwise secured conventional electronic documents generally accessible, people with disabilities must still be able to access information from documents that pertain to them. An accessible version of these documents must be provided in a timely manner.[316] A recipient might also need to make reasonable modifications to ensure that a person with a disability has equal access to its programs or activities.[317] For example, if a person with a disability requests access to an inaccessible bill from a county hospital, the hospital may need to extend the payment deadline and waive any late fees if the hospital does not provide the bill in an accessible format in sufficient time for the person to review the bill before payment is due.

As in other situations involving a recipient's effective communication obligations—for example, when providing an American Sign Language interpreter—this exception and its accompanying limitation would also apply to the companion of the person receiving the recipient's services in appropriate circumstances.[318]

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 47: What kinds of individualized, conventional electronic documents do recipients make available and how are they made available (e.g., on websites or mobile apps)? How difficult would it be to make such documents accessible? How do people with disabilities currently access such documents?*
- *Web Accessibility Question 48: Do recipients have an adequate system for receiving notification that an individual with a disability requires access to an individualized, password-protected conventional electronic document? What kinds of burdens do these notification systems place on individuals with disabilities and how easy are these systems to access? Should the Department consider requiring a particular system for notification or a particular process or timeline that recipients must follow when they are on notice that an individual with a disability requires access to such a document?*
- *Web Accessibility Question 49: What would the impact of this exception be on people with disabilities?*
- *Web Accessibility Question 50: Which provisions of this rule, including any exceptions (e.g., individualized, password-protected conventional electronic documents; content posted by a third party), should apply to mobile apps?*

§ 84.86 Conforming Alternate Versions

Generally, to meet the WCAG 2.1 standard, a web page must satisfy one of the defined levels of conformance—in the case of this proposed rule, Level AA.[319] However, WCAG 2.1 allows for the creation of a ''conforming alternate version,'' a separate web page that is accessible, up-to-date, contains the same information and functionality as the inaccessible web page, and can be reached via a conforming page or an accessibility-supported mechanism.[320] The ostensible purpose of a ''conforming alternate version'' is to provide individuals with relevant disabilities access to the information and functionality provided to individuals without relevant disabilities, albeit via a separate vehicle.

Having direct access to an accessible web page provides the best user experience for many individuals with disabilities, and it may be difficult for recipients to reliably maintain conforming alternate versions, which must be kept up-to-date. Accordingly, the W3C® explains that providing a conforming alternate version of a web page is intended to be a ''fallback option for conformance to WCAG and the preferred method of conformance is to make all content directly accessible.'' [321] However, WCAG 2.1 does not explicitly limit the circumstances under which a recipient may choose to create a conforming alternate version of a web

[316] *See* proposed 45 CFR 84.77(b)(2); 28 CFR 35.160(b)(2).

[317] *See* proposed 45 CFR 84.68(b)(7).

[318] *See* proposed 45 CFR 84.77; ADA Requirements: Effective Communication, U.S. Dep't of Just. (updated Feb. 28, 2020), *https://www.ada.gov/effective-comm.htm* [*https://perma.cc/W9YR-VPBP*].

[319] *See* W3C®, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), *https://www.w3.org/TR/WCAG21/#cc1* [*https://perma.cc/ZL6N-VQX4*].

[320] *See* W3C®, *Web Content Accessibility Guidelines 2.1, Conforming Alternate Version* (June 5, 2018), *https://www.w3.org/TR/WCAG21/#dfn-conforming-alternate-version* [*https://perma.cc/5NJ6-UZPV*].

[321] *See* W3C®, *Understanding WCAG 2.0* (Oct. 7, 2016), *https://www.w3.org/TR/UNDERSTANDING-WCAG20/conformance.html#uc-conforming-alt-versions-head* [*https://perma.cc/DV5L-RJUG*].

page instead of making the web page directly accessible.

The Department is concerned that WCAG 2.1 can be interpreted to permit the development of two separate websites—one for individuals with relevant disabilities and another for individuals without relevant disabilities—even when doing so is unnecessary and when users with disabilities would have a better experience using the main web page. This segregated approach is concerning and appears inconsistent with section 504's core principles of inclusion and integration.[322] The Department is also concerned that the creation of separate websites for individuals with disabilities may, in practice, result in unequal access to information and functionality. However, as the W3C® explains, certain limited circumstances may warrant the use of conforming alternate versions of web pages. For example, a conforming alternate version of a web page may be necessary when a new, emerging technology is used on a web page, but the technology is not yet capable of being made accessible, or when a website owner is legally prohibited from modifying the web content.[323]

Due to the concerns about user experience, segregation of users with disabilities, unequal access to information, and maintenance burdens discussed above, the Department is proposing to adopt a slightly different approach to ''conforming alternate versions'' than that provided under WCAG 2.1. Instead of permitting entities to adopt ''conforming alternate versions'' whenever they believe this is appropriate, proposed § 84.86 makes it clear that use of conforming alternate versions of websites and web content to comply with the Department's proposed requirements in § 84.84 is permissible only where it is not possible to make websites and web content directly accessible due to technical limitations (*e.g.,* technology is not yet capable of being made accessible) or legal limitations (*e.g.,* web content is protected by copyright). Conforming alternate versions should be used rarely—when it is truly not possible to make the content accessible for reasons beyond the recipient's control. For example, a conforming alternate version would not be permissible due to technical limitations just because a recipient's web developer lacked the knowledge or training needed to make content accessible. By contrast, the recipient could use a conforming alternate version if its website included a new type of technology that it is not yet possible to make accessible, such as a specific kind of immersive virtual reality environment. Similarly, a recipient would not be permitted to claim a legal limitation because its general counsel failed to approve contracts for a web developer with accessibility experience. Instead, a legal limitation would apply when the inaccessible content itself could not be modified for legal reasons specific to that content, such as lacking the right to alter the content or needing to maintain the content as it existed at a particular time due to pending litigation. The Department believes this approach is appropriate because it ensures that, whenever possible, people with disabilities have access to the same web content that is available to people without disabilities. However, proposed § 84.86 does not prohibit recipients from providing alternate versions of web pages *in addition* to their accessible main web page to possibly provide users with certain types of disabilities a better experience.

In addition to allowing conforming alternate versions to be used where it is not possible to make websites and web content directly accessible due to technical or legal limitations, this proposed rulemaking also incorporates general limitations if recipients can demonstrate that full compliance with § 84.84 would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens.[324] If an action would result in such an alteration or such burdens, a recipient shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the recipient to the maximum extent possible.[325] One way in which recipients could fulfill their obligation to provide the benefits or services to the maximum extent possible, in the rare instance when they can demonstrate that full compliance would result in a fundamental alteration or undue burdens, is through creating conforming alternate versions.

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

- *Web Accessibility Question 51: Would allowing conforming alternate versions due to technical or legal limitations result in individuals with disabilities receiving unequal access to a recipient's programs and activities?*

§ 84.87 Equivalent Facilitation

Proposed § 84.87 provides that nothing prevents a recipient from using designs, methods, or techniques as alternatives to those prescribed in the proposed regulation, provided that such alternatives result in substantially equivalent or greater accessibility and usability. The 1991 and 2010 ADA Standards for Accessible Design both contain an equivalent facilitation provision.[326] However, for purposes of proposed subpart I, the reason for allowing for equivalent facilitation is to encourage flexibility and innovation by recipients while still ensuring equal or greater access to web and mobile content. Especially in light of the rapid pace at which technology changes, this proposed provision is intended to clarify that recipients can use methods or techniques that provide equal or greater accessibility than this proposed rule would require. For example, if a recipient wanted to conform its website or mobile app to WCAG 2.1 Level AAA—which includes all the Level AA requirements plus some additional requirements for even greater accessibility—this provision makes clear that the recipient would be in compliance with this rule. A recipient could also choose to comply with this rule by conforming its website to WCAG 2.2 or WCAG 3.0, so long as the version and conformance level of those guidelines that the recipient selects includes all of the WCAG 2.1 Level AA requirements. The Department believes that this proposed provision offers needed flexibility for entities to provide usability and accessibility that meet or exceed what this rule would require as technology continues to develop. The responsibility for demonstrating equivalent facilitation rests with the recipient.

§ 84.88 Duties

Section 84.88 sets forth the general limitations on the obligations under subpart I. Proposed § 84.88(a) provides that in meeting the accessibility requirements set out in this subpart, a recipient is not required to take any action that would result in a

[322] *See, e.g.,* 45 CFR 84.4(b)(2)(requiring that recipients administer programs and activities in ''the most integrated setting appropriate''); proposed 45 CFR 84.68(d).

[323] *See* W3C®, *Understanding WCAG 2.0* (Oct. 7, 2016), *https://www.w3.org/TR/UNDERSTANDING-WCAG20/conformance.html#uc-conforming-alt-versions-head* [*https://perma.cc/DV5L-RJUG*].

[324] *See* proposed § 84.88.

[325] *See* proposed § 84.88(a).

[326] *See* 28 CFR pt. 36, app. D, at 1000 (1991); 36 CFR pt. 1191, app. B at 329.

fundamental alteration in the nature of its programs or activities or undue financial and administrative burdens. These proposed limitations on a recipient's duty to comply with the proposed regulatory provisions mirror the fundamental alteration and undue burdens compliance limitations proposed in this rulemaking in § 84.22(a)(2) (program accessibility), § 84.81 (effective communication), § 84.92(e) (accessible medical equipment), and the fundamental alteration compliance limitation in § 84.68(b)(7)(i) (reasonable modifications in policies, practices, or procedures). These fundamental alteration and undue burdens compliance limitations are also currently provided in the title II regulation in 28 CFR 35.150(a)(3) (program accessibility) and 35.164 (effective communication), and the fundamental alteration compliance limitation is currently provided in the title II regulation in 28 CFR 35.130(b)(7) (reasonable modifications in policies, practices, or procedures).

Generally, the Department believes it would not constitute a fundamental alteration of a recipient's programs or activities to modify web content or mobile apps to make them accessible, though the Department seeks the public's input on this view. Moreover, like the fundamental alteration and undue burdens limitations in the title II regulation referenced above, proposed § 84.88(a) does not relieve a recipient of all obligations to individuals with disabilities. Although a recipient under this proposed rule is not required to take actions that would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens, it nevertheless must comply with the requirements of this subpart to the extent that compliance does not result in a fundamental alteration or undue financial and administrative burdens. For instance, a recipient might determine that full Level AA compliance would result in a fundamental alteration or undue financial and administrative burdens. However, this same recipient must then determine whether it can take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the recipient to the maximum extent possible. To the extent that the recipient can, it must do so. This may include the recipient bringing its web content into compliance with some of the WCAG 2.1 Level A or Level AA success criteria.

It is the Department's view that most entities that choose to assert a claim that full compliance with the proposed web or mobile app accessibility requirements would result in undue financial and administrative burdens will be able to attain at least partial compliance. The Department believes that there are many steps a recipient can take to comply with WCAG 2.1 that should not result in an undue financial and administrative burdens, depending on the particular circumstances.

In determining whether an action would result in undue financial and administrative burdens, all of a recipient's resources available for use in the funding and operation of the program or activity should be considered. The burden of proving that compliance with proposed § 84.88 would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the recipient. The Department of Justice first promulgated this language in its title II regulation in 1991 and has consistently maintained that the decision that compliance would result in a fundamental alteration or impose undue burdens must be made by the head of the recipient or their designee, and must be memorialized with a written statement of the reasons for reaching that conclusion.[327] The Department is adopting this language in its proposed section 504 rule to maintain consistency between the ADA and section 504 and to maintain continuity for its recipients, most of whom are also covered by the ADA. The Department recognizes the difficulty recipients have in identifying the official responsible for this determination, given the variety of organizational structures within recipients and their components.[328] Thus, the Department intends to follow the approach that the determination must be made by a high level official, no lower than a major component head, that has been designated by the head of the recipient and has budgetary authority and responsibility for making spending decisions.[329] Where a recipient cannot bring web content or a mobile app into compliance without a fundamental alteration or undue burdens, it must take other steps to ensure that individuals with disabilities receive the benefits or services provided by the recipient to the maximum extent possible.

Once a recipient has complied with the web or mobile app accessibility requirements set forth in subpart I, it is not required to make further modifications to its web or mobile app content to accommodate an individual who is still unable to access, or does not have equal access to, the web or mobile app content due to their disability. Compliance with these web and mobile accessibility requirements does not remove covered entities' obligations as employers, with respect to job applicants and employees, under Title I of the ADA to not discriminate against qualified individuals on the basis of disability in regard to job application procedures; the hiring, advancement, or discharge of employees; employee compensation; job training; or other terms, conditions, and privileges of employment. These obligations include making reasonable accommodation to the known physical or mental limitations of applicants or employees, absent undue hardship. The Department realizes that the proposed rule is not going to meet the needs of and provide access to every individual with a disability, but believes that setting a consistent and enforceable web accessibility standard that meets the needs of a majority of individuals with disabilities will provide greater predictability for recipients, as well as added assurance of accessibility for individuals with disabilities.

Fully complying with the web and mobile app accessibility requirements set forth in subpart I means that a recipient is not required to make any further modifications to its web or mobile app content. However, if an individual with a disability, on the basis of disability, cannot access or does not have equal access to a program or activity through a recipient's web content or mobile app that conforms to WCAG 2.1 Level AA, the recipient still has an obligation to provide the individual an alternative method of access to that program or activity unless the recipient can demonstrate that alternative methods of access would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens.[330] Thus, just because a recipient is in full compliance with this rule's web or mobile app accessibility standard does not mean it has met all of its obligations under section 504 or other applicable laws. Even though no further changes to a recipient's web or mobile app content are required by section 504, a recipient

[327] 28 CFR 35.150(a)(3), 35.164.

[328] *See* similar determination by the Department of Justice. 28 CFR pt. 35, app. B, at 708 (2022).

[329] *See id.*

[330] *See, e.g.,* proposed 45 CFR 84.22(a)(2).

must still take other steps necessary to ensure that an individual with a disability who, on the basis of disability, is unable to access or does not have equal access to the program or activity provided by the recipient through its web content or mobile app can obtain access through other effective means. The recipient must still satisfy its general obligations to provide effective communication, reasonable modifications, and an equal opportunity to participate in or benefit from the entity's services using methods other than its website or mobile app.[331] Of course, a recipient may also choose to further modify its web or mobile app content to make that content more accessible or usable than this subpart requires.

The recipient must determine on a case-by-case basis how best to accommodate those individuals who cannot access the program or activity provided through the recipient's fully compliant web content or mobile app. A recipient should refer to 45 CFR 84.77 (effective communication) to determine its obligations to provide individuals with disabilities with the appropriate auxiliary aids and services necessary to afford them an equal opportunity to participate in, and enjoy the benefits of, the recipient's program or activity. A recipient should refer to 45 CFR 84.68(b)(7) (reasonable modifications) to determine its obligations to provide reasonable modifications in policies, practices, or procedures to avoid discrimination on the basis of disability. It is helpful to provide individuals with disabilities with information about how to obtain the modifications or auxiliary aids and services they may need. The Department therefore strongly recommends that the recipient provide notice to the public on how an individual who cannot use the web content or mobile app because of a disability can request other means of effective communication or reasonable modifications in order to access the recipient's programs or activities that are being provided through the web content or mobile app. The Department also strongly recommends that the recipient provide an accessibility statement that tells the public about how to bring web or mobile app accessibility problems to the recipient's attention, and that recipients consider developing and implementing a procedure for reviewing and addressing any such issues raised. For example, a recipient is encouraged to provide an email address, accessible link, accessible web page, or other accessible means of contacting the recipient to provide information about issues individuals with disabilities may encounter accessing web or mobile app content or to request assistance.[332] Providing this information will help recipients to ensure that they are satisfying their obligations to provide equal access, effective communication, and reasonable modifications.

Measuring Compliance

As discussed above, the Department is proposing to adopt specific standards for recipients to use to ensure that their web content and mobile apps are accessible to individuals with disabilities. Proposed § 84.84 requires recipients to ensure that any web content and mobile apps that they make available to members of the public or use to offer programs and activities to members of the public are readily accessible to and usable by individuals with disabilities. Proposed § 84.84(b) sets forth the specific technical requirements in WCAG 2.1 Level AA with which recipients must conform unless compliance results in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens. Now that the Department is proposing requiring recipients to conform with a specific technical standard for web accessibility, it seeks to craft a framework for determining when a recipient has complied with that standard. The framework will ensure the full and equal access to which individuals with disabilities are entitled, while setting forth obligations that will be achievable for recipients.

1. Existing Approaches To Defining and Measuring Compliance

a. Federal Approaches

The Department is aware of two Federal agencies that have implemented requirements for complying with technical standards for web accessibility. Each agency has taken a different approach to defining what it means to comply with its regulation. As discussed above, for Federal agency websites covered by Section 508, the Access Board requires conformance with WCAG 2.0 Level A and Level AA.[333] In contrast, in its regulation on accessibility of air carrier websites, the Department of Transportation took a tiered approach that did not require all web content to conform to a technical standard before the first compliance date.[334] Instead, the Department of Transportation required those web pages associated with ''core air travel services and information'' to conform to a technical standard first, while other types of content could come into conformance later.[335] The Department of Transportation also required air carriers to consult with members of the disability community to test, and obtain feedback about, the usability of their websites.[336]

b. State Governments' Approaches

Within the United States, different public entities have taken different approaches to measuring compliance with a technical standard under State laws. For example, Florida,[337] Illinois,[338] and Massachusetts[339] require conformance, without specifying how compliance will be measured or how recipients can demonstrate compliance with this requirement.[340] California requires the director of each State agency to certify compliance with technical standards and post a certification form on the agency's website.[341] California also provides assessment checklists for its agencies and guidelines for sampling and testing, including recommending that agencies use analytics data to conduct thorough testing on frequently used pages.[342] Minnesota requires compliance with a technical standard, provides accessibility courses and other resources, and notes the importance of both automated and manual testing; it also states that ''[f]ew systems are completely accessible,'' and that ''[t]he goal is continuous improvement.''[343]

[331] *See* 45 CFR 84.4, redesignated as 84.68; proposed 84.68(b)(7); proposed 84.77.

[332] *See* W3C®, *Developing an Accessibility Statement* (Mar. 11, 2021), *https://www.w3.org/WAI/planning/statements/* [*https://perma.cc/85WU-JTJ6*].

[333] 36 CFR 1194.1; *id.* part 1194, app. A (E205.4).

[334] 14 CFR 382.43(c)(1).

[335] *Id.*

[336] 14 CFR 382.43(c)(2).

[337] Fla. Stat. 282.603 (2023).

[338] 30 Ill. Comp. Stat. 587 (2023); *Illinois Information Technology Accessibility Act* (Mar. 18, 2022), *https://www.dhs.state.il.us/page.aspx?item=32765*.

[339] Commonwealth of Massachusetts, *Enterprise Information Technology Accessibility Policy* (July 28, 2021), *https://www.mass.gov/policy-advisory/enterprise-information-technology-accessibility-policy* [*https://perma.cc/8293-HXUA*].

[340] Fla. Stat. § 282.603 (2021); *Illinois Information Technology Accessibility Act* (Mar. 18, 2022), *https://www.dhs.state.il.us/page.aspx?item=32765; Web Accessibility Standards* (Jan. 20, 2005), *https://www.mass.gov/guides/web-accessibility-standards* [*https://perma.cc/MTG3-94PR*].

[341] Cal. Gov't Code 11546.7.

[342] Department of Rehabilitation, *Website Accessibility Requirements and Assessment Checklists, https://www.dor.ca.gov/Home/WebRequirementsAndAssessmentChecklists* [*https://perma.cc/JAS9-Q343*].

[343] Minnesota IT Services, *Guidelines for Accessibility and Usability of Information*

Continued

Texas law requires state agencies to, among other steps, comply with a technical standard, conduct tests with one or more accessibility validation tools, establish an accessibility policy that includes criteria for compliance monitoring and a plan for remediation of noncompliant items, and establish goals and progress measurements for accessibility.[344] Texas has also developed an automated accessibility scanning tool and offers courses on web accessibility.[345]

c. Other Approaches To Defining and Measuring Compliance

The Department understands that businesses open to the public, which are subject to title III of the ADA, have taken different approaches to web accessibility. These approaches may include collecting feedback from users with disabilities about inaccessible websites or mobile apps, or relying on external consultants to conduct periodic testing and remediation. Other businesses may have developed detailed internal policies and practices that require comprehensive automated and manual testing, including testing by people with disabilities, on a regular basis throughout their digital content development and quality control processes. Some businesses have also developed policies that include timelines for remediation of any accessibility barriers; these policies may establish different remediation time frames for different types of barriers.

2. Challenges of Defining and Measuring Compliance With This Rule

The Department recognizes that it must move forward with care, weighing the interests of all stakeholders, so that as accessibility for individuals with disabilities is improved, innovation in the use of the web or mobile apps by public entities is not hampered. The Department appreciates that the dynamic nature of web content and mobile apps presents unique challenges in measuring compliance. For example, as discussed further below, this type of content can change frequently and assessment of conformance can be complex or subjective. Therefore, the Department is seeking public input on issues concerning how compliance should be measured, which the Department plans to address in its final rule.

The Department is concerned that the type of compliance measures it currently uses in the ADA and other portions of section 504, such as the one used to assess compliance with the ADA Standards, may not be practical in the web or mobile app context. Specifying what it means to comply with a technical standard for web accessibility is unlike the physical accessibility required by the UFAS or the 2010 ADA Design Standards. While section 504 physical accessibility standards can be objectively and reliably assessed with one set of tools, different automated testing tools may provide different assessments of the same website's accessibility. For example, using different web browsers with different testing tools or assistive technology can yield different results. Assessments of a website's or mobile app's accessibility may change frequently over time as the web content or mobile apps change. Automated testing tools also may report purported accessibility errors inaccurately. For example, an automated testing tool may report an error because an image lacks alt text, but WCAG does not require such alternative text if the content is purely decoration or used for formatting.[346] These tools may also provide an incomplete assessment of a website's accessibility because automated tools cannot assess conformance with certain WCAG success criteria, such as whether color is being used as the only visual means of conveying information or whether all functionality of the content is operable through a keyboard interface.[347] Furthermore, the Department understands that a person's experiences of web or mobile app accessibility may vary depending on what assistive technology or other types of hardware or software they are using. Accordingly, the Department is considering what the appropriate measure for determining compliance with the web and mobile app accessibility requirements should be.

While the Department understands the challenges that full conformance with WCAG 2.1 Level AA at all times may pose for some recipients, the Department also appreciates the serious impact that a failure to conform with WCAG 2.1 Level AA can have on people with disabilities. For example, if a person who has limited manual dexterity and uses keyboard navigation is trying to apply for public benefits, and the ''submit'' button on the form is not operable using the keyboard, that person will not be able to apply for benefits independently for benefits online, even if the rest of the website is fully accessible. A person who is blind and uses a screen reader may not be able to make an appointment at a county health clinic if an element of the clinic's appointment calendar is not coded properly. Nearly all of a recipient's web content could conform with the WCAG 2.1 Level AA success criteria, but one instance of nonconformance could still prevent someone from accessing services on the website. People with disabilities must be able to access the many important government programs and activities that are offered through web content and mobile apps on equal terms, without sacrificing their privacy, dignity, or independence. The Department's concern about the many barriers to full and equal participation in civic life that inaccessible web content can pose for people with disabilities is an important motivating factor behind the Department's decision to propose requiring compliance with a technical standard. By clarifying what compliance with a technical standard means, the Department seeks to enhance the impact this requirement will have on the daily lives of people with disabilities by helping recipients to understand their obligations, thereby increasing compliance.

The Department believes that a more nuanced definition of compliance might be appropriate because some instances of nonconformance with WCAG success criteria may not impede access to the programs or activities offered through a public entity's web content or mobile app. For example, if the contrast between the text and background colors used for application instructions deviates by a few hundredths from the color contrast ratio required by WCAG 2.1 Level AA, most people with low vision will likely still be able to access those instructions without difficulty. However, the web content would be out of conformance with WCAG 2.1 Level AA. If the Department does not establish a more detailed compliance framework, a person with a disability would have a valid basis for filing a complaint with the Department or in Federal court about the scenario. This could expose recipients to extensive litigation risk, while potentially generating more complaints than the Department or the

Technology Standard (Apr. 17, 2018), *https://mn.gov/mnit/assets/accessibility-guidelines-2018_tcm38-336072.pdf* [*https://perma.cc/Q9P5-NGMT*].

[344] 1 Tex. Admin. Code 206.50, 213.21.

[345] Texas Department of Information Resources, *EIR Accessibility Tools & Training, https://dir.texas.gov/electronic-information-resources-eir-accessibility/eir-accessibility-tools-training* [*https://perma.cc/A5LC-ZTST*].

[346] *See* W3C®, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), *http://www.w3.org/TR/WCAG21/*[*https://perma.cc/UB8A-GG2F*].

[347] *See* W3C®, *Web Content Accessibility Guidelines 2.1, Use of Color* (June 5, 2018), *https://www.w3.org/TR/WCAG21/#use-of-color* [*https://perma.cc/R3VC-WZMY*]; *id.* at *Keyboard Accessible http://www.w3.org/TR/WCAG21/#keyboard-accessible* [*https://perma.cc/5A3C-9KK2*].

courts have capacity to resolve, and without improving access for people with disabilities.

Some may argue that the same risk of allegedly unjustified enforcement action also exists for some provisions of section 504. Yet, the Department believes that a recipient's website may be more likely to be out of full conformance with WCAG 2.1 Level AA than its buildings are to be out of compliance with the design standards required by Federal law, like UFAS or the 2010 ADA Standards. Sustained, perfect conformance with WCAG 2.1 Level AA may be more difficult to achieve on a website that is updated several times a week and includes thousands of pages of content than compliance with the ADA Standards is in a town hall that is renovated once a decade. The Department also believes that slight deviations from WCAG 2.1 Level AA may be more likely to occur without having a detrimental impact on access than is the case with the ADA Standards. Additionally, it may be easier for an aggrieved individual to find evidence of nonconformance with WCAG 2.1 Level AA than noncompliance with the ADA Standards, given the availability of many free testing tools and the fact that public entities' websites can be accessed from almost anywhere. The Department welcomes public comment on the accuracy of all of these assumptions, as well as about whether it is appropriate to consider the impact of nonconformance with a technical standard when evaluating compliance with the proposed rule.

3. Possible Approaches To Defining and Measuring Compliance With This Rule

The Department is considering a range of different approaches to measuring compliance with this proposed rule. These approaches involve linking noncompliance with a technical standard to:

(a) A numerical percentage of compliance with a technical standard;

(b) Situations that impact the ability to have equal access to the website or mobile app;

(c) The use of robust policies and practices for accessibility feedback, testing, and remediation; or

(d) Organizational maturity.

Numerical Percentage

The Department is considering whether to require a numerical percentage of conformance with a technical standard, which could be 100 percent or less. This percentage could be a simple numerical calculation based on the number of instances of nonconformance across a website or mobile app, or the percentage could be calculated by weighting different instances of nonconformance differently. Weighting could be based on factors like the importance of the content; the frequency with which the content is accessed; the severity of the impact of nonconformance on a person's ability to access the services, programs, or activities provided on the website; or some other formula.

However, the Department does not believe that a percentage-based approach would achieve the purposes of this rule or be feasible to implement. First, a percentage-based approach seems unlikely to ensure access for people with disabilities. Even if the Department were to require that 95 percent or 99 percent of an entity's web content or mobile apps conform with WCAG 2.1 (or that all content or apps conform to 95 percent or 99 percent of the WCAG 2.1 success criteria), the relatively small percentage that does not conform could still block an individual with a disability from accessing a program or activity.

A percentage-based standard is also likely to be difficult to implement. If the Department adopts a specific formula for calculating whether a certain percentage-based compliance threshold has been met, it could be challenging for members of the public and recipients to determine whether web content and mobile apps comply with this rule. Calculations required to evaluate compliance could become complex, particularly if the Department were to adopt a weighted or tiered approach that requires certain types of core content to be fully accessible, while allowing a lower percentage of accessibility for less important or less frequently accessed content. People with disabilities who are unable to use inaccessible parts of a website or mobile app may have particular difficulty calculating a compliance percentage, because it could be difficult, if not impossible, for them to correctly evaluate the percentage of a website or mobile app that is inaccessible if they do not have full access to the entire website or app. For these reasons, the Department currently is not inclined to adopt a percentage-based approach to measuring compliance, though we welcome public comment on ways that such an approach could be implemented successfully.

Finding Noncompliance Where Nonconformance With a Standard Impacts the Ability To Have Equal Access

Another possible approach would be to limit an entity's compliance obligations where nonconformance with a technical standard does not impact a person's ability to have equal access to programs or activities offered on a recipient's website or mobile app. For example, the Department could specify that nonconformance with WCAG 2.1 Level AA does not constitute noncompliance with this part if that nonconformance does not prevent a person with a disability from accessing or acquiring the same information, engaging in the same interactions, performing the same transactions, and enjoying the same programs and activities that the recipient offers visitors to its website without relevant disabilities, with substantially equivalent ease of use. This approach would provide equal access to people with disabilities, while limiting the conformance obligations of recipients where technical nonconformance with WCAG 2.1 Level AA does not affect access. If a recipient's compliance were to be challenged, in order to prevail, the recipient would need to demonstrate that, even though it was technically out of conformance with one or more of the WCAG 2.1 Level AA success criteria, the nonconformance had such a minimal impact that this provision applies, and the recipient has therefore met its obligations under the ADA despite nonconformance with WCAG 2.1.

The Department believes that this approach would have a limited impact on the experience of people with disabilities who are trying to use web content or mobile apps for two reasons. First, by its own terms, the provision would require a recipient to demonstrate that any nonconformance did not have a meaningful effect. Second, it is possible that few recipients will choose to rely on such a provision, because they would prefer to avoid assuming the risk inherent in this approach to compliance. A recipient may find it easier to conform to WCAG 2.1 Level AA in full so that it can depend on that clearly defined standard, instead of attempting to determine whether any nonconformance could be excused under this provision. Nonetheless, the Department believes some recipients may find such a provision useful because it would prevent them from facing the prospect of failing to comply with the ADA based on a minor technical error. The

Department seeks public comment on all of these assumptions.

The Department also believes such an approach may be logically consistent with the general nondiscrimination principles of Section 508, which require comparable access to information and data,[348] and of the ADA's implementing regulation, which require an equal opportunity to participate in and benefit from services.[349] The Department has heard support from the public for ensuring that people with disabilities have equal access to the same information and services as people without disabilities, with equivalent ease of use. The Department is therefore evaluating ways that it can incorporate this crucial principle into a final rule, while simultaneously ensuring that the compliance obligations imposed by the final rule will be attainable for public entities in practice.

Accessibility Feedback, Testing, and Remediation

Another approach the Department is considering is whether a recipient could demonstrate compliance with this part by affirmatively establishing and following certain robust policies and practices for accessibility feedback, testing, and remediation. The Department has not made any determinations about what policies and practices, if any, would be sufficient to demonstrate compliance, and the Department is seeking public comment on this issue. However, for illustrative purposes only, and to enable the public to better understand the general approach the Department is considering, assume that a recipient proactively tested its existing web and mobile app content for conformance with WCAG 2.1 Level AA using automated testing on a regular basis (*e.g.,* every 30 days), conducted user testing on a regular basis (*e.g.,* every 90 days), and tested any new web and mobile app content for conformance with WCAG 2.1 Level AA before that content was posted on its website or added to its mobile app. This recipient also remediated any nonconformance found in its existing web and mobile app content soon after the test (*e.g.,* within two weeks). A recipient that took these (or similar) steps on its own initiative could be deemed to have complied with its obligations under the section 504, even if a person with a disability encountered an access barrier or a particular automated testing report indicated nonconformance with WCAG 2.1 Level AA. The recipient would be able to rely on its existing, effectively working web and mobile app content accessibility testing and remediation program to demonstrate compliance with section 504. In a final rule, the Department could specify that nonconformance with WCAG 2.1 Level AA does not constitute noncompliance with this part if a recipient has established certain policies for testing the accessibility of web and mobile app content and remediating inaccessible content, and the entity can demonstrate that it follows those policies.

This approach would enable a recipient to remain in compliance with section 504 even if its website or mobile app is not in perfect conformance with WCAG 2.1 Level AA at all times, if the entity is addressing any nonconformance within a reasonable period of time. A new policy that a recipient established in response to a particular complaint, or a policy that an entity could not demonstrate that it has a practice of following, would not satisfy such a provision. The Department could craft requirements for such policies in many different ways, including by requiring more prompt remediation for nonconformance with a technical standard that has a more serious impact on access to programs and activities; providing more detail about what testing is sufficient (*e.g.,* both automated testing and manual testing, testing by users with certain types of disabilities); setting shorter or longer time frames for how often testing should occur; setting shorter or longer time frames for remediation; or establishing any number of additional criteria.

Organizational Maturity

The Department is also considering whether a recipient should be permitted to demonstrate compliance with this rule by showing organizational maturity—that the organization has a sufficiently robust program for web and mobile app accessibility. Organizational maturity models provide a framework for measuring how developed an organization's programs, policies, and practices are—either as a whole or on certain topics (*e.g.,* cybersecurity, user experience, project management, accessibility). The authors of one accessibility maturity model observe that it can be difficult to know what a successful digital accessibility program looks like, and they suggest that maturity models can help assess the proficiency of accessibility programs and a program's capacity to succeed.[350] Whereas accessibility conformance testing evaluates the accessibility of a particular website or mobile app at a specific point in time, organizational maturity evaluates whether a recipient has developed the infrastructure needed to produce accessible websites and mobile apps consistently.[351] For example, some outcomes that an organization at the highest level of accessibility maturity might demonstrate include integrating accessibility criteria into all procurement and contracting decisions, leveraging employees with disabilities to audit accessibility, and periodically evaluating the workforce to identify gaps in accessibility knowledge and training.[352]

A focus on organizational maturity would enable a recipient to demonstrate compliance with section 504 even if its website or mobile app is not in perfect conformance with WCAG 2.1 Level AA at all times, so long as the recipient can demonstrate sufficient maturity of its digital accessibility program, which would indicate its ability to quickly remedy any issues of nonconformance identified. The Department could define requirements for organizational maturity in many different ways, including by adopting an existing organizational maturity model in full, otherwise relying on existing organizational maturity models, establishing different categories of organizational maturity (*e.g.,* training, testing, feedback), or establishing different criteria for measuring organizational maturity levels in each category. The Department could also require a recipient to have maintained a certain level of organizational maturity across a certain number of categories for a specified period of time, or require a recipient to have improved its organizational maturity by a certain amount in a specified period of time.

The Department has several concerns about whether allowing recipients to demonstrate compliance with this rule through their organizational maturity will achieve the goals of this rulemaking. First, this approach may not provide sufficient accessibility for individuals with disabilities. It is not clear that when recipients make their accessibility programs more robust, that

[348] *See* 29 U.S.C. 794d(a)(1)(A).

[349] 28 CFR 35.130(b)(ii).

[350] *See* Level Access, *The Digital Accessibility Maturity Model: Introduction to DAMM, https://www.levelaccess.com/the-digital-accessibility-maturity-model-introduction-to-damm/,* [*https://perma.cc/6K38-FJZU*].

[351] *See* W3C®, *W3C Accessibility Maturity Model, About the W3C Accessibility Maturity Model* (Sept. 6, 2022), *https://www.w3.org/TR/maturity-model/* [*https://perma.cc/NB29-BDRN*].

[352] *See* W3C®, *W3C Accessibility Maturity Model, Ratings for Evaluation* (Sept. 6, 2022), *https://www.w3.org/TR/maturity-model/* [*https://perma.cc/W7DA-HM9Z*].

will necessarily result in websites and mobile apps that consistently conform to WCAG 2.1 Level AA. If the Department permits a lower level of organizational maturity (*e.g.,* level 4 out of 5) or requires the highest level of maturity in only some categories (*e.g.,* level 5 in training), this challenge may be particularly acute. Second, this approach may not provide sufficient predictability or certainty for recipients. Organizational maturity criteria may prove subjective and difficult to measure, so disputes about a recipient's assessments of its own maturity may arise. Third, an organizational maturity model may be too complex for the Department to define or for recipients to implement. Some existing models include as many as ten categories of accessibility, with five levels of maturity, and more than ten criteria for some levels.[353] Some of these criteria are also highly technical and may not be feasible for some recipients to understand or satisfy (*e.g.,* testing artifacts are actively updated and disseminated based on lessons learned from each group; accessibility testing artifacts required by teams are actively updated and maintained for form and ease of use).[354] Of course, a recipient that does not want to use an organizational maturity model would not need to do so; it could meet its obligations under the rule by conforming with WCAG 2.1 Level AA. But it is unclear whether this approach will benefit either people with disabilities or recipients. We seek public comment on whether the Department should adopt an approach to compliance that includes organizational maturity, and how such an approach could be implemented successfully.

The Department seeks public comment on how compliance with the web and mobile app accessibility requirements should be assessed or measured, including comments on these approaches to measuring compliance and any alternative approaches it should consider.

Please provide as much detail as possible and any applicable data, suggested alternative approaches or requirements, arguments, explanations, and examples in your responses to the following questions.

[353] Level Access, *Digital Accessibility Maturity Model (DAAM) Archives, https://www.levelaccess.com/category/damm/,* [*https://perma.cc/Z683-X9H5*].

[354] Level Access, *The Digital Accessibility Maturity Model: Dimension #7—Testing and Validation, https://www.levelaccess.com/the-digital-accessibility-maturity-model-dimension-7-testing-and-validation/,* [*https://perma.cc/VU93-3NH4*].

- *Web Accessibility Question 52: What should be considered sufficient evidence to support an allegation of noncompliance with a technical standard for purposes of enforcement action? For example, if a website or mobile app is noncompliant according to one testing methodology, or using one configuration of assistive technology, hardware, and software, is that sufficient?*
- *Web Accessibility Question 53: In evaluating compliance, do you think a recipient's policies and practices related to web and mobile app accessibility (e.g., accessibility feedback, testing, remediation) should be considered and, if so, how?*
- *Web Accessibility Question 54: If you think a recipient's policies and practices for receiving feedback on web and mobile app accessibility should be considered in assessing compliance, what specific policies and practices for feedback would be effective? What specific testing policies and practices would be effective? What specific testing policies and practices would be effective?*
- *Web Accessibility Question 55: Should a recipient be considered in compliance with this part if the recipient remediates web and mobile app accessibility errors within a certain period of time after the recipient learns of nonconformance through accessibility testing or feedback? If so, what time frame for remediation is reasonable?*
- *Web Accessibility Question 56: Should compliance with this rule be assessed differently for web content that existed on the recipient's website on the compliance date than for web content that is added after the compliance date?*
- *Web Accessibility Question 57: In evaluating compliance, do you think a recipient's organizational maturity related to web and mobile app accessibility should be considered and, if so, how? For example, what categories of accessibility should be measured? Would such an approach be useful for recipients?*
- *Web Accessibility Question 58: Should the Department consider limiting recipients' compliance obligations if nonconformance with a technical standard does not prevent a person with disabilities from accessing the programs and activities offered on the recipient's website or mobile app?*
- *Web Accessibility Question 59: When assessing compliance, should all instances of nonconformance be treated equally? Should nonconformance with certain WCAG 2.1 success criteria, or nonconformance in more frequently accessed content or more important core content, be given more weight when determining whether a website or mobile app meets a particular threshold for compliance?*
- *Web Accessibility Question 60: How should the Department address isolated or temporary noncompliance*[355] *with a technical standard and under what circumstances should noncompliance be considered isolated or temporary? How should the Department address noncompliance that is a result of technical difficulties, maintenance, updates, or repairs?*
- *Web Accessibility Question 61: Are there any local, state, Federal, international, or other laws or policies that provide a framework for measuring, evaluating, defining, or demonstrating compliance with web or mobile app accessibility requirements that the Department should consider adopting?*

Subpart J—Accessible Medical Equipment

Background

The Department is proposing adding a new subpart J to the existing section 504 regulation to address the lack of accessible medical equipment for people with disabilities. Disability advocates have long sought adoption of Federal accessibility standards for medical equipment—a step that will help endure nondiscriminatory access to critical, and potentially lifesaving, care for people with disabilities. In addition, regulated entities would benefit from specific technical guidance on how to fulfill their obligations and make their programs accessible. NCD has issued multiple reports recommending that HHS adopt the U.S. Access Board's Standards for Accessible Medical Diagnostic Equipment (MDE Standards).[356]

[355] See 28 CFR 35.133(b).

[356] *See, e.g.,* Nat'l Council on Disability, Enforceable Accessible Medical Equipment Standards: A Necessary Means to Address the Health Care Needs of People with Mobility Disabilities (2021), *https://ncd.gov/sites/default/files/Documents/NCD_Medical_Equipment_Report_508.pdf*; Nat'l Council on Disability, 2021 Progress Report: The Impact of Covid on People with Disabilities (2021), *https://ncd.gov/sites/default/files/NCD_COVID-19_Progress_Report_508.pdf* (''the lack of accessible examination and medical equipment in medical care means that people with disabilities, specifically people with mobility disabilities, receive substandard primary care compared to people without disabilities.''). NCD also contacted OCR directly with these concerns. *See, e.g.,* Advisory Letter from Nat'l Council on Disability to U.S. Dep't of Health & Hum. Servs (Aug. 27, 2019) (responding to Section 1557 Notice of Proposed Rulemaking, *https://ncd.gov/publications/2019/advisory-letter-1557* (''NCD is extremely concerned about the significant barriers to health care posed by the common lack of accessible medical diagnostic equipment (AMDE) in

Continued

OCR has recognized, in its enforcement, that section 504 requires covered medical practices to be accessible to persons with disabilities, including by utilizing accessible equipment.[357] OCR has investigated and resolved complaints of alleged discrimination resulting from the lack of accessible medical equipment. In addition, DOJ has investigated complaints involving the lack of accessible medical equipment and entered into numerous agreements with hospitals requiring the purchase, lease, or acquisition of accessible medical equipment.[358] And for years, the Department has received comments and letters, including public comments on versions of the Section 1557 rule, detailing the harm that people with disabilities face from the lack of accessible medical equipment and the expectation that the Department would address these barriers using its regulatory authority.[359]

The ACA added Section 510 to the Rehabilitation Act, directing the Access Board, in consultation with the Food and Drug Administration, to promulgate regulatory standards setting forth the minimum technical criteria for medical diagnostic equipment (MDE) used in (or in conjunction with) physicians' offices, clinics, emergency rooms, hospitals, and other medical settings.[360] These standards were needed to ensure that such equipment would be accessible to, and usable by, individuals with disabilities with accessibility needs, and allow independent entry to, use of, and exit from the equipment by such individuals to the maximum extent possible. However, the MDE Standards are not enforceable requirements for health care providers or equipment manufacturers until they are adopted by a Federal regulatory agency. In 2010, DOJ issued an Advance Notice of Proposed Rulemaking (ANPRM) on ''Nondiscrimination on the Basis of Disability by State and Local Governments and Places of Public Accommodation,'' [361] that identified the need for accessible medical equipment and furniture:

Without accessible medical examination tables, dental chairs, radiological diagnostic equipment, scales, and rehabilitation equipment, individuals with disabilities do not have an equal opportunity to receive medical care. Individuals with disabilities may be less likely to get routine preventative medical care than people without disabilities because of barriers to accessing that care.[362]

The ANPRM said that DOJ may propose regulations to ensure the accessibility of medical equipment that is used for treatment, rehabilitative, or other purposes. However, DOJ later formally withdrew the ANPRM.[363] In the Fall 2022 Unified Regulatory Agenda, DOJ restated its intent to publish an NPRM under title II of the ADA covering accessibility of MDE.[364]

In 2015, HHS issued an NPRM on Nondiscrimination in Health Programs and Activities under Section 1557 of the ACA prohibiting discrimination on various bases, including disability, in certain health programs and activities. In the NPRM, the Department stated that once the Access Board standards were promulgated, OCR ''intends to issue regulations or policies that require covered entities to conform to those standards.'' In 2017, the Access Board published the final rule on Standards for Accessible Medical Diagnostic Equipment.[365] However, when the Department issued a final rule on Section 1557 in 2020, the Department did not include the MDE Standards.[366] Similarly, the Department's 2022 Section 1557 NPRM does not require adherence to the MDE Standards, but requests comment on the MDE Standards.[367] The Department has determined that action on this issue is overdue and, as a result, is proposing this new subpart to the section 504 regulation. While some entities covered under Section 1557 may not be covered under section 504, and vice versa, ''health programs or activities'' under Section 1557 that are also ''programs or activities'' under section 504 receiving Federal financial assistance would be covered by this proposed subpart.[368]

The Department is coordinating its publication of this proposed rule with DOJ, which is concurrently publishing a proposed rule addressing the accessibility of medical diagnostic equipment under title II of the ADA. Given the relationship between section 504 and title II and Congressional intent

most health care settings. As HHS is aware, lack of AMDE contributes to a lack of preventive care that is necessary for early diagnosis of diseases and has been linked to poor health outcomes, poorer quality of life, and shorter length of life for people with disabilities. When a person cannot be properly examined because he cannot transfer onto an exam table or a diagnostic machine, non-diagnosis and misdiagnosis are likely. Disease and illness that may be treatable if caught early may become worse or incurable, resulting in high human and economic costs.'').

[357] *See, e.g.,* OCR Complaint 01–21–421198 (Complainant alleged that there was no method to receive an x-ray from the covered entity as their x-ray machine was not sufficiently adjustable to accommodate her in her wheelchair, nor was there a method to transfer her from her wheelchair to the x-ray machine. After investigation the complaint was closed with corrective action by the covered entity including asking for necessary accommodations during scheduling, training staff on transfers, and acquiring a Hoyer lift for transfers); OCR Complaint 02–18–302905 (Complainant alleged that she told covered entity she would require accessible equipment or a Hoyer lift to transfer for her OBGYN exam. Despite her request, there was no lift or accessible equipment present at her appointment. The complaint was resolved through the early complaint resolution process and corrective action.); OCR Complaint 01–16–248000 (Complainant alleged that covered entity told her she would have to bring her own means of transfer to appointments. Covered entity subsequently acquired a lift, trained employees on its use, and updated its nondiscrimination training.).

[358] U.S. Dep't of Justice, Justice Department Settles with Tufts Medical Center to Better Ensure Equal Access for Individuals with Disabilities (Feb. 28, 2020), *https://www.justice.gov/opa/pr/justice-department-settles-tufts-medical-center-better-ensure-equal-access-individuals*; U.S. Dep't of Justice, Justice Department Reaches ADA Settlement with Beth Israel Deaconess Medical Center (Oct. 22, 2009), *https://www.justice.gov/opa/pr/justice-department-reaches-ada-settlement-beth-israel-deaconess-medical-cente*r; U.S. Dep't of Justice, Washington Hospital Center Agreement Fact Sheet (Nov. 2, 2005), *https://www.ada.gov/whcfactsheet.htm, https://archive.ada.gov/whc.htm*; U.S. Dep't of Justice, Settlement Agreement between U.S. and Valley Radiologists Medical Group (Nov. 2, 2005), Settlement Agreement between the United States of America and Valley Radiologists Medical Group, Inc. (Nov. 2, 2005)Settlement Agreement between the United States of America and Valley Radiologists Medical Group, Inc. (Nov. 2, 2005) *https://archive.ada.gov/vri.htm.*

[359] Examples include, from the 2013 Request for Information, U.S. Dept. of Health and Human Serv., 78 FR 46558, the comments from the Disability Rights Education and Defense Fund, *available at https://www.regulations.gov/comment/HHS-OCR-2013-0007-0152*; Letter from Nat'l Council on Disability, to Alex Azar, Sec'y U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts. (July 31, 2020)(on need for accessible medical equipment rule), *https://ncd.gov/publications/2020/ncd-letter-hhs-secretary-azar-accessible-medical-equipment-rule; Lankford, Colleagues Press HHS to Prevent Discrimination of Individuals with Disabilities in Health Care, Lankford.senate.gov* (May 26, 2021), *https://www.lankford.senate.gov/news/press-releases/lankford-colleagues-press-hhs-to-prevent-discrimination-of-individuals-with-disabilities-in-health-care, https://www.lankford.senate.gov/news/press-releases/lankford-colleagues-press-hhs-to-prevent-discrimination-of-individuals-with-disabilities-in-health-care*; Letter from Autistic Self Advocacy Network et al., to Xavier Beccera, Sec'y, U.S. Dept. of Health and Human Servs. (Aug. 18, 2022) (urging the Department to provide clear standards for medical exam and diagnostic equipment); Letter from American Association of People with Disabilities et al., to Xavier Beccera, Sec'y, U.S. Dept. of Health and Human Servs. (Feb. 24, 2022) (requesting that the Department issue medical diagnostic equipment standards) *at https://www.aapd.com/wp-content/uploads/2022/03/HHS_Disability-Advocates-Memo-02.24.22.pdf.*

[360] 29 U.S.C. 794f.

[361] 75 FR 43452 (July 26, 2010).

[362] 75 FR 43452, 43455 (July 26, 2010).

[363] 82 FR 60932 (Dec. 26, 2017).

[364] Nondiscrimination on the Basis of Disability by State and Local Government, Public Accommodations, and Commercial Facilities: Medical Diagnostic Equipment, RIN 1190–AA78, *https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=1190-AA78* (last visited April. 2, 2023).

[365] 36 CFR 1195.

[366] 85 FR 37160 (June 19, 2020).

[367] 87 FR 47824, 47909 (Aug. 4, 2022).

[368] *See* 42 U.S.C. 18116(a).

that the two disability rights laws generally be interpreted consistently, both Departments are proceeding with rulemakings that provide the same requirements, one for recipients of Federal financial assistance from HHS and the other for public entities subject to title II of the ADA.

Overview of Access Board's MDE Standards

In implementing the mandate set forth in § 510 of the Rehabilitation Act to promulgate technical standards for accessible MDE, the Access Board received input from various stakeholders through a multi-year deliberative process and published the MDE Standards on January 9, 2017.[369] The Access Board divides the MDE Standards into four separate technical criteria based on how the equipment is used by the patient: (1) supine, prone, or side lying position; (2) seated position; (3) seated in a wheelchair; and (4) standing position. For each category of use, the MDE Standards provide for independent entry to, use of, and exit from the equipment by patients with disabilities to the maximum extent possible.

The technical requirements for MDE used by patients in the supine, prone, or side-lying position (such as examination tables) and MDE used by patients in the seated position (such as examination chairs) focus on ensuring that the patient can transfer from a mobility device onto the MDE. The other two categories set forth the necessary technical requirements to allow the patient to use the MDE while seated in their wheelchair (such as during a mammogram) or while standing (such as on a weight scale), respectively. The MDE Standards also include technical criteria for supports, including for transfer, standing, leg, head and back supports; instructions or other information communicated to patients through the equipment; and operable parts used by patients.

The Access Board's MDE Standards currently contain a temporary standard governing the minimum low height requirement for transfers from diagnostic equipment used by patients in a supine, prone, side-lying, or seated position. Specifically, the temporary standard provides for a minimum low transfer height requirement of 17 inches to 19 inches. The temporary nature of this standard was due to insufficient data on the extent to which, and how many, individuals would benefit from a transfer height lower than 19 inches. While this temporary standard is in effect, any low transfer height between 17 and 19 inches will meet the MDE Standards. Under a sunset provision, as extended, this low height range remains in effect only until January 10, 2025.[370]

On May 23, 2023, the Access Board issued an NPRM that proposes removing the sunset provisions in the Board's existing MDE Standards related to the low-height specifications for transfer surfaces, and replacing them with final specifications for the low transfer height of medical diagnostic equipment used in the supine, prone, side-lying, and seated positions.[371] Comments on this NPRM will be received until August 31, 2023.[372] After the Access Board analyzes the comments that it receives, the Board will issue a final, updated minimum low transfer height standard. After this new standard is adopted, the Department will consider issuing a supplemental rulemaking under section 504 to adopt the updated Standards.

Need for the Adoption of MDE Standards

The accessibility of MDE is essential to providing equal access to medical care to people with disabilities. In developing this proposed subpart, the Department considered the well-documented barriers individuals with disabilities face when accessing MDE, as well as the benefits for people with disabilities and health care workers alike of using accessible MDE.[373] The accessibility or inaccessibility of MDE impacts a substantial population—approximately 61 million adults live with a disability in the U.S., and 13.7% of those individuals have a mobility disability with serious difficulty walking or climbing stairs.[374] According to the U.S. Census Bureau, as of 2019, of the over 41 million people with disabilities in the U.S. living outside of institutional settings, mobility or ambulatory impairment is estimated to be the most common category of disability.[375] While not all individuals with a mobility disability with serious difficulty walking or climbing stairs, or individuals with mobility or ambulatory impairments will require accessible MDE, or benefit from it to the same extent, significant portions of these populations will benefit from accessible MDE. Further, a number of studies and reports have shown that individuals with disabilities may be less likely to get routine or preventative medical care than people without disabilities because of barriers to accessing appropriate care through MDE.[376] In one case, a patient with a disability remained in his wheelchair for the entirety of his annual physical exam, which consisted of his doctor listening to his heart and lungs underneath his clothing, looking inside his ears and throat, and then stating, ''I assume everything below the waist is fine.''[377] In another case, a patient with a disability could be transferred to a standard exam table, but extra staff was needed to keep her from falling off the table since it did not have any side rails. As a result of this and a number of other frightening experiences, the patient avoided going to the doctor unless she was very ill.[378] Multiple studies have been conducted that found individuals with certain disabilities face barriers to accessing MDE and are often denied accessible MDE by their health care providers.[379] Accessible MDE is thus often critical to an entity's ability to provide a person with a disability equal access to, and opportunities to benefit from, its health care programs and activities.

The Department has also consistently provided information to covered entities

[369] 82 FR 2810 (Jan. 9, 2017).

[370] *See* 87 6037 (Feb. 3, 2022).

[371] 88 FR 33056–33063 (May 23, 2023).

[372] 88 FR 50096 (Aug. 1, 2023).

[373] Nat'l Council on Disability, The Current State of Health Care for People with Disabilities (2009), *https://www.ncd.gov/publications/2009/Sept302009* (last accessed Aug. 17, 2022). *See, e.g.,* Dep't of Health & Human Servs., Administration for Community Living, Wheelchair-Accessible Medical Diagnostic Equipment: Cutting Edge Technology, Cost-Effective for Health Care Providers, and Consumer-Friendly (2020), *https://health.maryland.gov/bhm/DHIP/Documents/Medical%20Diagnostic%20Equipment%20Fact%20Sheet%20Final.pdf* (last accessed Aug. 17, 2022).

[374] U.S. Dep't of Health & Human Servs., Ctrs. for Disease Control, Disability Impacts All of Us, *https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html* (last visited Oct. 25, 2022).

[375] U.S. Census Bureau, American Community Survey, Disability Characteristics, *https://data.census.gov/cedsci/table?t=Disability&tid=ACSST1Y2019.S1810* (last visited Dec. 27, 2021).

[376] *See, e.g.,* Anna Marrocco and Helene J Krouse, ''Obstacles to preventive care for individuals with disability: Implications for nurse practitioners,'' J. Am. Ass'n of Nurse Pract. 2017 May;29(5):282–293 (2017) at 289; U.S. Dep't of Health & Human Servs., Off. of the Surgeon Gen., ''The Surgeon General's Call To Action To Improve the Health and Wellness of Persons with Disabilities,'' (2005), *available at https://www.ncbi.nlm.nih.gov/books/NBK44667/* (last visited Dec. 2, 2021); NCD Report at 14.

[377] Nat'l Council on Disability Enforceable Accessible Medical Equipment Standards at 15 (2021), *https://ncd.gov/sites/default/files/Documents/NCD_Medical_Equipment_Report_508.pdf.*

[378] *Id.* at 16–17.

[379] *See* A. Ordway et al., ''Health Care Access and the Americans with Disabilities Act: A Mixed Methods Study,'' 14 Disability and Health J. (2021) (Stating that of 536 people with disabilities surveyed, 25% had difficulty accessing exam tables). *See also* J. L. Wong et al., ''Identification of Targets for Improving Access to Care in Persons with Long Term Physical Disabilities,'' 12 Disability and Health J. 366 (2019) (stating that of the 462 people who needed a height-adjustable examination table, 56% received it).

on how they can make their health care programs and activities accessible to individuals with mobility disabilities. For example, the Department and DOJ jointly issued a technical assistance document on medical care for people with mobility disabilities, addressing how accessible MDE can be critical to ensure that people with disabilities receive medical services equal to those received by people without disabilities.[380] In particular, the document explains that the ''availability of accessible medical equipment is an important part of providing accessible medical care, and doctors and other providers must ensure that medical equipment is not a barrier to individuals with disabilities.'' [381] The guidance also provides examples of accessible medical equipment, including adjustable-height exam tables and chairs, wheelchair-accessible scales, adjustable-height radiologic equipment, portable floor and overhead track lifts, gurneys, and stretchers, and discusses how people with mobility disabilities use this equipment.

The Department recognizes that in addition to its efforts to ensure that people with disabilities have equal access to medical care, including through technical assistance,[382] providing enforceable technical standards will help ensure clarity to recipients on how to fulfill their existing obligations under title II and section 504 in their health care programs and activities. As discussed in the preamble to § 84.56, Medical treatment, the COVID–19 pandemic has had a devastating and disproportionate impact on people with disabilities and has underscored how dire the consequences may be for those who lack adequate access to medical care and treatment. As the NCD Report notes, significant health care disparities for persons with disabilities are due in part to the lack of physical access to MDE, and ''[e]nsuring physical access to care through accessible MDE is necessary to equitably provide medical care for all people, and the need continues to grow.'' [383] As a result of its findings, NCD called upon DOJ to revise its ADA regulations to require health care providers to formally adopt the MDE Standards.[384]

[380] *See* ''Access to Medical Care for Individuals with Mobility Disabilities,'' May 17, 2010, *available at https://www.ada.gov/medcare_mobility_ta/medcare_ta.htm* (last visited Dec. 2, 2021).

[381] *Id.*

[382] *See, e.g.,* U.S. Dep't of Just. & U.S. Dep't of Health & Human Servs., *Access to Medical Care for Individuals with Mobility Disabilities* (July 22, 2010), *available at https://www.ada.gov/medcare_mobility_ta/medcare_ta.htm.*

[383] NCD Report at 14.

[384] *Id.* at 52.

Accordingly, the Department is proposing changes to its section 504 regulations that can help ensure that vital health care programs and activities are equally available to individuals with disabilities. Specifically, the Department is considering adopting and incorporating into its section 504 regulation the specific technical requirements for accessible MDE that are set forth in the Access Board's MDE Standards.

Section-by-Section Analysis

This analysis discusses the Department's proposed changes to the section 504 regulation, including the reasoning behind the proposals, and poses questions for public comment.

§ 84.90 Application

This section states that the subpart applies to recipients of Federal financial assistance from the Department.

§ 84.91 Requirements for Medical Diagnostic Equipment

This section provides general accessibility requirements for programs and activities that recipients provide through or with the use of MDE. Recipients must ensure that their programs and activities offered through or with the use of MDE are accessible to individuals with disabilities.

Under this general provision (barring an applicable limitation or defense), a recipient cannot deny services that it would otherwise provide to a patient with a disability because the recipient lacks accessible MDE. A recipient also cannot require a patient with a disability to bring someone along with them to help during an exam. A patient may choose to bring another person such as a friend, family member, or personal care aide to an appointment, but regardless, the recipient may need to provide reasonable assistance to enable the patient to receive medical care. Such assistance may include helping a person who uses a wheelchair to transfer from their wheelchair to the exam table or diagnostic chair.[385] The recipient cannot require the person accompanying the patient to assist.

§ 84.92 Newly Purchased, Leased, or Otherwise Acquired Medical Diagnostic Equipment

For MDE that recipients purchase, lease, or otherwise acquire after the effective date of this proposed rule (60 days after its publication in the **Federal Register**), the proposed rule adopts an approach that draws on the approach that the existing section 504 regulations apply to new construction and alterations of buildings and facilities. The Department would require that all MDE that a recipient purchases, leases, or otherwise acquires after the rule's effective date must be accessible, unless and until the proposed rule's scoping requirements, set forth in more detail in § 84.92(b), are satisfied. As in the fixed or built-in environment, this rule is proposing that the accessibility of MDE will be governed by a specific set of design standards promulgated by the Access Board that set forth technical requirements for accessibility. So long as a recipient has the amount of accessible MDE set forth in the scoping requirements in § 84.92(b), the recipient is not required to continue to obtain accessible MDE when it purchases, leases, or otherwise acquires MDE after the effective date. However, a recipient may choose to acquire additional accessible MDE after it satisfies the scoping requirements.

[385] *See* U.S. Dep't of Just. & U.S. Dep't of Health & Human Servs., *Access to Medical Care for Individuals with Mobility Disabilities* (July 22, 2010), *available at https://www.ada.gov/medcare_mobility_ta/medcare_ta.htm.*

§ 84.92(a) Requirements for Newly Purchased, Leased, or Otherwise Acquired Medical Diagnostic Equipment

Paragraph (a) adopts the Access Board's MDE Standards as the standard governing whether MDE is accessible and establishes one of the proposed rule's key requirements: that subject to applicable limitations and defenses, all MDE that recipients purchase, lease, or otherwise acquire after the effective date must meet the MDE Standards unless and until the recipient already has a sufficient amount of accessible MDE to satisfy the scoping requirements of the proposed rule.

As explained above in more detail, the MDE Standards include technical criteria for equipment that is used when patients are either 1) in a supine, prone, or side-lying position; 2) in a seated position; 3) in a wheelchair; or 4) in a standing position. They also contain standards for supports, communication, and operable parts. In addition, the MDE Standards also contain requirements for equipment to be compatible with patient lifts where a patient would transfer under positions (1) and (2) above.

Consistent with the language in 29 U.S.C. 794f(b), MDE covered under this subpart includes examination tables, examination chairs (including chairs used for eye examinations or procedures, and dental examinations or procedures), weight scales, mammography equipment, x-ray machines, and other radiological

equipment commonly used for diagnostic purposes by health professionals. This section covers medical equipment used by health professionals for diagnostic purposes even if it is also used for treatment purposes.

Given the many barriers to health care that people with disabilities encounter due to inaccessible MDE, adopting the MDE Standards will give many people with disabilities an equal opportunity to participate in and benefit from health care programs and activities.

§ 84.92(b) Scoping

Paragraph (b) proposes scoping requirements for accessible MDE. Accessibility standards generally contain scoping requirements (how many accessible features are needed) and technical requirements (what makes a particular feature accessible). For example, the 2010 ADA Standards for Accessible Design (2010 ADA Standards) provide scoping requirements for how many toilet compartments in a particular toilet room must be accessible and provide technical requirements on what makes these toilet compartments accessible.[386] The MDE Standards issued by the Access Board contain technical requirements, but they do not specify scoping requirements. Rather, the MDE Standards state that ''[t]he enforcing authority shall specify the number and type of diagnostic equipment that are required to comply with the MDE Standards.'' [387] For the technical requirements to be implemented and enforced effectively, it is necessary for the Department to provide scoping requirements to specify how much accessible MDE is needed for a recipient's program or activity to comply with section 504.

The scoping requirements that the Department proposes are based on the requirements the 2010 ADA Standards establish for accessible patient sleeping rooms and parking in hospitals, rehabilitation facilities, psychiatric facilities, detoxification facilities, and outpatient physical therapy facilities.[388] Because many recipients must comply with titles II and III of the ADA,[389] many recipients are likely already familiar with these standards.

According to the 2010 ADA Standards, licensed medical care facilities and licensed long-term care facilities where the period of stay exceeds 24 hours shall provide accessible patient or resident sleeping rooms and disperse them proportionately by type of medical specialty.[390] Where sleeping rooms are altered or added, the sleeping rooms being altered or added shall be made accessible until the minimum number of accessible sleeping rooms is provided.[391] Hospitals, rehabilitation facilities, psychiatric facilities, and detoxification facilities that do not specialize in treating conditions that affect mobility shall have at least 10 percent of their patient sleeping rooms, but no fewer than one, provide specific accessibility features for patients with mobility disabilities.[392] Hospitals, rehabilitation facilities, psychiatric facilities, and detoxification facilities that specialize in treating conditions that affect mobility must have 100 percent of their patient sleeping rooms provide specific accessibility features for patients with mobility disabilities.[393] In addition, at least 20 percent of patient and visitor parking spaces at outpatient physical therapy facilities and rehabilitation facilities specialized in treating conditions that affect mobility must be accessible.[394]

- *MDE Question 1: The Department seeks public comment on whether and how to apply the existing scoping requirements for patient or resident sleeping rooms or parking spaces in certain medical facilities to MDE; and on whether there are meaningful differences between patient or resident sleeping rooms, accessible parking, and MDE that the Department should consider when finalizing the scoping requirements.*
- *MDE Question 2: The Department seeks public comment on whether different scoping requirements should apply to different types of MDE, and if so, what scoping requirements should apply to what types of MDE.*

Proposed paragraphs (b)(1)–(3) lay out scoping requirements for this section. Paragraph (b)(1) provides the general requirement for physician's offices, clinics, emergency rooms, hospitals, outpatient facilities, multi-use facilities, and other medical programs and activities that do not specialize in treating conditions that affect mobility. When these entities use MDE to provide programs or activities, they must ensure that at least 10 percent, but no fewer than one unit, of each type of equipment complies with the MDE Standards. For example, a medical practice with 20 examination chairs would be required to have two examination chairs (10 percent of the total) that comply with the MDE Standards. In a medical practice with five examination chairs, the practice would be required to have one examination chair that complies with the MDE Standards (because every covered entity must have no fewer than one unit of each type of equipment that is accessible). If a dental practice has one x-ray machine, that x-ray machine would be required to be accessible. Proposed paragraph (b)(2) provides the scoping requirement for rehabilitation facilities that specialize in treating conditions that affect mobility, outpatient physical therapy facilities, and other medical programs and activities that specialize in treating conditions that affect mobility. This paragraph requires that at least 20 percent of each type of MDE used in these types of programs and activities, but no fewer than one unit of each type of MDE, must comply with the MDE Standards. Because these facilities specialize in treating patients who are likely to need accessible MDE, it is reasonable for them to have more accessible MDE than is required for the health care providers covered by paragraph (b)(1), who do not have the same specialization. The Department considered whether to require 100 percent of MDE in these programs to be accessible, like ec. 223.2.2 of the 2010 ADA Standards for Accessible Design, which requires that 100 percent of patient sleeping rooms in similar facilities provide specific accessibility features for patients with mobility disabilities. However, the Department is instead proposing a scoping requirement analogous to sec. 208.2.2 of the 2010 ADA Standards, which requires 20 percent of visitor and patient parking spaces at such facilities to be accessible. The time-limited use of MDE is more analogous to the use of parking spaces at a rehabilitation facility than to the use of sleeping rooms. As with parking spaces, several different patients with mobility disabilities could use the same piece of MDE in a day, while patients generally occupy a sleeping room for all or a significant part of the day. Thus, the Department's proposed rule draws on the 2010 ADA Standards' scoping requirements by requiring at least 20 percent (but no fewer than one unit) of each type of

[386] *See* 36 CFR pt. 1191, app. B sec. 213.3.1.

[387] 82 FR 2810, 2846 (Jan. 9, 2017).

[388] *See* 36 CFR pt. 1191, app. B secs. 208.2.2, 223.2.1, 223.2.2.

[389] Recipients that are public entities are subject to the requirements of title II of the ADA; recipients that are private entities engaged in providing health care or social services, among other entities, are subject to the requirements of title III of the ADA.

[390] *See* 28 CFR 35.151(h); 36 CFR pt. 1191, app. B sec. 223.1.

[391] *See* 36 CFR pt. 1191, app. B sec. 223.1.

[392] *See* 36 CFR pt. 1191, app. B sec. 223.2.1.

[393] See 36 CFR pt. 1191, app. B sec. 223.2.2.

[394] See 36 CFR pt. 1191, app. B sec. 208.2.2.

equipment in use in facilities that specialize in treating conditions that affect mobility to meet the MDE Standards, and requiring at least 10 percent (but no fewer than one unit) of each type of equipment in use in other facilities to meet the MDE Standards.

- *MDE Question 3: Because more patients with mobility disabilities may need accessible MDE than need accessible parking, the Department seeks public comment on whether the Department's suggested scoping requirement of 20 percent is sufficient to meet the needs of persons with disabilities.*
- *MDE Question 4: The Department seeks public comment on any burdens that this proposed requirement or a higher scoping requirement might impose on recipients.*

Paragraph (b)(3) addresses facilities or programs with multiple departments, clinics, or specialties. The current ADA title II regulation requires medical care facilities that do not specialize in the treatment of conditions that affect mobility to disperse the accessible patient sleeping rooms in a manner that is proportionate by type of medical specialty.[395] The proposed rule includes an analogous dispersion requirement. In any facility or program that has multiple departments, clinics, or specialties, where a program or activity utilizes MDE, the accessible MDE required by paragraphs (b)(1) and (2) shall be dispersed proportionately across departments, clinics, or specialties. For example, a hospital that is required to have five accessible x-ray machines cannot place all the accessible x-ray machines in the orthopedics department and none in the emergency department. People with disabilities must have an opportunity to benefit from each type of medical care provided by the recipient that is equal to the opportunity provided to people without disabilities.[396] The proposed rule would not require recipients to acquire additional MDE, beyond the amount specified in proposed paragraphs (b)(1) and (2), to ensure that accessible MDE is available in every department, clinic, and specialty. The Department believes that this approach is consistent with many provisions of the 2010 ADA Standards.[397] Additionally, the Department believes that if the rule were to require full dispersion across every department, clinic, and specialty, it could be difficult to determine whether the scoping requirements have been satisfied. For example, a clinic may be part of a department and also part of a specialty (or include providers with multiple specialties), so calculating the percentages of accessible MDE each department, clinic, or specialty has could become complex. However, the Department also recognizes that it is critically important for people with disabilities to have access to all types of medical care. Therefore, covered entities would still be required to ensure that all of their programs and activities are accessible to and usable by individuals with disabilities, regardless of whether a specific department, clinic, or specialty would be required to acquire accessible MDE under proposed paragraph (b)(3).

- *MDE Question 5: The Department seeks public comment on whether the proposed approach to dispersion of accessible MDE is sufficient to meet the needs of individuals with disabilities, including the need to receive different types of specialized medical care.*
- *MDE Question 6: The Department seeks public comment on whether additional requirements should be added to ensure dispersion (e.g., requiring at least one accessible exam table and scale in each department, clinic, or specialty; requiring each department, clinic and specialty to have a certain percentage of accessible MDE).*
- *MDE Question 7: The Department seeks information regarding:*
  - *The extent to which accessible MDE can be moved or otherwise shared between clinics or departments.*
  - *The burdens that the rule's proposed approach to dispersion or additional dispersion requirements may impose on recipients.*
  - *The burdens that the rule's proposed approach to dispersion may impose on people with disabilities (e.g., increased wait times if accessible MDE needs to be located and moved, embarrassment, frustration, or impairment of treatment that may result if a patient must go to a different part of a hospital or clinic to use accessible MDE).*

84.92(c) Requirements for Examination Tables and Weight Scales

Paragraph (c) sets forth specific requirements for examination tables and weight scales. Proposed paragraph (c)(1) would require recipients that use at least one examination table in their program or activity to purchase, lease, or otherwise acquire, within two years after the publication of this part in final form, at least one examination table that meets the requirements of the MDE Standards, unless the entity already has one in place. Similarly, proposed paragraph (c)(2) requires recipients that use at least one weight scale in their program or activity to purchase, lease, or otherwise acquire, within two years after the publication of this part in final form, at least one weight scale that meets the requirements of the MDE Standards, unless the entity already has one in place. This requirement is subject to the other requirements and limitations set forth in § 84.92. Thus, this section does not require a recipient to acquire an accessible examination table and an accessible weight scale if doing so would result in a fundamental alteration in the nature of the program or activity or undue financial and administrative burdens, per § 84.92(e) and (f). In addition, recipients may use designs, products, or technologies as alternatives to those prescribed by the MDE Standards if the criteria set forth in § 84.92(d) are satisfied.

The Department notes that it is proposing to retain § 84.22(c) in the Existing Facilities section of its current section 504 rule, which applies to small health, welfare, or other social service providers. Under this provision, when a recipient with fewer than fifteen employees finds, after consultation with an individual with disabilities seeking its services, that there is no method of complying with these requirements other than making a significant alteration in its existing facilities, it may refer the patient with a disability who seeks health care services to other providers of those services that are accessible. The Department is considering applying the framework of that provision to this subpart. The recipient in question must ensure that the other medical practice is taking patients and that the practice is accessible. It should also be within a reasonable distance of the referring provider. The Department seeks comment on the advisability and equity implications of retaining this provision and applying it to the obligation to acquire accessible MDE under this proposed rule. The Department also seeks any suggestions for addressing its scope, including what should constitute a ''reasonable distance'' to a referred provider.

- *MDE Question 8: The Department seeks public comment on the potential impact of the requirement of paragraph*

[395] 28 CFR 35.151(h). A similar dispersion requirement was not necessary for medical care facilities that specialize in the treatment of conditions that affect mobility, because 100 percent of patient sleeping rooms in those facilities are required to be accessible. See 36 CFR pt. 1191, app. B sec. 223.2.2.

[396] See 28 CFR 35.130(b)(ii); 35.150(a).

[397] *See, e.g.,* 36 CFR pt. 1191, app. B secs. 221.2.2, 224.5, 225.3.1, 235.2.1. According to these sections, when the required number of accessible elements has been provided, further dispersion is not required.

(c) on people with disabilities and recipients, including the impact on the availability of accessible MDE for purchase and lease.

• *MDE Question 9: The Department seeks public comment on whether two years would be an appropriate amount of time for the requirements of paragraph (c); and if two years would not be an appropriate amount of time, what the appropriate amount of time would be.*

§ 84.92(d) Equivalent Facilitation

Paragraph (d) specifies that a recipient may use designs, products, or technologies as alternatives to those prescribed by the MDE Standards, for example, to incorporate innovations in accessibility. However, this exception applies only where the recipient provides substantially equivalent or greater accessibility and usability than the MDE Standards require. It does not permit a recipient to use an innovation that reduces access below what the MDE Standards would provide. The responsibility for demonstrating equivalent facilitation rests with the recipient.

§ 84.92(e) Fundamental Alteration and Undue Burdens

Paragraph (e) addresses the fundamental alteration and undue financial and administrative burdens defenses. While the proposed rule generally requires recipients to adhere to the MDE Standards when newly purchasing, leasing, or otherwise acquiring equipment, it does not require recipients to take steps that would result in a fundamental alteration in the nature of their programs or activities or undue financial or administrative burdens. These proposed limitations mirror the existing ADA title II regulation at 28 CFR 35.150(a)(3). If a particular action would result in a fundamental alteration or undue burdens, the recipient would be obligated to take other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services the recipient provides.

§ 84.92(f) Diagnostically Required Structural or Operational Characteristics

Paragraph (f) incorporates what the Access Board's MDE Standards refer to as a General Exception. The paragraph states that, where a recipient can demonstrate that compliance with the MDE Standards would alter diagnostically required structural or operational characteristics of the equipment, preventing the use of the equipment for its intended diagnostic purpose, compliance with the Standards would result in a fundamental alteration and therefore would not be required. The Department expects that this provision will apply only in rare circumstances.

In such circumstances, the recipient would still be required to take other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities could receive the programs or activities the recipient provides. For example, the Department has been informed that certain positron emission tomography (PET) machines cannot meet the MDE Standards' technical requirements for accessibility and still serve their diagnostic function. If this is so, then recipients would not be required to make those PET machines fully accessible, but they would be required to take other action that would enable individuals with disabilities to access PET machines in some other way without fundamentally altering the nature of the program or activity or imposing an undue financial or administrative burdens. Such actions may include assisting patients who use wheelchairs with transferring so that they can receive a PET scan.

§ 84.93 Existing Medical Diagnostic Equipment

In addition to the requirements for newly purchased, leased, or otherwise acquired MDE, proposed § 84.93 requires that recipients address access barriers resulting from a lack of accessible MDE in their existing inventory of equipment. Here the proposed rule adopts an approach analogous to the concept of program accessibility in the existing regulation at § 84.22. Under this approach, recipients may make their programs and activities available to individuals with disabilities without extensive retrofitting of their existing buildings and facilities that predate the regulations, by offering access to those programs through alternative methods. The Department intends to adopt a similar approach with MDE to provide flexibility to recipients, address financial concerns about acquiring new MDE, and at the same time ensure that individuals with disabilities will have access to the programs and activities of the recipient.

Proposed § 84.93 requires that each program or activity of a recipient, when viewed in its entirety, be readily accessible to and usable by individuals with disabilities. Section 84.93(a)(1) makes clear, however, that a recipient is not required to make each piece of its existing MDE accessible. Like § 84.92(e), § 84.93(a)(2) incorporates the concepts of fundamental alteration and undue financial and administrative burdens. These provisions do not excuse a recipient from addressing the accessibility of the program. If a particular action would result in a fundamental alteration or undue burdens, the recipient would still be obligated to ensure that individuals with disabilities are able to receive the recipient's benefits and services.

§ 84.93(b) Methods

Paragraph (b) sets forth various methods by which recipients can make their programs and activities readily accessible to and usable by individuals with disabilities when the requirements in proposed § 84.92 have not been triggered by the new acquisition of MDE. Of course, the purchase, lease, or other acquisition of accessible MDE may often be the most effective way to achieve program accessibility. However, except as stated in proposed § 84.92, a recipient is not required to purchase, lease, or acquire accessible MDE if other methods are effective in achieving compliance with this subpart.

For example, if doctors at a medical practice have staff privileges at a local hospital that has accessible MDE, the medical practice may be able to achieve program accessibility by ensuring that the doctors see these patients at the hospital, rather than at the local office, so long as the person with a disability is afforded an opportunity to participate in or benefit from the program or activity equal to that afforded to others. Similarly, if a medical practice has offices in several different locations, and one of the locations has accessible MDE, the medical practice may be able to achieve program accessibility by serving the patient who needs accessible MDE at that location. However, such an arrangement would not provide an equal opportunity to participate in or benefit from the program or activity if it was, for example, significantly less convenient for the patient, or if the visit to a different location resulted in higher costs for the patient.

• *MDE Question 10: The Department seeks information about other methods that recipients can use to make their programs and activities readily accessible to and usable by individuals with disabilities in lieu of purchasing, leasing, or otherwise acquiring accessible MDE.*

Similarly, if the scoping requirements set forth in § 84.92(b) would require a recipient's medical practice to have three height-adjustable exam tables and an accessible weight scale, but the practice's existing equipment includes only one accessible exam table and one

accessible scale, then until the practice must comply with § 84.92, the practice could ensure that its services are readily accessible to and usable by people with disabilities by establishing operating procedures such that, when a patient with a mobility disability schedules an appointment, the accessible MDE can be reserved for the patient's visit. In some cases, a recipient may be able to make its services readily accessible to and usable by individuals with disabilities by using a patient lift or a trained lift team, especially in instances in which a patient cannot or chooses not to independently transfer to the MDE in question.[398]

If the means by which a recipient carries out its obligation under § 84.93(a) to make its program or activity readily accessible to and usable by individuals with disabilities is by purchasing, leasing, or otherwise acquiring accessible MDE, the requirements for newly purchased, leased, or otherwise acquired MDE set forth in § 84.92 apply.

The Department is also aware that there may be initial supply issues for accessible MDE, particularly if a large number of recipients seek to purchase accessible MDE at the same time. The Department does note that the fundamental alteration and undue financial and administrative burdens limitations may apply if supply chain issues hamper the ability of recipients to purchase, lease, or otherwise acquire accessible MDE.

The proposed rule's requirements apply regardless of whether recipients are using MDE that is leased, purchased, or acquired through other means. The Department is aware that some recipients may lease MDE, rather than purchasing it outright. The Department's existing section 504 regulation, at 45 CFR 84.4(b)(4), redesignated as § 84.68(b)(4), provides that a recipient may not, directly or through contractual or other arrangements, use criteria or methods of administration that subject qualified persons with disabilities to discrimination on the basis of disability. The Department's existing section 504 regulation, at 45 CFR 84.4(b)(1)(i)–(ii), redesignated as § 84.68(b)(1)(i)–(ii), also prohibits a recipient from, directly or through contractual or other arrangements, denying a qualified individual with a disability the opportunity to participate in or benefit from a service, or affording a qualified individual with a disability an opportunity to participate in or benefit from a service that is not equal to the opportunity afforded others. Under these longstanding regulatory provisions, the manner in which a recipient acquires its equipment does not alter the entity's obligation to provide an accessible program or activity. The proposed rule's requirements also apply if the recipient contracts with a third party to provide medical programs, services, or activities.

- *MDE Question 11: The Department seeks information regarding recipients' leasing practices, including how many and what types of recipients use leasing, rather than purchasing, to acquire MDE; when recipients lease equipment; whether leasing is limited to certain types of equipment (e.g., costlier and more technologically complex types of equipment); and the typical length of recipients' MDE lease agreements.*
- *MDE Question 12: The Department seeks information regarding whether there is a price differential for MDE lease agreements for accessible equipment.*
- *MDE Question 13: The Department seeks information regarding any methods that recipients use to acquire MDE other than purchasing or leasing.*

Medical Equipment Used for Treatment, Not Diagnostic, Purposes

Many types of medical equipment other than MDE are used in the provision of health care. The accessibility, or lack thereof, of these types of equipment can determine whether people with disabilities have an equal opportunity to participate in and benefit from health programs and activities. This non-diagnostic medical equipment may be used in federally assisted programs and includes, for example, devices intended to be used for therapeutic or rehabilitative care such as treatment tables and chairs for oncology, obstetrics, physical therapy, and rehabilitation medicines; lifts; infusion pumps used for dispensing chemotherapy drugs, pain medications, or nutrients into the circulatory system; dialysis chairs used while a patient's blood is pumped between a patient and a dialyzer; other tables or chairs designed for highly specialized procedures; general exercise and rehabilitation equipment used while seated or standing; and ancillary equipment[399] needed to ensure the safety and comfort of patients in the use of medical equipment.[400] Although the MDE Standards do not address non-diagnostic medical equipment, certain types of other medical equipment that are not diagnostic in purpose may still fall into the technical criteria categories set out by the MDE Standards (equipment used in (1) supine, prone, or side lying position, (2) seated position, (3) while seated in a wheelchair, and (4) standing position; certain technical requirements concerning methods of communication and operable parts). As noted above, equipment used for both diagnostic purposes and other purposes is MDE if it otherwise meets the definition of MDE.

The Department is considering adding a provision establishing that when the MDE Standards contain technical standards that can be applied to a particular piece of non-diagnostic medical equipment, the requirements set forth in §§ 84.91–84.94 apply to the non-diagnostic medical equipment at issue. Although MDE Standards were promulgated by the Access Board in response to a statutory mandate to provide standards specific to diagnostic equipment, recipients have an obligation under section 504 to provide equal opportunity to benefit from medical care of all types, including through the use of equipment that does not satisfy the definition of MDE. The Department seeks comment on whether to apply the Access Board's MDE Standards to non-diagnostic equipment—for example, because the relevant characteristics of some types of non-diagnostic equipment may be sufficiently similar to MDE to warrant applying the same standards—and if there is adequate justification for applying the MDE Standards' technical specifications to non-diagnostic equipment, which non-diagnostic equipment should be covered. For example, infusion chairs used only to dispense chemotherapy drugs are not used for diagnostic purposes and therefore would not fall under the definition of MDE. But if the MDE Standards contained technical standards that could be applied to infusion chairs, the requirements set forth in §§ 84.91–84.94 could apply to such equipment. The Department seeks public comment on whether this rule should apply to medical equipment that is not used for diagnostic purposes, and if so, in what situations it should apply.

[398] *See* U.S. Dep't of Just. & U.S. Dep't of Health & Human Servs., Access to Medical Care for Individuals with Mobility Disabilities (July 22, 2010), available at *https://www.ada.gov/medcare_mobility_ta/medcare_ta.htm.*

[399] Ancillary equipment may include equipment such as cushions, bolsters, straps, sliding boards, or other items used to facilitate transfers and to help position patients.

[400] *See* U.S. Access Board, Medical Diagnostic Equipment Accessibility Standards Advisory Committee, Advancing Equal Access to Diagnostic Services: Recommendations on Standards for the Design of Medical Diagnostic Equipment for Adults with Disabilities (Dec. 6, 2013).

- *MDE Question 14: If this rule were to apply to medical equipment that is not used for diagnostic purposes,*
  - *"Should the technical standards set forth in the Standards for Accessible Medical Diagnostic Equipment be applied to non-diagnostic medical equipment, and if so, in what situations should those technical standards apply to non-diagnostic medical equipment?"*
  - *Are there particular types of non-diagnostic medical equipment that should or should not be covered?*

§ 84.94 Qualified Staff

The proposed rule requires recipients to ensure that their staff are able to successfully operate accessible MDE, assist with transfers and positioning of individuals with disabilities, and carry out the program access obligation with respect to existing MDE. This will enable recipients to carry out their obligation to make the programs and activities that they offer through or with the use of MDE readily accessible to and usable by individuals with disabilities. The Department believes recipients must have, at all times when services are provided to the public, appropriate and knowledgeable personnel who can operate MDE in a manner that ensures services are available and timely provided. Often, the most effective way for recipients to ensure that their staff are able to successfully operate accessible MDE is to provide staff training on the use of MDE.

- *MDE Question 15: The Department seeks general comments on this proposal, including any specific information on the effectiveness of programs used by recipients in the past to ensure that their staff is qualified and any information on the costs associated with such programs.*
- *MDE Question 16: The Department seeks public comment on whether there are any barriers to complying with this proposed requirement, and if so, how they may be addressed.*

III. Nondiscrimination in Programs and Activities

B. Revised Provisions Addressing Discrimination and Ensuring Consistency With Statutory Changes and Significant Court Decisions

The Department seeks to revise its existing section 504 regulation for federally assisted programs to incorporate statutory amendments to the Rehabilitation Act, the enactment of the ADA and the ADAAA, the Affordable Care Act, and Supreme Court and other significant court cases. The regulations also need to be revised to update outdated terminology and regulatory provisions.

The ADA revised the Rehabilitation Act to include definitions of the terms "drugs" and "illegal use of drugs," directing that these terms be interpreted consistent with the principles of the Controlled Substances Act, 21 U.S.C. 801 *et seq.*[401] Both the ADA and the Rehabilitation Act expressly exclude from coverage an individual who is currently engaging in the illegal use of drugs,[402] although the exclusions in the Rehabilitation Act differ in some ways from those in the ADA.[403] The Rehabilitation Act Amendments of 1992 changed the term "handicapped person" to "individual with a disability" and provided that the standards contained in title I of the ADA apply to determinations of employment discrimination under section 504. More recently, the ADAAA revised the meaning and interpretation of the definition of "disability" under section 504 to ensure that the term is interpreted consistently with the expanded definition of "disability" codified in the ADA and in section 504's statutory language.

To ensure consistency with the ADA, the proposed rule contains the following provisions that mirror the ADA provisions: definition of "disability," notice, maintenance of accessible features, retaliation or coercion, personal devices and services, service animals, mobility devices, and communications. Provisions that are similar to the ADA include purpose and broad coverage, definitions, general prohibitions against discrimination, program accessibility, illegal drugs, direct threat, and integration. Courts have generally interpreted section 504 consistently with title II of the ADA.[404] For this reason, and because applying the same standard under both statutes promotes compliance and eases the burden on recipients of the Department's financial assistance, we propose to align the provisions of this rule with ADA requirements absent some specific statutory language or strong policy reason to take a divergent path.[405]

In addition, there have been significant U.S. Supreme Court decisions interpreting section 504 requirements relating to the "direct threat" limitation and to the obligation to provide "reasonable modifications" unless those modifications can be shown to pose a fundamental alteration to the program or activity.[406] The proposed regulation incorporates the "direct threat" principle in § 84.75 and the "reasonable modifications" principle in § 84.68(b)(7).

Relationship Between Section 504 and the ADA

Title II of the ADA prohibits discrimination on the basis of disability by public entities (*i.e.,* State and local governments and their agencies),[407] and is modeled on section 504 of the Rehabilitation Act.[408] Title II of the ADA and section 504 are generally understood to impose similar requirements, given the similar language employed in the ADA and the Rehabilitation Act.[409] The legislative history of the ADA makes clear that title

[401] *See* 29 U.S.C. 705(10).

[402] *See* 29 U.S.C. 705(10), (20)(C).

[403] *Compare* 42 U.S.C. 12210 (ADA) *with* 29 U.S.C. 705(20)(C) (Rehabilitation Act).

[404] *See, e.g., Berardelli* v. *Allied Servs. Inst. of Rehab. Med.,* 900 F.3d 104, 117, 120 (3d Cir. 2018) (concluding that courts "constru[e] the provisions of [both statutes] in light of their close similarity of language and purpose," and "generally apply the same standard for determination of liability" to both "in recognition that the scope of protection afforded under both statutes, *i.e.,* the general prohibition[ ] against discrimination, is materially the same," and holding "that the service animal regulations, although technically interpreting the ADA, are no less relevant to the interpretation of the RA") (cleaned up); *Argenyi* v. *Creighton Univ.,* 703 F.3d 441, 448 (8th Cir. 2013) (stating, in a communications access case, that "[s]ince the ADA and the Rehabilitation Act are similar in substance," we treat the case law interpreting them as interchangeable.") (cleaned up); *Zukle* v. *Regents of Univ. of Cal.,* 166 F.3d 1041, 1045 n.11 (9th Cir. 1999) ("There is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act.") *See also, Abrahams* v. *MTA Long Island Bus.,* 644 F. 3d 110, 115 (2d Cir. 2011) ("Because the ADA and the Rehabilitation Act impose nearly identical requirements, we focus on the ADA but our analysis applies to the Rehabilitation Act as well."); *Weixel* v. *Bd. of Educ.,* 287 F. 3d 138, 146 n. 6 (2d Cir. 2002) (". . . the reach and requirements of both statutes are precisely the same. . . ."); *Rodriguez* v. *City of N.Y.,* 197 F. 3d 611, 618 (2d Cir. 1999) ("Because section 504 of the Rehabilitation Act and the ADA impose identical requirements, we consider these claims in tandem."); *Theriault* v. *Flynn,* 162 F. 3d 46, 48 n. 3 (1st Cir. 1998) ("Title II of the ADA was expressly modeled after section 504 of the Rehabilitation Act, and is to be interpreted consistently with that provision."); *Doe* v. *Univ. of Md. Med. Sys. Corp.,* 50 F. 3d 1261, 1265 n. 9 (4th Cir. 1995) ("Because the language of the two statutes is substantially the same, we apply the same analysis to both."); *Collings* v. *Longview Fibre Co.,* 63 F. 3d 828, 832 n. 3 (9th Cir. 1995) ("The legislative history of the ADA indicates that Congress intended judicial interpretation of the Rehabilitation Act be incorporated by reference when interpreting the ADA.").

[405] In addition, the legislative history of the 1992 amendments to the Rehabilitation Act reveals congressional intent that the policies, practices, and procedures of the ADA should guide all titles of the Rehabilitation Act. S. Rept. 102–357, at 14 (Aug. 3, 1992); H.R. Rep. 102–822, at 81 (Aug. 10, 1992).

[406] *See, e.g., Schl. Bd. of Nassau Cnty.* v. *Arline,* 480 U.S. 273 (1987); *Alexander* v. *Choate,* 469 U.S. 287 (1985); *Southeastern Cmty. Coll.* v. *Davis,* 442 U.S. 397 (1979).

[407] 42 U.S.C. 12132.

[408] *See, e.g.,* H. Rept. 101–485(II) at 84 (May 15, 1990).

[409] *See, e.g.,* 42 U.S.C. 12201(a).

II of the ADA was intended to extend the requirements of section 504 to apply to all State and local governments, regardless of whether they receive Federal funding, demonstrating Congress's intent that title II and section 504 be interpreted consistently.[410]

The Rehabilitation Act Amendments of 1992 revised the Rehabilitation Act's findings, purpose, and policy provisions to incorporate language acknowledging the discriminatory barriers faced by persons with disabilities, and recognizing that persons with disabilities have the right to "enjoy full inclusion and integration in the economic, political, social, cultural and educational mainstream of American society." [411] The legislative history to the Rehabilitation Act Amendments of 1992 states that the purpose and policy statement is "a reaffirmation of the precepts of the Americans with Disabilities Act," [412] and that these principles are intended to guide the Rehabilitation Act's policies, practices, and procedures.[413] Further, courts interpret these statutes consistently.[414] Thus, the Department believes there is and should be parity between the relevant provisions of section 504 and title II of the ADA. Because the Department is amending its existing, longstanding regulation and not simply issuing a new regulation, it is necessary to incorporate its revisions in several subparts of the existing rule.[415] The added or revised provisions are:

- Purpose and broad coverage (§ 84.1): Revisions to Subpart A
- Application (§ 84.2): Revisions to Subpart A
- Relationship to other laws (§ 84.3): Revisions to Subpart A
- Definition of disability (§ 84.4): Revisions to Subpart A
- Notice (§ 84.8): Revisions to Subpart A
- Definitions (§ 84.10): Revisions to Subpart A
- Employment (§ 84.16): Revisions to Subpart B
- Program Accessibility (§§ 84.21–84.23): Revisions to Subpart C
- Childcare, Preschool, Elementary and Secondary, and Adult Education (§§ 84.31, 84.38): Revisions to Subpart D
- Health, Welfare, and Social Services (§§ 84.51–84.55): Revisions to Subpart F
- Subpart G: General Requirements (§§ 84.68–84.76)): New subpart
- General prohibitions against discrimination (§ 84.68)
- Illegal use of drugs (§ 84.69)
- Maintenance of accessible features (§ 84.70)
- Retaliation and coercion (§ 84.71)
- Personal devices and services (§ 84.72)
- Service animals (§ 84.73)
- Mobility devices (§ 84.74)
- Direct threat (§ 84.75)
- Integration (§ 84.76)
- Subpart H: Communications (§§ 84.77–84.81): New subpart
- Subpart K: Procedures (§ 84.98)

Proposed Section 504 Regulations and Existing Requirements

Recipients of Federal financial assistance from HHS that are also State and local governments (subject to title II of the ADA) and those that are places of public accommodation (subject to title III of the ADA) have been obligated to comply with the ADA title II and title III regulations since 1991 when those regulations were promulgated. Most entities covered by section 504 that are not covered by title II are covered by title III. Accordingly, in most instances, this proposed section 504 regulation is not imposing new requirements on recipients. Rather, in such instances, it is aligning section 504 requirements with existing ADA requirements to which many entities have been subject since 1991.

The sections of the proposed regulation that track the ADA title II and/or III regulations are: definition of "disability," notice, general prohibitions against discrimination, maintenance of accessible features, retaliation and coercion, personal devices and services, service animals, mobility devices, and communications. The following sections are similar to the ADA title II and/or title III regulations: purpose and broad coverage, definitions, program accessibility, illegal use of drugs, direct threat, and integration.

Terminology

When the Department's section 504 regulation was issued in 1977, it followed the terminology of the statute, using the word "handicap" and the phrase "handicapped person." However, the Rehabilitation Act Amendments of 1992 changed the term "handicapped person" to "individual with a disability." The Department's proposed revisions incorporate these terminology changes into its rules. The revisions also include use of the phrase "qualified individual with a disability" rather than the phrase "qualified handicapped person." The terminology changes also include substitution of the phrase "individual with a substance use disorder" for "drug addict" and "individual with an alcohol use disorder" for "alcoholic." In making these changes as well as other similar ones, the Department is merely updating terminology and intends no substantive change to its interpretation of section 504 and its implementing regulation.

§ 84.1 Purpose and Broad Coverage: Revision to Subpart A

Proposed § 84.1(a) states that the purpose of this part is to implement section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of disability in programs and activities receiving Federal financial assistance.

Proposed § 84.1(b) states that the definition of "disability" in this part shall be construed broadly in favor of expansive coverage. This is consistent with the ADAAA's purpose of reinstating a broad scope of protection under the ADA and ensuring that the Rehabilitation Act was interpreted consistently by including a conforming amendment for section 504. The ADAAA amended the definition of disability provisions of the ADA and applied the same new definitional provisions to section 504.[416] Congress passed the ADAAA to overturn Supreme Court decisions that had too narrowly interpreted the ADA's definition of disability.[417] Those narrow interpretations resulted in the denial of the ADA's protection for many individuals with impairments who Congress intended to cover under the law. The ADAAA provides clear direction about what "disability" means under the ADA and how it should be interpreted so that covered individuals seeking the protection of the ADA can establish that they have a disability.[418] Section 84.4 sets forth the definition of the term. The ADAAA codified the broad view of disability adopted by the Supreme Court in the section 504 case, *School Board of Nassau County* v. *Arline*.[419] To ensure consistency in defining disability, the ADAAA includes a conforming amendment for section 504's definition of disability to have the "same meaning" as the ADA definition.[420]

In the ADAAA, Congress made clear that it intended the definition of disability to be construed very broadly.[421] The primary object of attention, Congress said, should be "whether entities covered under the

[410] *See* H. Rep. 101–485(II) at 84 (May 15, 1990).

[411] 29 U.S.C. 701(a)(3)(F), *as amended.*

[412] S. Rep. 102–357, at 14 (Aug. 3, 1992).

[413] *See id.; see also* H.R. Rep. 102–822, at 81 (Aug. 10, 1992).

[414] *See supra* note 243.

[415] Where HHS has made changes to this section 504 regulation to correspond to provisions in the Department of Justice's title II regulation, HHS encourages individuals to look to the corresponding title II guidance and section-by-section analysis for guidance on how to interpret these provisions. See 28 CFR part 35, app. A, B, C.

[416] See 29 U.S.C. 705(20)(B); ADA Amendments Act of 2008, Public Law 110–325 section 7(2) (2008).

[417] *See* ADAAA section 2(a)(6), (b)(2)–(5) (2008).

[418] ADAAA section 4(a) (2008).

[419] 480 U.S. 273 (1987).

[420] ADAAA section 7 (2008).

[421] 42 U.S.C. 12102(4)(A).

ADA have complied with their obligations'' and whether discrimination has occurred, not whether the individual meets the definition of ''individual with a disability.'' [422] According to both the ADAAA purpose provisions and the ADA regulations, this question of whether an individual meets the definition of disability should not demand extensive analysis.[423]

§ 84.2 Application: Revisions to Subpart A

Paragraph (a) states that this part applies to the recipient's programs or activities that involve individuals in the United States. It does not apply to the recipient's programs and activities outside of the United States that do not involve individuals with disabilities in the United States.

Paragraph (b) states that the section 504 requirements do not apply to ultimate beneficiaries of any program or activity receiving Federal financial assistance. An ultimate beneficiary is a person who is entitled to benefits from, or otherwise participates in, a program or activity.

In paragraph (c), the Department proposes language addressing the issue of severability. The provision states that, if any provision at 45 CFR part 84 is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, it shall be construed to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which case the provision shall be severable from this part and shall not affect the remainder thereof or the application of the provision to other persons not similarly situated or to other dissimilar circumstances. The Department seeks to ensure that, if a specific regulatory provision in this rule is found to be invalid or unenforceable, the remaining provisions of the rule will remain in effect.

§ 84.3 Relationship to Other Laws: Revisions to Subpart A

This section states that this part does not invalidate or limit remedies, rights, and procedures of other laws that provide greater or equal protection for the rights of individuals with disabilities or those associated with them, such as the ACA and the Fair Housing Act. The section is substantially similar to the corresponding section in the ADA regulations at 28 CFR 35.103(b).

[422] *Id.* at section 2.

[423] 42 U.S.C. 12101; 28 CFR 35.101(b) and 35.108.

§ 84.4 Definition of Disability: Revisions to Subpart A

One of the main purposes of the ADAAA was to ensure that the term ''disability''—in both the ADA and the Rehabilitation Act—would be construed broadly in favor of expansive coverage to the maximum extent possible. The ADAAA revised the meaning and interpretation of the definition of ''disability'' under section 504 to ensure that the term is interpreted consistently with the ADAAA, Public Law 110–325 (2008), and applied the same definitional provisions to section 504, *id.* section 7(2). In this section, the Department incorporates the definition contained in the ADA title II regulations at 28 CFR 35.108, with modifications when the terminology about a particular disability mentioned in the regulation has changed, including capitalizing certain impairments; substituting ''autism spectrum disorder'' for ''autism''; substituting ''substance use disorder'' for ''drug addiction''; and substituting ''alcohol use disorder'' for ''alcoholism.'' In addition, long COVID, a condition that did not exist when the ADA regulations were published, has been added to the list of physical and mental impairments.

This proposed regulation recodifies many of the sections in the existing rule. Section 84.4 in the existing rule contains the general prohibitions. Those general prohibitions now appear in Subpart G, General Requirements, § 84.68. Proposed § 84.4 contains the definition of ''disability.'' Similar redesignations in the numbering of sections occur throughout the proposed regulation.

Section 84.4(a)—Disability

Proposed § 84.4(a)(1) states that, with respect to an individual, disability means ''(i) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (ii) a record of such an impairment; or (iii) being regarded as having such an impairment as described in paragraph (f) of this section.''

Proposed § 84.4(a)(2)(i) states that the definition of ''disability'' is to be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of section 504.

Proposed § 84.4(a)(2)(ii) provides that an individual can establish coverage using any of the three prongs, the ''actual disability'' in the first prong, the ''record of'' in the second prong, or the ''regarded as'' in the third prong. The use of the word ''actual disability'' is a shorthand for the first prong and is not meant to suggest that individuals covered under the first prong have any more rights than those covered by the second or third prongs, with the exception that the ADAAA revised the ADA to expressly state that an individual who meets the definition of ''disability'' solely under the ''regarded as'' prong is not entitled to reasonable modifications of policies, practices, or procedures. *See* 42 U.S.C. 12201(h)).

Proposed § 84.4(a)(2)(iii) indicates that consideration of coverage under the first two prongs will generally be unnecessary except when there has been a request for reasonable modifications. Accordingly, absent a claim of a failure to provide reasonable modifications, typically it is not necessary to rely on the ''actual disability'' or ''record of'' disability prongs. Instead, in such cases, coverage can be evaluated exclusively under the ''regarded as'' prong, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. However, individuals can proceed under the first or second prongs if they choose.

Section 84.4(b)—Physical or Mental Impairment

Proposed § 84.4(b)(1) provides an illustrative and non-exhaustive list of examples of physiological disorders or conditions, cosmetic disfigurement, or anatomical loss affecting one or more body systems that may be affected by a physical impairment. It also provides an illustrative list of mental or psychological disorders. Section 84.4(b)(2) contains a non-exhaustive list of examples of physical or mental impairments. The preamble to the ADA title II regulations explains why there was no attempt made to set forth a comprehensive list of physical and mental impairments. The preamble states that ''[i]t is not possible to include a list of all the specific conditions, contagious and noncontagious diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that other conditions or disorders may be identified in the future.'' 28 CFR part 35, app. B. This proposed section adopts that reasoning.

On July 26, 2021, DOJ and HHS issued guidance on how ''long COVID'' can be a disability under the ADA, section 504, and Section 1557.[424] The

[424] *See* U.S. Dep't of Health & Human Servs., U.S. Dep't of Justice, *Guidance on ''Long COVID'' as a Disability Under the ADA, section 504, and section 1557* (July 26, 2021), *https://www.hhs.gov/civil-*

Continued

guidance notes that some people continue to experience symptoms that can last months after first being infected with COVID–19 or may have new or recurring symptoms at a later time.[425] This can happen even if the initial illness was mild. This condition, ''long COVID,'' can meet the definition of ''disability'' if it, or one of the conditions that results from it, satisfies one of the three prongs of the disability definition.

The guidance states that long COVID is a physiological condition affecting one or more body systems and is a physical or mental impairment. For example, some people experience lung damage, heart damage, kidney damage, neurological damage, damage to the circulatory system resulting in poor blood flow, and/or mental health symptoms. It, or its symptoms, can substantially limit one or more life activities. For example, a person with lung damage that causes shortness of breath, fatigue, and related effects is substantially limited in respiratory function, among other major life activities. The inclusion of long COVID as a physical or mental impairment aligns with DOJ's interpretation under the ADA.

Section 84.4(b)(3) states that sexual orientation is not included in the definition of physical or mental impairment. The Rehabilitation Act at 29 U.S.C. 705(20)(E) contains a specific exclusion of individuals on the basis of homosexuality or bisexuality. It states that the term ''impairment'' does not include homosexuality or bisexuality. Therefore, the term ''individual with a disability'' does not include individuals who are homosexual or bisexual. The ADA likewise states that homosexuality and bisexuality are not impairments and, as such, are not disabilities. 42 U.S.C. 12211(a). The title II regulations incorporate this exclusion in 28 CFR 35.108(b)(3).

Section 84.4(c)—Major Life Activities

The ADAAA significantly expanded the range of major life activities by directing that ''major'' be interpreted in a more expansive fashion than previously. It specified that major life activities include major bodily functions, and provided non-exhaustive lists of examples of major life activities. Proposed § 84.4(c) incorporates the title II regulation at 28 CFR 35.108(c). ''Major life activities'' includes not only activities such as caring for oneself, seeing, hearing, and walking, but also includes the operation of a major bodily function such as the functions of the immune system, normal cell growth, and reproductive systems.

Proposed § 84.2(c)(1)(i) and (ii) list examples of major life activities. The absence of a particular life activity or bodily function from the lists should not create a negative implication as to whether an activity or function is a major life activity.

Proposed § 84.4(c)(2) sets forth two specific principles applicable to major life activities. Proposed § 84.4(c)(2)(i) states that the term ''major'' should not be interpreted strictly. Proposed § 84.4(c)(ii) states that whether an activity is a ''major life activity'' is not determined by reference to whether it is of ''central'' importance to daily life. This language is included to align with the incorporation of the ADAAA in the ADA regulations and the ADAAA's rejection of standards articulated in *Toyota Motor Manufacturing, Kentucky, Inc.* v. *Williams* that (1) strictly interpreted the terms ''substantially'' and ''major'' in the definition of ''disability'' to create a demanding standard for qualifying as disabled under the ADA, and that (2) required an individual to have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.[426]

Section 84.4(d)—Substantially Limits

Proposed § 84.4(d)(1) sets forth nine rules of construction clarifying how to interpret the meaning of ''substantially limits'' when determining whether an individual's impairment substantially limits a major life activity. The language in these provisions reflects the rules of construction that Congress provided in the ADAAA.

Proposed § 84.4(d)(1)(i) states that the term ''substantially limits'' should be construed broadly in favor of expansive coverage to the maximum extent permitted by section 504. This is not meant to be a demanding standard.

Proposed § 84.4(d)(1)(ii) states that the primary object of attention should be whether entities have complied with their obligations and whether discrimination occurred, not the extent to which the impairment substantially limits a major life activity. Thus, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.

Proposed § 84.4(d)(1)(iii) indicates that an impairment that substantially limits just one major life activity is sufficient to be considered a substantially limiting impairment. For example, an individual seeking to establish coverage need not show a substantial limit in the ability to learn if that individual is substantially limited in another major life activity, such as walking or the functioning of the nervous or endocrine systems. The proposed section also is intended to clarify that where the major life activity is something that may include a range of different activities (such as manual tasks), the ability to perform some of those tasks does not preclude a finding that the person is substantially limited in the major life activity. For example, an individual with cerebral palsy could have the capacity to perform certain manual tasks and be unable to perform others. Such an individual still has a substantial limitation in the ability to carry out the ''major life activity'' of performing manual tasks.

Proposed § 84.4(d)(1)(iv) states that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. This section is intended to reject the reasoning of court decisions concluding that certain individuals with certain conditions—such as epilepsy or post-traumatic stress disorder—were not protected by the ADA because their conditions were episodic or intermittent.

The legislative history provides that ''[t]his . . . rule of construction thus rejects the reasoning of the courts in cases like *Todd* v. *Academy Corp.,* where the court found that the plaintiff's epilepsy, which resulted in short seizures during which the plaintiff was unable to speak and experienced tremors, was not sufficiently limiting, at least in part because those seizures occurred episodically.[427] It similarly rejects the results reached in cases [such as *Pimental* v. *Dartmouth-Hitchcock Clinic,*] where the courts have discounted the impact of an impairment [such as cancer] that may be in remission as too short-lived to be substantially limiting.[428] It is thus expected that individuals with impairments that are episodic or in remission (*e.g.,* epilepsy, post-traumatic stress disorder, multiple sclerosis, cancer) will be able to establish

rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html.

[425] As the CDC has described, ''Long COVID can last weeks, months, or years after COVID–19 illness . . .'' *See Long COVID or Post-COVID Conditions,* Centers for Disease Control and Prevention, *https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects/index.html#:~:text=For%20some%20people%2C%20Long%20COVID,over%20different%20lengths%20of%20time* (last updated Dec. 16, 2022).

[426] 534 U.S. 184 (2002).

[427] 57 F. Supp. 2d 448, 453 (S.D. Tex. 1999).

[428] *Pimental* v. *Dartmouth-Hitchcock Clinic,* 236 F. Supp. 2d 177, 182–83 (D.N.H. 2002).

coverage if, when active, the impairment or the manner in which it manifests (*e.g.,* seizures) substantially limits a major life activity.'' [429] This language incorporates the ADAAA's rejection of court decisions finding that individuals with certain conditions such as epilepsy or post-traumatic stress disorder were not protected because their conditions were episodic or in remission.

Proposed § 84.4(d)(1)(v) states that determinations as to whether an impairment substantially limits a major life activity should be based on a comparison to most people in the general population. The impairment does not need to prevent, or significantly or severely restrict an individual from performing a major life activity to be considered substantially limiting. For example, an individual with the physical impairment of carpal tunnel syndrome can demonstrate that the impairment substantially limits the major life activity of writing even if the impairment does not prevent or severely restrict the individual from writing. However, not every impairment will constitute a disability within the meaning of this section.

Proposed § 84.4(d)(1)(vi) states that determination as to whether an impairment substantially limits a major life activity requires an individualized assessment. Additionally, the paragraph requires that, in making this assessment, the term ''substantially limits'' shall be interpreted and applied to require a standard of functional limitation that is lower than that the standard applied prior to the ADAAA. These rules of construction reflect Congress's concern that prior to the adoption of the ADAAA, courts were using too high a standard to determine whether an impairment substantially limited a major life activity.[430]

Proposed § 84.4(d)(1)(vii) states that comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population does not usually require scientific, medical, or statistical evidence. This section seeks to prevent an overbroad, burdensome, and generally unnecessary requirement on individuals seeking accommodations or modifications. Other types of evidence that are less onerous to collect, such as statements or affidavits of affected individuals, school records, or determinations of disability status under other statutes should, in most cases, be considered adequate to establish that an impairment is substantially limiting. However, nothing in this paragraph is intended to prohibit or limit the presentation of scientific, medical, or statistical evidence where appropriate.

Proposed § 84.4(d)(1)(viii) prohibits any consideration of the ameliorative effects of mitigating measures when determining whether an individual's impairment substantially limits a major life activity, except for the ameliorative effects of ordinary eyeglasses or contact lenses. The determination as to whether an individual's impairment substantially limits a major life activity is unaffected by an individual's choice to forego mitigating measures. For individuals who do not use a mitigating measure (including, for example, medication or auxiliary aids and services that might alleviate the effects of an impairment), the availability of such measures has no bearing on whether the impairment substantially limits a major life activity.

Proposed § 84.4(d)(1)(ix) states that the six-month ''transitory'' part of the ''transitory and minor'' exception in § 84.4(f)(2), the ''regarded as'' prong of the definition, does not apply to the ''actual disability'' or ''record of'' prongs of the definition. The effects of an impairment lasting or expected to last less than six months can be substantially limiting within the meaning of this section for establishing an actual disability or a record of a disability. Whether an impairment is both ''transitory and minor'' is a question of fact that is dependent upon individual circumstances.

Proposed § 84.4(d)(2), Predictable assessments, states that the rules of construction in this section are intended to provide a generous and expansive application of the prohibition on discrimination. Specific rules of construction are contained in subsections discussing the definition of ''disability,'' § 84.4(a)(2); ''major life activities,'' § 84.4(c)(2); and ''substantially limits,'' § 84.4(d)(1). Proposed § 84.4(d)(2)(ii) states that the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under the first prong of the definition (''actual disability'') or the second prong (''record of''). Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward and should not demand extensive analysis.

Proposed § 84.4(d)(2)(iii) contains a non-exhaustive list of eleven types of impairments and the major life activity limited by those impairments. The list illustrates impairments that virtually always will result in a substantial limitation of one or more major life activities. It is consistent with the Equal Employment Opportunity Commission's (EEOC) predictable assessment list at 29 CFR 1630.2(g)(3)(iii), except that this section adds traumatic brain injury to the list. The section is intended to provide clear, strong, consistent, enforceable standards.

The absence of any particular impairment from the list of examples of predictable assessments does not indicate that the impairment should be subject to undue scrutiny. Also, the listed impairments may substantially limit additional major life activities not explicitly mentioned.

Proposed § 84.4(d)(3), Condition, manner, or duration, provides guidance on determining whether an individual is substantially limited in a major life activity. The determination is intended to be an appropriate threshold issue but not an onerous burden. However, individuals can still offer evidence needed to establish that their impairment is substantially limiting if they so desire. While condition, manner, and duration are not required factors that must be considered, to the extent that such factors may be useful or relevant, some or all of the factors may be considered. However, evidence relating to each of these factors often will not be necessary to establish coverage.

Proposed § 84.4(d)(3)(i) states that it may be useful to consider as compared to most people in the general population, the conditions under which the individual performs the major life activity; the manner in which the individual performs the major life activity; or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

Proposed § 84.4(d)(3)(ii) sets forth examples of the types of evidence that might demonstrate condition, manner, or duration limitations, including the way that an impairment affects the operation of a major bodily function, the difficulty or effort required to perform a major life activity, the pain experienced when performing a major life activity, and the length of time it takes to perform a major life activity. The section clarifies that the non-ameliorative effects of mitigating measures may be taken into account to

[429] H.R. Rep. No. 110–730, pt. 2, at 19–20 (2008) (House Committee on the Judiciary).

[430] *See* Public Law 110–325, sec. 2(b)(4)–(5); *see also* 154 Cong. Rec. S8841 (daily ed. Sept. 16, 2008) (Statement of the Managers) (''This bill lowers the standard for determining whether an impairment constitute[s] a disability and reaffirms the intent of Congress that the definition of disability in the ADA is to be interpreted broadly and inclusively.'').

demonstrate the impact of an impairment on a major life activity. These non-ameliorative effects could include negative side effects of medicine, burdens associated with following a particular treatment regimen, and complications arising from surgery.

An impairment may substantially limit the ''condition'' or ''manner'' in which a major life activity can be performed in a number of ways. For example, it may refer to how the individual performs a major life activity, *e.g.,* the condition or manner under which a person with an amputated hand performs manual tasks will likely be more cumbersome than the way that most people in the general population would perform the same tasks. The terms may also describe how performance of a major life activity affects an individual with an impairment. For example, an individual whose impairment causes more pain or fatigue than most people would experience when performing that major life activity may be substantially limited. The condition or manner under which someone with coronary artery disease performs the major life activity of walking would be substantially limited if the individual experiences shortness of breath and fatigue when walking distances that most people could walk without experiencing such effects.

Condition or manner may refer to the extent to which a major life activity, including a major bodily function, can be performed. In some cases, the condition or manner under which a major bodily function can be performed may be substantially limited when the impairment causes the operation of a bodily function to over-produce or under-produce in a harmful fashion. For example, the pancreas, which is part of the endocrine system, of a person with type 1 diabetes does not produce sufficient insulin. For that reason, compared to most people in the general population, the impairment of diabetes substantially limits the major bodily functions of endocrine function and digestion.

''Duration'' refers to the length of time an individual can perform a major life activity or the length of time it takes an individual to perform a major life activity, as compared to most people in the general population. For example, a person whose back or leg impairment precludes them from standing for more than two hours without significant pain would be substantially limited in standing, because most people can stand for more than two hours without significant pain. Some impairments, such as Attention-Deficit/Hyperactivity Disorder (ADHD) may have two different types of impact on duration considerations. ADHD frequently affects both an ability to sustain focus for an extended period of time and the speed with which someone can process information. Each of these duration-related concerns could demonstrate that someone with ADHD, as compared to most people in the general population, takes longer to complete major life activities such as reading, writing, concentrating, or learning.

Proposed § 84.4(d)(3)(iii) states that in determining whether an individual has a disability under the ''actual disability'' or ''record of'' prongs, the focus should be on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more of the major life activities of reading, writing, speaking, or learning because of the additional time or effort that he or she must spend to read, speak, write, or learn compared to most people in the general population.

Proposed § 84.4(d)(3)(iv) clarifies that analysis of condition, manner, or duration will not always be necessary, particularly with respect to certain impairments that can easily be found to substantially limit a major life activity such as those included in the list of impairments contained in § 84.4(d)(2)(iii). However, should an individual seeking coverage under the first or second prong wish to offer evidence establishing that their impairment is substantially limiting, they should be permitted to do so.

Proposed § 84.4(d)(1)(viii) described earlier makes clear that ameliorative effects of mitigating measures must not be considered when determining whether an impairment substantially limits a major life activity except that the ameliorative effects of ordinary eyeglasses or contact lenses must be considered. Proposed § 84.4(d)(4) provides a non-exclusive list of mitigating measures that may not be considered. As in § 84.4(d)(1)(viii), this section reiterates the exception for eyeglasses or contact lenses, stating that mitigating measures include ''low-vision devices,'' defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses. The absence of any particular measure from this list should not convey a negative implication as to whether it is a mitigating measure.

Section 84.4(e)—Has a Record of Such an Impairment

Proposed § 84.4(e)(1) states that an individual meets the second prong of the definition of disability, the ''record of'' prong, if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. An example of the first group (those who have a history of an impairment) is a person with a history of mental or emotional illness or cancer who is denied entry to a program based on their record of disability. An example of the second group (those who have been misclassified as having an impairment) is an individual who does not have an intellectual or developmental disability, but has been misclassified as having that disability. There could be a violation of § 84.4(e)(1) if a recipient acts based on a ''record of'' disability. Proposed § 84.4(e)(2) states that whether an individual meets this prong shall be construed broadly to the maximum extent permitted by section 504. The determination should not demand extensive analysis.

There are many types of records that could potentially contain information demonstrating a record of an impairment, including but not limited to, education, medical, or employment records. However, past history need not be reflected in a specific document. Any evidence that an individual has a past history of an impairment that substantially limited a major life activity is all that is needed to establish coverage under this prong. An individual can meet this prong even if the recipient does not specifically know about the relevant record. However, the individual with a ''record of'' a substantially limiting impairment must prove that the recipient discriminated on the basis of the record of a disability.

Individuals who are covered under the ''record of'' prong may be covered under the first prong of the definition of ''disability'' as well. This is because an individual with an impairment that is episodic or in remission can be protected under the first prong if the impairment would be substantially limiting when active. For example, a person with cancer that is in remission is covered under the first ''actual disability'' prong because he has an impairment that would substantially limit normal cell growth when active. He also is covered under the ''record of'' prong because of his history of having had an impairment that substantially limited normal cell growth.

Proposed § 84.4(e)(3) provides that an individual who falls within this prong

may be entitled reasonable modifications. For example, a student with a record of an impairment that previously was substantially limiting, but no longer substantially limits a major life activity, may need permission to miss a class or have a schedule change as a reasonable modification that would permit him or her to attend follow-up or monitoring appointments from a health care provider.

Section 84.4(f)—Is Regarded as Having Such an Impairment

The third prong of the definition of disability, ''regarded as having such an impairment,'' was included in the ADA specifically to protect individuals who might not meet the first two prongs of the definition but were subject to adverse decisions based upon unfounded concerns, mistaken beliefs, fears, myths, or prejudices about persons with disabilities. 42 U.S.C. 12102(3). The third prong was later amended by the ADAAA. Consistent with this amended version, proposed § 84.4(f)(1) states that an individual is regarded as having an impairment if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit a major life activity, even if the recipient asserts, or may or does ultimately establish, a defense to the action prohibited by section 504.

The rationale for this prong was articulated by the Supreme Court in a case involving section 504, *School Board of Nassau County* v. *Arline*.[431] The Court noted that although an individual may have an impairment that does not diminish their physical or mental capabilities, it could ''nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.'' [432] Thus, individuals seeking section 504 protection under this third prong only had to show that some action prohibited by the statute was taken because of an actual or perceived impairment. At the time of the *Arline* decision, there was no requirement that the individual demonstrate that they, in fact had or were perceived to have, an impairment that substantially limited a major life activity. For example, if a childcare center refused to admit a child with burn scars because of the presence of those scars, then the childcare center regarded the child as an individual with a disability, regardless of whether the child's scars substantially limited a major life activity.

In *Sutton* v. *United Air Lines, Inc.,* the Supreme Court significantly narrowed application of this prong, holding that individuals who asserted coverage under the ''regarded as'' prong had to establish either that the covered entity mistakenly believed that the individual had a physical or mental impairment that substantially limited a major life activity, or that the covered entity mistakenly believed that ''an actual, nonlimiting impairment substantially limit[ed] a major life activity'' when in fact the impairment was not so limiting.[433] Congress expressly rejected this standard in the ADAAA by amending the ADA to clarify that it is sufficient for an individual to establish that the covered entity regarded him or her as having an impairment, regardless of whether the individual actually has the impairment or whether the impairment constitutes a disability under the Act.[434] This amendment restores Congress's intent to allow individuals to establish coverage under the ''regarded as'' prong by showing that they were treated adversely because of an actual or perceived impairment without having to establish the covered entity's beliefs concerning the severity of the impairment.[435]

This clarification of the ''regarded as'' prong by the ADAAA responded primarily to narrow interpretations of the ADA but ensured that the same amendments were made to 504 since the definitions were intended to be the same.

Thus, it is not necessary for an individual to demonstrate that a recipient perceived him as substantially limited in the ability to perform a major life activity to meet the ''regarded as'' requirements. Nor is it necessary to demonstrate that the impairment relied on by a recipient is (in the case of an actual impairment) or would be (in the case of a perceived impairment) substantially limiting for an individual to be ''regarded as having such an impairment.'' In short, to be covered under this prong, an individual is not subject to any functional test. The concepts of ''major life activities'' and ''substantial limitation'' are not relevant in evaluating whether an individual meets this prong.

Proposed § 84.4(f)(2) states that an individual is not ''regarded as'' having an impairment if the recipient demonstrates that the impairment is, objectively, both ''transitory'' and ''minor.'' It is not enough for a recipient to simply demonstrate that it subjectively believed that the impairment was transitory and minor; rather, the recipient must demonstrate that it is (in the case of an actual impairment) or would be (in the case of a perceived impairment), objectively, both ''transitory'' and ''minor.'' For purposes of this section, ''transitory'' is defined as lasting or expected to last six months or less. This section makes clear that the ''transitory and minor'' exception to a claim under this prong is a defense to a claim of discrimination and not part of the individual's prima facie case. For example, an individual with a minor back injury could be ''regarded as'' an individual with a disability if the back impairment lasted or was anticipated to last more than six months.

The relevant inquiry is whether the actual or perceived impairment is objectively ''transitory and minor,'' not whether the recipient claims it subjectively believed the impairment was transitory or minor. Moreover, as an exception to the general rule for broad coverage under the ''regarded as'' prong, this limitation on coverage should be construed narrowly. For example, a school that expelled a student whom it believes has Bipolar Disorder cannot take advantage of this exception by asserting that it believed the student's impairment was transitory and minor, because Bipolar Disorder is not objectively transitory and minor. It is important to note that the six-month ''transitory'' part of the ''transitory and minor'' exception does not apply to the ''actual disability'' or ''record of'' prongs of the disability definition.

Proposed § 84.4(f)(3) provides that an individual who is ''regarded as'' having an impairment does not establish liability based on that showing alone. Instead, the individual must prove that the recipient discriminated on the basis of disability within the meaning of section 504. This provision was intended to make clear that to establish liability, an individual must establish coverage as a person with a disability, as well as establish that they had been subjected to an action prohibited by section 504.

Section 84.4(g)—Exclusions

Proposed § 84.4(g), is taken directly from the Rehabilitation Act, 29 U.S.C. 705(20)(F), and is consistent with similar exclusions contained in the ADA.[436] The section states that the term ''disability'' does not include:

[431] 480 U. S. 273 (1987).

[432] *Id.* at 283.

[433] 527 U.S. 471, 489 (1999).

[434] 42 U.S.C. 12102(3)(A).

[435] *See* H.R. Rep. No. 110–730, pt. 2, at 18 (2008).

[436] 42 U.S.C. 12211.

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

The issue of gender identity disorders was recently addressed by the Fourth Circuit in *Williams* v. *Kincaid,* a case brought under both section 504 and the ADA.[437]

The Fourth Circuit reversed and remanded the district court's dismissal of the case, holding that the plaintiff ''has plausibly alleged that gender dysphoria does not fall within section 504's and the ADA's exclusion for ''gender identity disorders not resulting from physical impairments.'' [438] The court noted that the term ''gender dysphoria,'' was not used in section 504 or the ADA nor in the then current version of the Diagnostic and Statistical Manual of Mental Disorders (DSM). In 2013, the phrase was changed in the DSM from ''gender identity disorder'' to ''gender dysphoria,'' a revision that the court said was not just semantic but reflected a shift in medical understanding. Under the court's reasoning, gender dysphoria is not included in the scope of ''gender identity disorder'' and is thus not excluded from coverage under the ADA or section 504.[439] Alternatively, the court held that even if gender dysphoria were a gender identity disorder, the exclusion would not apply in this case because the plaintiff's complaint ''amply supports [the] inference[]'' that her gender dysphoria ''result[s] from a physical impairment.''.[440]

Recognizing ''Congress' express instruction that courts construe the ADA in favor of maximum protection for those with disabilities,'' [441] the court said that it saw ''no legitimate reason why Congress would intend to exclude from the ADA's protections transgender people who suffer from gender dysphoria.'' [442] The Department agrees that restrictions that prevent, limit, or interfere with otherwise qualified individuals' access to care due to their gender dysphoria, gender dysphoria diagnosis, or perception of gender dysphoria may violate section 504.

§ 84.10 Definitions: Revisions to Subpart A

Proposed § 84.10 contains the definitions. These definitions are revised to correspond to the ADA title II regulations, to delete terminology that is obsolete, to revise or add certain terms to incorporate statutory changes to the Rehabilitation Act, to add terms used in new sections specific to the Department, and to make other minor edits.

To ensure consistency of terminology between section 504 and title II of the ADA and include additional terms that are needed in the proposed rule, the Department is proposing to add definitions of the following terms: ''2004 ADA Accessibility Guidelines (ADAAG),'' ''2010 Standards,'' ''ADA,'' ''Architectural Barriers Act,'' ''Archived web content,'' ''Auxiliary Aids and Services,'' ''Companion,'' ''Conventional electronic documents,'' ''Current illegal use of drugs,'' ''Direct threat,'' ''Disability,'' ''Drug,'' ''Existing facility,'' ''Foster care, '' ''Illegal use of drugs,'' ''Individual with a disability,'' ''Kiosks,'' ''Medical diagnostic equipment,'' ''Mobile applications (apps),'' ''Most integrated setting,'' ''Other power-driven mobility device,'' ''Parents,'' ''Prospective parents,'' ''Qualified individual with a disability,'' ''Qualified interpreter,'' ''Qualified reader,'' ''Service animal,'' ''Standards for Accessible Medical Diagnostic Equipment,'' ''State,'' ''Ultimate beneficiary,'' ''Video remote interpreting (VRI) services,'' ''WCAG 2.1,'' ''Web content,'' and ''Wheelchair.''

Terms added without change from the title II ADA regulations are: ''2004 ADA Accessibility Guidelines,'' ''2010 Standards,'' ''Auxiliary aids and services,'' ''Current illegal use of drugs,'' ''Direct threat,'' ''Disability,'' ''Drug,'' ''Existing facility,'' ''Facility,'' ''Illegal use of drugs,'' ''Individual with a disability,'' ''Other power-driven mobility device,'' ''Qualified individual with a disability,'' ''Qualified interpreter,'' ''Qualified reader,'' ''section 504,'' ''Service animal,'' ''State,'' ''Video Remote Interpreting (VRI),'' and ''Wheelchair.''

Terms added without change from the Department of Justice title II NPRM, ''Nondiscrimination on the Basis of Disability: Accessibility of Web Information and Services of State and Local Government Entities'' are: ''Archived web content,'' ''Conventional electronic documents,'' ''Mobile applications (apps),'' ''WCAG 2.1,'' and ''Web content.''

The Department proposes to remove ''The Act,'' ''Education of the Handicapped Act,'' ''Handicap,'' ''Handicapped person,'' and ''Qualified handicapped person.'' The Department proposes to retain and make minor revisions to the following terms: ''Applicant for assistance,'' (changed to ''Applicant''), ''Federal financial assistance,'' ''Program or activity,'' and ''section 504.''

The definition of ''Federal financial assistance'' in the existing rule states that Federal financial assistance means ''any grant, cooperative agreement, loan, contract (other than a procurement contract or a contract of insurance or guaranty) . . . .'' The proposed revision adds ''direct Federal'' so that it reads ''(other than a direct Federal procurement contract or a contract of insurance or guaranty''). No substantive change is intended.

Finally, the Department proposes to retain with no revisions the terms ''Recipient,'' ''Director,'' and ''Department.''

New definitions of note are discussed below.

''Archived Web Content''

The Department proposes to add a definition for ''archived web content'' to proposed § 84.10. The proposed definition defines ''archived web content'' as ''web content that (1) is maintained exclusively for reference, research, or recordkeeping; (2) is not altered or updated after the date of archiving; and (3) is organized and stored in a dedicated area or areas clearly identified as being archived.'' The definition is meant to capture web content that, while outdated or superfluous, is maintained unaltered in a dedicated area on a recipient's website for historical, reference, or other similar purposes, and the term is used in the proposed exceptions set forth in § 84.85. Throughout this rule, a recipient's ''website'' is intended to include not only the websites hosted by the recipient, but also websites operated on behalf of a recipient by a third party. For example, recipients sometimes use vendors to create and host their web content. Such content would also be covered by this rule.

''Auxiliary Aids and Services''

This section, added to be consistent with the title II regulations, sets forth a non-exhaustive list of auxiliary aids and services that reflect the latest technology and devices available in some places that may provide effective

[437] *Williams* v. *Kincaid,* 45 F. 4th 759 (4th Cir. 2022), *cert. denied,* 600 U.S. __(U.S. June 30, 2023)(No. 22–633).

[438] *Id.* at 780.

[439] *Id.* at 769.

[440] *Id.* at 773–774 (citing 42 U.S.C. 12211(b)); see also *id.* at 770–772.

[441] *Id.* at 769–70.

[442] *Id.* at 773.

communication in some situations.[443] The Department does not intend to require that every recipient provide every device or all new technology at all times as long as the communication that is provided is as effective as communication with others.

''Companion''

This phrase, added to be consistent with the title II regulations, means a family member, friend, or associate of an individual seeking access to a program or activity of a recipient, who, along with such individual, is an appropriate person with whom the recipient should communicate.

''Conventional Electronic Documents''

The Department proposes to add a definition for ''conventional electronic documents.'' The proposal defines ''conventional electronic documents'' as ''web content or content in mobile apps that is in the following electronic file formats: portable document formats (PDFs), word processor file formats, presentation file formats, spreadsheet file formats, and database file formats.'' The definition thus provides an exhaustive list of electronic file formats that constitute conventional electronic documents. Examples of conventional electronic documents include: Adobe PDF files (*i.e.,* portable document formats), Microsoft Word files (*i.e.,* word processor files), Apple Keynote or Microsoft PowerPoint files (*i.e.,* presentation files), Microsoft Excel files (*i.e.,* spreadsheet files), and FileMaker Pro or Microsoft Access files (*i.e.,* database files).

The term ''conventional electronic documents'' is intended to describe those documents created or saved as an electronic file that are commonly available on recipients' websites and mobile apps in either an electronic form or as printed output. The term is intended to capture documents where the version posted by the recipient is not open for editing by the public. For example, if a recipient maintains a Word version of a flyer on its website, that would be a conventional electronic document. A third party could technically download and edit that Word document, but their edits would not impact the ''official'' posted version. Similarly, a Google Docs file that does not allow others to edit or add comments in the posted document would be a conventional electronic document. The term ''conventional electronic documents'' is used in proposed § 84.85(b) to provide an exception for certain electronic documents created by or for a recipient that are available on a recipient's website before the compliance date of this rule and in proposed § 84.85(g) to provide an exception for certain individualized, password-protected documents, and is addressed in more detail in the discussion regarding proposed § 84.85(b) and (g).

• *Definitions (conventional electronic documents) Question 1: The Department's definition of ''conventional electronic documents'' consists of an exhaustive list of specific file types. Should the Department instead craft a more feasible definition that generally describes the types of documents that are covered or otherwise change the proposed definition, such as by including other file types (e.g., images or movies), or removing some of the listed file types?*

''Current Illegal Use of Drugs''

This phrase, added to be consistent with the title II regulations, means illegal use of drugs that occurred recently enough to justify a reasonable belief that the person's drug use is current or that continuing use is a real and ongoing problem.

''Direct Threat''

The definition of ''direct threat'' under section 504 was added to be consistent with the title II regulations and with the Supreme Court case of *School Board of Nassau County* v. *Arline,*[444] which states that a ''direct threat'' is a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services. In *Arline,* a case interpreting section 504, the Supreme Court recognized that there is a need to balance the interests of people with disabilities against legitimate concerns for public safety.

Although persons with disabilities are generally entitled to the protection of this part, a person who poses a significant risk to others constituting a direct threat will not be ''qualified'' if reasonable modifications to the recipient's policies, practices, or procedures will not eliminate that risk. The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability.[445] It must be based on an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.[446] This is the test established by the Supreme Court in *Arline.* Such an inquiry is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks. Making this assessment will not usually require the services of a physician. Sources for medical knowledge include guidance from public health authorities, such as the U.S. Public Health Service, the Centers for Disease Control and Prevention (CDC), and the National Institutes of Health, including the National Institute of Mental Health.[447]

Specific provisions concerning ''direct threat'' are derived from the ADA title II regulations and are contained in the proposed Direct threat section at § 84.75.

''Disability''

The ADAAA was passed to revise the meaning and interpretation of the definition of ''disability'' and to ensure that the definition is broadly construed and applied without extensive analysis. The definition of ''disability'' can be found at § 84.4. With respect to employment, the definition of ''disability'' is found at the regulations of the EEOC at 29 CFR 1630.2.

''Foster Care''

The term means 24-hour substitute care for children placed away from their parents or guardians and for whom the State agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, childcare institutions, and preadoptive homes. A child is in foster care in accordance with this definition regardless of whether the foster care facility is licensed and payments are made by the State or local agency for the care of the child, whether adoption

[443] The voice, text, and video-based communications included in the definition for auxiliary aids and services include Telecommunication Relay Services (such as internet Protocol Relay Services) and Video Relay Services.

[444] 480 U.S. 273 (1987).

[445] 28 CFR pt. 35, app. B (1991) (addressing § 35.139).

[446] *Id.*

[447] *Id.*

subsidy payments are being made prior to the finalization of an adoption, or whether there is Federal matching of any payments that are made. Foster care providers include individuals and institutions. The proposed rule makes clear where the language applies specifically to foster parents. The proposed definition is consistent with the definition of ''foster care'' in the Department's title IV–E foster care program regulations at 45 CFR 1355.20.

''Illegal Use of Drugs''

The term, added for consistency with title II of the ADA, means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812 *et seq.*). The term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law. Specific provisions are contained in the Illegal use of drugs section at § 84.69.

The definitions section includes ''drug,'' which means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812 *et seq.*). Also defined is ''current illegal use of drugs'' which means the illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

''Kiosks''

The Department proposes to add a definition of ''kiosks.'' Kiosks are self-service transaction machines made available by recipients at set physical locations for the independent use of patients or program participants in health or human service programs or activities. The devices usually consist of a screen and an input device, either a keyboard, touch screen or similar device, onto which the program participant independently types in or otherwise enters requested information. In health and human service programs, recipients often make kiosks available so that patients or program participants can check in, provide information for the receipt of services, procure services, have their vital signs taken, or perform other similar actions. These devices may rely on web content or mobile apps or may be closed functionality devices, *i.e.,* devices that do not rely on web content or mobile apps.

• *Definitions (kiosks) Question 2: The Department requests comment on whether a definition of* ''*kiosks*'' *is necessary, and if so, requests comment on the Department's proposed definition in § 84.10 and any suggested revisions to it.*

''Medical Diagnostic Equipment''

The term ''medical diagnostic equipment'' (MDE) comes from Section 510 of the Rehabilitation Act and means equipment used in, or in conjunction with, medical settings by health care providers for diagnostic purposes.[448] It includes, for example, examination tables, examination chairs (including those used for eye examinations or procedures and for dental examinations or procedures), weight scales, mammography equipment, x-ray machines, and other radiological equipment commonly used for diagnostic purposes by health care professionals.

''Mobile Applications (Apps)''

Mobile apps are software applications that are downloaded and designed to run on mobile devices such as smartphones and tablets. For the purposes of this part, mobile apps include, for example, native apps built for a particular platform (*e.g.,* Apple iOS, Google Android, among others) or device and hybrid apps using web components inside native apps.

''Most Integrated Setting''

The most integrated setting is described in Appendix B to the regulation implementing title II of the ADA as ''a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.'' [449] As further described in DOJ's ''Guidance on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead* v. *L.C.,*'' integrated settings provide individuals with disabilities the opportunity to interact with non-disabled persons to the fullest extent possible; are located in mainstream society; offer access to community activities and opportunities at times, frequencies and with persons of an individual's choosing; and afford individuals choice in their daily life activities.[450] The Department proposes to adopt this language as its definition for ''*most integrated setting.*''

• *Definitions (most integrated setting) Question 3: The Department requests comment on the need to include additional language in the definition of* ''*most integrated setting.*''

''Other Power-Driven Mobility Device''

The term ''other power-driven mobility device'' (OPDMD) is a term of art coined by DOJ in its regulations implementing the ADA at 28 CFR 35.104. It covers any mobility device powered by batteries, fuel, or other engines, whether or not designed primarily for use by individuals with mobility disabilities, that is used by individuals with mobility disabilities for the purpose of locomotion. Common OPDMD's include golf carts, electronic personal assistance mobility devices such as the Segway®, or other mobility devices designed to operate in areas without defined pedestrian routes but that is not a wheelchair within the meaning of this section.

''Parents''

The terms ''parents'' means biological or adoptive parents or legal guardians as determined by applicable State law. For purposes of this section, ''prospective parents'' means individuals who are seeking to become foster or adoptive parents. The proposed definition is based on the definition of ''parents'' in the Social Security Act title IV–E.[451]

''Qualified Individual With a Disability''

The Department proposes to replace the term and definition of ''qualified handicapped person'' with the term ''qualified individual with a disability'' and the corresponding definition drawn from title II of the ADA. The introduction of the definition from the Department's title II regulation will ensure consistency with title II of the ADA. Paragraph (1) states that except as provided in paragraph (2), a ''qualified individual with a disability'' is an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by the recipient.

Paragraph (2) provides the definition of qualified individual with a disability in the employment context. The language tracks the corresponding EEOC provision at 29 CFR 1630.2(m) because the meaning of ''qualified'' is different in an employment context as compared to a nonemployment context. The employment portion of the definition

[448] 29 U.S.C. 794f.

[449] 28 CFR pt. 35 app. B, 690 (2015) (addressing § 35.130(d)).

[450] U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead* v. *L.C.* (2020), *https://www.ada.gov/olmstead/q&a_olmstead.htm* (last visited Feb. 12, 2023).

[451] 42 U.S.C. 675.

incorporates the EEOC definition of ''qualified,'' thereby implementing the employment standards of title I of the ADA in accordance with section 503(b) of the Rehabilitation Act Amendments of 1992, at 29 U.S.C. 791(f).

Paragraph (3) sets forth the definition with respect to childcare, preschool, elementary and secondary, and adult educational services. The definition in § 84.3 of the existing regulations limits the definition to public preschool, elementary, secondary, or adult education services. That rule makes a distinction between requirements for recipients that operate public elementary and secondary education programs and activities (§ 84.32 and 84.33) and recipients who provide private education (§ 84.39). The proposed rule is not retaining those provisions and makes no distinction between public and private programs or activities. Accordingly, the reference to ''public'' is deleted from this definition. It should be noted that the application section at § 84.31, which is being retained with the addition of ''childcare,'' states that the subpart applies to all preschool, elementary and secondary, and adult education and does not limit the coverage to public programs and activities. The requirement that the entity be public is contained only in the sections dealing specifically with recipients who operate elementary and secondary programs, sections that are not retained in the proposed rule.

Paragraph (4) provides the definition with respect to postsecondary education.

''Qualified Interpreter''

This definition is added for consistency with title II of the ADA. A qualified interpreter must be able to interpret effectively, accurately, and impartially. Qualified interpreters include sign language interpreters, oral transliterators, and cued-language transliterators.

This list of interpreters is illustrative. Different situations require different types of interpreters. For example, an oral interpreter who has special skill and training to mouth a speaker's words silently for individuals who are deaf or hard of hearing may be necessary for an individual who was raised orally and taught to read lips or was diagnosed with hearing loss later in life and does not know sign language. An individual who is deaf or hard of hearing may need an oral interpreter if the speaker's voice is unclear, if there is a quick-paced exchange of communications (*e.g.,* in a meeting), or when the speaker does not directly face the individual who is deaf or hard of hearing. A cued-speech interpreter functions in the same manner as an oral interpreter except that they use a hand code or cue to represent each speech sound. The guiding criterion is that the recipient must provide appropriate auxiliary aids and services to ensure effective communication.

In addition to sign language interpreters, the illustrative list in the definition includes ''cued-language transliterators'' and ''oral transliterators.'' A cued-language transliterator is an interpreter who has special skill and training in the use of the Cued Speech system of handshapes and placements, along with non-manual information, such as facial expression and body language, to show auditory information visually, including speech and environmental sounds. An oral transliterator is an interpreter who has special skill and training to mouth a speaker's words silently for individuals who are deaf or hard of hearing.

''Qualified Reader''

This definition is added for consistency with the ADA. A qualified reader is a person who is able to read effectively, accurately, and impartially using any necessary specialized vocabulary. Failure to provide a qualified reader to an individual with a disability may constitute a violation of the requirement to provide appropriate auxiliary aids and services.

To be ''qualified,'' a reader must be skilled in reading the language and subject matters and must be able to be easily understood by the individual with a disability. For example, if a reader is reading aloud the questions for a college microbiology examination, that reader, to be qualified, must know the proper pronunciation of scientific terminology used in the text, and must be sufficiently articulate to be easily understood by the individual with a disability for whom he or she is reading.

''Service Animal''

This definition was added for consistency with the ADA. Service animals, which are limited to dogs, must be individually trained to do work or perform tasks for the benefit of an individual with a disability. The work and tasks must be directly related to the individual's disability. This includes alerting individuals who are deaf or hard of hearing to the presence of people or sounds and providing non-violent protection or rescue work. The phrase ''non-violent protection'' is used to exclude so-called ''attack dogs'' or dogs with traditional ''protection training'' as service animals. The crime-deterrent effect of a dog's presence, by itself, does not qualify as work or tasks for purposes of the definition. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of the definition.

''Standards for Accessible Medical Diagnostic Equipment''

The Department proposes that the term ''Standards for Accessible Medical Diagnostic Equipment'' means the standards at 36 CFR part 1195, promulgated by the Architectural and Transportation Barriers Compliance Board (Access Board) under section 510 of the Rehabilitation Act of 1973, as amended, found in the Appendix to 36 CFR part 1195.

''Video Remote Interpreting Service (VRI)''

This definition was added for consistency with the ADA. Video remote interpreting services are a means of providing interpreting services for persons who are deaf or hard of hearing that use video conference technology over dedicated lines or wireless technologies offering high-speed, wide-bandwidth video connection that delivers high-quality video images.

''WCAG 2.1''

The Department proposes to add a definition of ''WCAG 2.1.'' The term ''WCAG 2.1'' refers to the 2018 version of the voluntary guidelines for web accessibility, known as the Web Content Accessibility Guidelines 2.1 (WCAG). The W3C®, the principal international organization involved in developing standards for the web, published WCAG 2.1 in June 2018, and it is available at *https://www.w3.org/TR/WCAG21/.*[452] WCAG 2.1 is discussed in more detail in proposed § 84.84.

''Web Content''

The Department proposes to add a definition for ''web content'' that is based on the WCAG 2.1 definition but is slightly less technical and intended to be more easily understood by the public generally. The Department's proposal defines ''web content'' as ''information or sensory experience—including the encoding that defines the content's structure, presentation, and interactions—that is communicated to the user by a web browser or other software. Examples of web content include text, images, sounds, videos, controls, animations, and conventional

[452] *See* W3C®, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), *https://www.w3.org/TR/WCAG21/* [*https://perma.cc/UB8A-GG2F*].

electronic documents.'' WCAG 2.1 defines web content as ''information and sensory experience to be communicated to the user by means of a user agent, including code or markup that defines the content's structure, presentation, and interactions.'' [453]

The definition of ''web content'' attempts to describe the different types of information and experiences available on the web. The Department's NPRM proposes to cover the accessibility of recipients' web content available on public entities' websites and web pages regardless of whether the web content is viewed on desktop computers, laptops, smartphones, or other devices.

The definition of ''web content'' also includes the encoding used to create the structure, presentation, or interactions of the information or experiences on web pages that range in complexity from, for example, pages with only textual information to pages where users can complete transactions. Examples of languages used to create web pages include Hypertext Markup Language (HTML), Cascading Style Sheets (CSS), Python, SQL, PHP, and JavaScript.

- *Definitions (web content) Question 4: Are there refinements to the definition of ''web content'' the Department should consider? Consider, for example, WCAG 2.1's definition of ''web content'' as ''information and sensory experience to be communicated to the user by means of a user agent, including code or markup that defines the content's structure, presentation, and interactions.''*

''Wheelchair''

The proposed rule adopts the definition of wheelchair used by the DOJ in its ADA rules. It defines wheelchair as a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor, or of both indoor and outdoor locomotion.

Sections Retained

This proposed rule is retaining existing sections on (1) Assurances (§ 84.5); (2) Remedial action, voluntary action, and self-evaluation (§ 84.6); and (3) Designation of responsible employee and adoption of grievance procedures (§ 84.7). The Notice section (§ 84.8) has been revised to be consistent with the title II regulations. It states that a recipient must make available to all employees, applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the programs or activities of the recipient, and make such information available to them in such manner as the head of the recipient or his or her designee finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this part.

It is also retaining Administrative requirements for small recipients, § 84.9. That section states that recipients with fewer than 15 employees need not comply with the Designation of responsible employee and adoption of grievance procedures section or the Notice section unless the Director determines that compliance is appropriate because of a finding of a violation or a finding that such compliance will not significantly impair the ability of the recipient to provide benefits or services.

Employment Practices: Revisions to Subpart B

Proposed § 84.16 lists the general prohibitions in employment practices. This proposed rule replaces the existing employment section at § 84.11. Paragraph (a) states that no qualified individual with a disability shall be subjected to discrimination on the basis of disability. The Rehabilitation Act Amendments of 1992, Public Law 102–569 (Oct. 29,1992), amended title V of the Rehabilitation Act to apply the employment standards set forth in title I of the ADA to employment discrimination under section 504.[454] Paragraph (b) implements this requirement. It states that the standards to be used in determining whether the section has been violated shall be the standards applied under title I of the ADA of 1990 and sections 501 through 504 and 511 of the ADA, as amended (codified at 42 U.S.C. 12201–12204, 12210), as implemented in the EEOC's regulation at 29 CFR part 1630. This employment section recognizes the potential for jurisdictional overlap that exists with respect to laws prohibiting discrimination in employment. The EEOC enforces title I of the ADA and, under E.O. 12067, has the responsibility for coordinating and leading the Federal Government's efforts to eradicate workplace discrimination. The Department of Labor enforces section 503 of the Rehabilitation Act; and at least 25 Federal agencies that provide financial assistance are responsible for enforcing section 504 in their programs. Section 107 of the ADA requires that coordination mechanisms be developed in connection with the administrative enforcement of complaints alleging discrimination under title I and complaints alleging discrimination in employment in violation of the Rehabilitation Act. This provision ensures that Federal investigations of title II and section 504 complaints will be coordinated on a government-wide basis.

Program Accessibility: Revisions to Subpart C

Section 84.21 states that except as provided in § 84.22, no qualified individual with a disability shall, because a recipient's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the programs or activities of a recipient, or be subjected to discrimination by any recipient. This subpart addresses accessibility to the built environment with two approaches: (1) providing standards for new construction and alterations, and (2) applying the concept of program access for programs or activities carried out in new as well as previously existing facilities, even when those facilities are not directly controlled by the recipient. For example, where a recipient hospital contracts out certain health care activities to another entity, and those activities are inaccessible, then the recipient hospital may have impermissibly denied qualified individuals with disabilities the benefits of the programs and activities and subjected those individuals to discrimination.

The Department's existing rule at § 84.22, which is retained in part in the proposed rule, states that a recipient is not required to make each of its existing facilities accessible if its program as a whole is accessible. Access to a program may be achieved by a number of means, including reassignment of services to already accessible facilities, redesign of equipment, delivery of services at alternate accessible sites and, if necessary, structural changes.

Section 84.22(a)(2), which mirrors the ADA title II regulation and the section 504 regulations for federally conducted programs, provides that in meeting the program accessibility requirement, a recipient is not required to take any action that would result in a fundamental alteration in the program

[453] *See* W3C®, *Web Content Accessibility Guidelines 2.1* (June 5, 2018), *https://www.w3.org/TR/WCAG21/#glossary* [*https://perma.cc/YB57-ZB8C*].

[454] 29 U.S.C. 794(d). *See also* 29 CFR pt. 1630 (Regulations to Implement the Equal Opportunity Provisions of the ADA); 29 CFR pt. 1640 (Procedures for Coordinating the Investigation of Complaints or Charges of Employment Discrimination Based on Disability Subject to the Americans with Disabilities Act and section 504 of the Rehabilitation Act of 1973.

or activity or undue financial and administrative burdens. A similar limitation is provided in § 84.22 (Existing facilities), § 84.81 (Communications), § 84.88 (Web, mobile, and kiosk accessibility), and § 84.93 (Accessible medical equipment.)

This paragraph does not establish an absolute defense: it does not relieve a recipient of all obligations to individuals with disabilities. Although a recipient is not required to take actions that would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with disabilities receive the benefits or services provided by the recipient.

It is the Department's view that compliance with § 84.22(a), like compliance with the corresponding provisions of the ADA title II regulation and the section 504 regulations for federally conducted programs, would in most cases not result in undue financial and administrative burdens on a recipient. In determining whether financial and administrative burdens are undue, all recipient resources available for use in the funding and operation of the program or activity should be considered. The burden of proving that compliance with § 84.22(a) would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the recipient.

The decision that compliance would result in such alterations or burdens must be made by the head of the recipient or their designee and must be accompanied by a written statement of the reasons for reaching that conclusion. The Department recognizes the difficulty of identifying the official responsible for this determination, given the variety of organizational forms that may be taken by recipients and their components. The intention of this paragraph is that the determination must be made by a high level official or senior leader who has budgetary authority and responsibility for making spending decisions.

Section 84.22 (b), methods, is identical to the title II provision at 28 CFR 35.150 (b) and, with minor changes, the existing section 504 regulation at § 84.22(b). Any differences between this proposed section and the existing section are intended to be non-substantive. The proposed rule retains provisions based in the existing rule relating to small health, welfare, or other social services providers (§ 84.22(c)); time period for compliance (§ 84.22(d)); transition plan (§ 84.22(e)); and notice (§ 84.22(f)).

The requirements for new construction and alterations, set forth in § 84.23, are more stringent than § 84.22, which contains the requirements for existing facilities. Section 84.23(a)), Design and construction, requires each facility or part of a facility constructed by, on behalf of, or for the use of a recipient to be designed and constructed in such a manner that the facility or part of the facility is ''readily accessible to and usable by'' individuals with disabilities, if the construction was commenced after June 3, 1977.

Section 84.23(b), Alterations, states that each facility or part of a facility constructed by, on behalf of, or for the use of a recipient that affects or could affect the usability of the facility or part of the facility, shall, to the maximum extent feasible, be altered in such a manner that the altered portion is readily accessible and usable by individuals with disabilities, if the alteration was commenced after June 3, 1977.

Section 84.23(c) addresses accessibility standards and compliance dates for recipients that are public entities. The term ''public entities'' is derived from DOJ's ADA title II regulation and is incorporated in subsection (c)(1) and means any State or local government; any department, agency, special purpose district, or other instrumentality of a State or states or local government; and The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act). (45 U.S.C. 541). Section 84.23(d) addresses accessibility standards and compliance dates for recipients that are private entities. The term ''private entities'' is derived from DOJ's ADA title III regulation and is incorporated in subsection (d)(1) and means any person or entity other than a public entity.

Section 84.23(c)(1) states that as of January 18, 1991, design, construction, or alteration of buildings in conformance with sections 3–8 of the Uniform Federal Accessibility Standards (UFAS)[455] shall be deemed to comply with the requirements of § 84.23(a). When the Department first issued its section 504 rule in 1977, it included a different standard, the ANSI (American National Standard Institute's Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped), known as ANSI A117.1–1961(R1971). This standard covered facilities built or altered during the time period from June 3, 1977 until January 18, 1991. In 1990, the Department changed its standard to sections 3–8 of the Uniform Federal Accessibility Standards (''UFAS'') and applied the standard to all facilities constructed by recipients of HHS funding after January 18, 1991.

In its regulations implementing the ADA, DOJ adopted more up-to-date and comprehensive accessibility standards, first the 1991 ADA Accessibility Guidelines (ADAAG) Standards and then the 2010 ADAAG Standards. For example, the 2010 Standards contain requirements for children's facilities, standards for a series of recreation facilities, higher requirements for the number of accessible entrances, and more detailed provisions on accessible toilet facilities. In addition, these Standards are written in a different format that follows the approach of private accessibility standards that are commonly used in state and local building codes. Under title II of the ADA, these Standards apply to all public entities; under title III of the ADA, these Standards apply to a wide range of private entities, including hospitals, the offices of health care providers, pharmacies, childcare centers, senior citizen centers, homeless shelters, food banks, adoption agencies, or other social service center establishments. Therefore, these Standards have applied to many recipients of HHS funding for many years.[456]

In this rule, the Department seeks to use the Standards currently used in the ADA: the 2010 Standards. The 2010 Standards for Accessible Design consist of the 2004 ADAAG and the requirements contained in 28 CFR 35.151. To avoid making this regulation overly cumbersome, the Department incorporates the components of the 2010 Standards (that is, the 2004

[455] Appendix A to 41 CFR 101–19.6 (July 1, 2002 ed.), 49 FR 31528, app. A (Aug. 7, 1984).

[456] For private entities subject to title III of the Americans with Disabilities Act, any facility designed and constructed for first occupancy after January 26, 1993, would be required to meet the accessibility requirements of DOJ's 1991 Accessibility Standards. 28 CFR 36.401. For such facilities for which the start of physical construction or alterations occurred on or after March 15, 2012, the facility would be required to meet DOJ's 2010 Accessibility Standards. 28 CFR 36.406(a).

For public entities subject to title II of the Americans with Disabilities Act, any facility, where construction was commenced after January 26, 1992, would be required to meet the accessibility requirements of either UFAS or the DOJ's 1991 Accessibility Standards, excluding the elevator exemption. 28 CFR 35.151(a). For such facilities where the physical construction commenced on or after March 15, 2012, the facility would be required to meet the accessibility requirements of DOJ's 2010 Accessibility Standards. 28 CFR 35.151(c).

ADAAG and 28 CFR part 151, as defined in § 84.10 of this rule) by reference. Sections (c) and (d) clarify the considerations for choosing between UFAS and the 2010 Standards for new construction and alterations. Unlike the Department's previous provision for new construction in § 84.23, which used a ''deeming'' approach, § 84.23(c)(5) and (d)(5) of the amended rule, which will apply to physical construction or alterations that commence on or after one year from the publication date of the final rule in the **Federal Register**, will require recipients to comply with the 2010 Standards. Section 84.23(c)(2) and (3) and (d)(2) and (3) of the amended rule, which will apply to physical construction and alterations that commenced before the rule's effective date, will still use the ''deeming'' approach. Section 84.23(c)(4) and (d)(4) of the amended rule, which will apply to physical construction or alterations that commence (or, in certain situations set forth in Section (d)(4), construction or alterations that are permitted) on or after the effective date of the final rule and before the date one year from the publication date of the final rule in the **Federal Register**, will require recipients to comply either with UFAS or the 2010 Standards. This will make the Department's approach under section 504 parallel to the approach under the ADA. Similar to its approach in the existing section 504 regulation, the Department will allow recipients that are public entities to depart from particular technical and scoping requirements by the use of other methods where those methods provide equivalent or greater access to and usability of the building or facility.

One of the major advantages of using the 2010 Accessibility Standards rather than UFAS is that the 2010 Standards have been harmonized with private sector codes that form the basis for many State and local building codes. In addressing building accessibility, HHS recipients must now comply with local and State building codes as well as UFAS—distinct bodies of regulation that in many instances impose overlapping and sometimes inconsistent requirements. Because the 2010 Standards were designed to harmonize with other accessibility codes, HHS recipients will face less confusion and difficulty in determining how to undertake alterations to existing facilities or to construct new facilities. In addition, the 2010 Standards are much more complete, providing specific requirements for certain types of facilities, including medical care facilities and social service care establishments, and providing specific guidance on the types of features in buildings, such as standards for toilet rooms, assembly areas, and accessible routes both within a facility and from outside features like parking areas and public transportation stops. The new Standards also include technical requirements based on children's dimensions and anthropometrics.

The Department proposes that this new Standard will take effect on the effective date of this rule, which is 60 days after the publication date in the **Federal Register**.

To address how recipients of Federal financial assistance from the Department should address construction standards for projects that are being built during a variety of time periods, the proposed rule offers a detailed blueprint on how construction should proceed. The series of scenarios detailed in § 84.23(c) follow the approach used by the DOJ in its 2010 regulation implementing the ADA at 28 CFR 35.151(c).

For example, proposed § 84.23(c)(3) states that physical construction or alterations that commence after January 18, 1991, but before the effective date of the final rule, will be deemed in compliance with the new construction obligation if the recipient's construction meets the requirements of UFAS. Under proposed § 84.23(c)(4), if the construction commences after the effective date of the final rule but before one year from that publication date, the recipient will be in compliance if it follows either UFAS or the 2010 Standards. (However, if the recipient is also covered by the ADA, it will be required by the ADA and the proposed regulation to follow the 2010 Standards.) All new construction and alterations projects that start physical construction one year from the publication date in the **Federal Register**, *i.e.,* this date for which the last application for a building permit is certified as complete, must follow the 2010 Standards. This approach is necessary because of the delays that often occur in the construction process between the design process and the permitting and actual construction process.

Program Accessibility and the ''Safe Harbor'' Under § 84.22(g)

The adoption of a new standard for accessible buildings and facilities necessitates a change to the Department's existing regulation for existing facilities. The ''program accessibility'' requirement in regulations implementing section 504 requires that each program or activity, when viewed in its entirety, be readily accessible to and usable by individuals with disabilities.[457] Section 504 requires recipients' programs and activities to be accessible in their entirety, and recipients generally have flexibility in how to address accessibility issues or barriers as long as program access is achieved. Program access does not necessarily require a recipient to make each of its existing facilities accessible to and usable by individuals with disabilities, and recipients are not required to make structural changes to existing facilities where other methods are effective in achieving program access.[458] Recipients do, however, have program access considerations that are independent of, but may coexist with, requirements imposed by new construction or alteration requirements in those same facilities.

Where a recipient opts to alter existing facilities to comply with its program access requirements, the recipient must look to the accessibility requirements in § 84.23(c). Under the Department's rule, these alterations will be required to comply with the 2010 Standards. The 2010 Standards introduce technical and scoping specifications for many elements not covered by UFAS, the Department's existing standard. In existing facilities, these supplemental requirements need to be taken into account by a recipient in ensuring program access. Also included in the 2010 Standards are revised technical and scoping requirements for a number of elements that were addressed in earlier standards. These revised requirements reflect incremental changes that were added either because of additional study by the Access Board or to harmonize Federal access requirements with those of private model codes.

Although the program accessibility standard offers recipients a level of discretion in determining how to achieve program access, in the NPRM, the Department proposes to follow the lead established by DOJ in its ADA regulations and include an addition to the existing facilities requirements, a new paragraph, § 84.22(g), entitled ''Safe harbor,'' to clarify that if a recipient has constructed or altered elements in accordance with the specifications of UFAS (or for facilities constructed or altered under ANSI), such recipient is not, solely because of the Department's proposed use of the 2010 Standards, required to retrofit such elements to reflect incremental changes in the

[457] 45 CFR 84.21–22.

[458] *See id.*

proposed standards. In these circumstances, the recipient would be entitled to a safe harbor for the already compliant elements until those elements are altered. The safe harbor does not negate a recipient's new construction or alteration obligations; it must comply with the new construction or alteration requirements in effect at the time of the construction or alteration. With respect to existing facilities designed and constructed after the effective date of the first section 504 regulation, but before the recipients were required to comply with the 2010 Standards (between June 3, 1977 and one year from the publication date of this NPRM in final in the **Federal Register**), the rule is that any elements in these facilities that were not constructed in conformance with accessibility requirements are in violation of section 504 and must be brought into compliance. *See* proposed § 84.23(a), (c)(5), and (d)(5). Similarly, if elements in existing facilities were altered during this time period, and those alterations were not made in conformance with the alteration requirements in effect at the time, then those alteration violations must be corrected. *See* proposed § 84.23(b), (c)(5), and (d)(5).

Section 84.23(g) states that nothing in this section relieves recipients whose facilities are covered by the Architectural Barriers Act from their responsibility of complying with that Act.

Section 84.23(h) sets forth requirements with regard to mechanical rooms.

Childcare, Preschool, Elementary and Secondary, and Adult Education: Revisions to Subpart D

The proposed rule clarifies two sections from the existing regulation: § 84.31, Application, and § 84.38, Preschool and adult education. The existing application section states that it applies to adult education among other things, but childcare is not mentioned. However, the existing § 84.38 refers both to day care (which was intended to include childcare) and adult education. We propose to add childcare to § 84.31, the application section, since the regulation was intended to broadly reach any form of childcare, whether or not it would be considered ''day care.'' We also propose to change the heading of § 84.38 to ''Childcare, preschool, and adult education'' to reflect the text of the section. In addition, we propose to add Child Care and Adult Education to the subpart heading to reflect what is contained in the two sections we are retaining. Other sections in the existing regulation concerning elementary and secondary education are reserved.

HHS administers the largest Federal funding source for childcare through the Child Care and Development Fund (CCDF) and provides significant Federal financial assistance to early childhood education through Early Head Start, Head Start, and the Preschool Development Birth through Five (PDG B–5) programs.

Although ''day care'' is included in the existing § 84.38, in recent years, there has been national attention to the lack of availability and accessibility of inclusive childcare and preschool for children with disabilities. Section 504 follows the precedent set by other civil rights laws based on the receipt of Federal funds, most prominently, Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972. Thus, section 504 applies to recipients of Federal funding, including public or private preschools, childcare centers, family childcare homes, and other entities that receive Federal funds including through a grant, loan, contract, or voucher.[459]

The proposed regulation clarifies existing obligations for childcare providers under subpart D of section 504 (childcare, preschool, elementary and secondary, and adult education.) Childcare providers must also comply with obligations in subpart A (general), B (employment), C (program accessibility), F (health, welfare, and social services), G (general requirements), H (communications), and I (web and mobile accessibility), subparts that apply to all recipients. The Department is aware that some childcare providers that receive financial assistance from HHS may not be familiar with these obligations.[460]

• *Child Care, Preschool, Elementary and Secondary, and Adult Education Question 1: The Department wants to better understand potential impacts of the proposed rule on these recipients and requests comment on the application of the proposed rule to childcare providers and any potential barriers to compliance.*

Upon finalizing this regulation, the Department would provide additional guidance to childcare providers to ensure that they understand the requirements of these provisions.

In January 2020, the Center for American Progress (CAP) issued a report, ''The Child Care Crisis Disproportionately Affects Children With Disabilities.'' Analyzing the 2016 Early Childhood Program Participation Survey and a combined sample of the 2016–2018 National Survey of Children's Health, as well as family interviews, CAP found that ''compared with parents of nondisabled children, a larger proportion of parents with disabled children experience at least some difficulty finding care (34 percent vs. 25 percent).'' [461] These parents face many barriers to care, ''including a lack of available slots, scheduling challenges, and concerns about quality.'' [462] ''Compared with parents of nondisabled children, parents of young children with disabilities are three times more likely to experience job disruptions because of problems with childcare.'' [463]

In 2015, the Department and the Department of Education issued a joint ''Policy Statement on Inclusion of Children With Disabilities in Early Childhood Programs'' that cited the ADA and section 504 as part of the legal foundation for inclusion.[464] The Department stated that ''all young children with disabilities should have access to inclusive high-quality early childhood programs, where they are provided with individualized and appropriate support in meeting high expectations.'' In 1997, DOJ issued guidance titled ''Commonly Asked Questions About Child Care Centers and the Americans with Disabilities Act,'' [465] which set forth requirements for childcare services, programs, and activities covered by title II of the ADA and privately-run childcare centers covered by title III of the ADA. The

[459] *See, e.g., Grove City Coll.* v. *Bell,* 465 U.S. 555 (1988) (addressing Title IX, the Supreme Court held that the method by which the assistance reached the entity operating a program or service was not determinative of whether the assistance was Federal financial assistance under the Spending Clause civil rights statutes. The Court held that Basic Educational Opportunity Grants were Federal financial assistance to a college, even though the grants were dispersed to students, who in turn used those funds for education-related expenses).

[460] Because childcare providers are covered by both titles II and III of the ADA, the obligations of this proposed regulation will be coextensive with the existing disability rights obligations for most childcare entities, except for those private childcare entities that are controlled and operated by a religious entity and are exempt from coverage by the ADA.

[461] Ctr. for Am. Progress, *The Child Care Crisis Disproportionately Affects Children With Disabilities,* (Jan. 29, 2020), *https://www.americanprogress.org/article/child-care-crisis-disproportionately-affects-children-disabilities/.*

[462] *Id.*

[463] *Id.*

[464] U.S. Dep't of Health & Hum. Servs., U.S. Dep't of Ed., Policy Statement on Inclusion of Children with Disabilities in Early Childhood Programs (Sept. 14, 2015), *https://www2.ed.gov/policy/speced/guid/earlylearning/joint-statement-full-text.pdf.*

[465] U.S. Dep't of Justice, Commonly Asked Questions About Child Care Centers and the Americans with Disabilities Act (2020), *https://www.ada.gov/childqanda.htm* (last accessed Feb. 15, 2023).

guidance provides that, barring an applicable limitation, childcare centers must make reasonable modifications to their policies, practices, and procedures to integrate children, parents, and guardians with disabilities into their programs unless their presence would pose a direct threat to the health or safety of others or require a fundamental alteration of the program. In addition, centers must make reasonable modifications to their policies and practices to integrate children, parents, and guardians with disabilities into their programs unless doing so would constitute a fundamental alteration. Centers must generally make their facilities accessible to persons with disabilities. Existing facilities are subject to the readily achievable standard for barrier removal, while newly constructed facilities and any altered portions of existing facilities must be fully accessible.

In past years, OCR has received several complaints about discrimination on the basis of disability in childcare services. For example, OCR investigated a complaint filed by the parent of a child with autism spectrum disorder who was denied an opportunity to participate in the childcare program based on the child's disability. The childcare center committed to a corrective action plan aimed at remedying its discriminatory policy, including a requirement to provide staff training and to implement a grievance procedure. In another complaint, a child with a disability was denied enrollment in a childcare program because he needed assistance with toileting. Following the complaint, the program revised its policies. Diapering, medication assistance, and the need for one-on-one support are common reasons children with disabilities are denied enrollment. These complaints demonstrate that some covered childcare entities lack awareness of their obligations to comply with section 504. By explicitly including ''childcare'' providers in the regulatory language, the Department clarifies obligations for these recipients.

Recipients generally are subject to all the general and specific prohibitions against discrimination contained at proposed § 84.68 as well as the specific prohibition applicable to childcare and early education programs in § 84.38. Accordingly, recipients must provide auxiliary aids and services; make reasonable modifications to their policies, practices, and procedures; and integrate children, parents, and guardians with disabilities into their programs. The question of what is a ''reasonable modification'' will depend on a number of factors including the size of the entity, the types of services provided at the center, and staffing demands. For example, as explained in DOJ's ''Commonly Asked Questions About Child Care Centers and the Americans with Disabilities Act'' guidance document, ''[c]enters that provide personal services such as diapering or toileting assistance for young children must reasonably modify their policies and provide diapering services for older children who need it due to a disability. Generally speaking, centers that diaper infants should diaper older children with disabilities when they would not have to leave other children unattended to do so.'' However, if the program never provides toileting assistance to any child, the program is not required to do so for a child with a disability.[466]

The Department is retaining current subpart E, Postsecondary Education.

Health, Welfare, and Social Services: Revisions to Subpart F

The Department proposes to retain § 84.51, Application, as well as the general prohibitions in § 84.52(a) and the notice requirement in § 84.52(b). It is deleting paragraph (c), concerning emergency treatment of [individuals who are deaf or hard of hearing] and paragraph (d) concerning auxiliary aids, and is substituting in their place proposed new subpart H, §§ 84.77–84.81, Communications.[467] That subpart provides detailed requirements for communications and is not limited to requirements with regard to auxiliary aids.

The Department also proposes to retain § 84.53, which states that a recipient that operates a general hospital or outpatient facility may not discriminate in admission or treatment against an individual with a [substance use disorder] who is suffering from a medical condition, because of the person's [substance use disorder]. The Appendix states that the section was included ''pursuant to section 407, Public Law 92–255, the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1174), as amended, and section 321, Public Law 901–616, the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 (42 U.S.C. 4581), as amended, and section 321, Public Law 93–282.'' It notes that the section prohibits discrimination against [individuals with substance use disorders] not just by hospitals as in section 407 of the Drug Abuse Office and Treatment Act but it also includes outpatient facilities ''because of the broader application of section 504.''[468]

• *Health, Welfare, and Social Services Question 1: The Department seeks comment on whether the application of the section should extend beyond hospitals (including inpatient, long-term hospitals, and psychiatric hospitals) and outpatient facilities. If so, what types of treatment programs, providers, or other facilities should be included in this section?*

This section should be read in conjunction with § 84.69, Illegal use of drugs.

The Department proposes to retain § 84.54, Education of institutionalized persons, which provides that individuals with disabilities who are institutionalized must be provided with an appropriate education. The existing regulation states that the appropriate education must be consistent with § 84.33(b), a section not retained in this rule. In its place, the proposed rule references the section 504 regulations of the Department of Education, 34 CFR 104.33(b).

The Department is also retaining paragraphs (a) and (f) of § 84.55, Procedures relating to health care for [infants with disabilities]. Paragraphs (b)–(e) are not retained because they are subject to an injunction prohibiting their enforcement. In *Bowen* v. *American Hospital Association,* the Supreme Court upheld the action of the United States District Court declaring invalid and enjoining enforcement of those provisions.[469]

Paragraph (a) encourages, but does not require, that recipients that provide health care services to infants establish an Infant Care Review Committee (ICRC) to assist the provider in delivering health care services to infants. The committee would assist in the development of standards, policies, and procedures for providing treatment to infants with disabilities and in making decisions concerning medically beneficial treatment in specific cases. The ICRC should be composed of individuals representing a broad range of perspectives and should include a practicing physician, a representative of a disability organization, a practicing nurse, and other individuals. A suggested model ICRC is set forth in paragraph (f).

[466] *Id.*

[467] Throughout the regulation, brackets are used to indicate substitution of an obsolete word or phrase, unless they are being used in a direct quotation.

[468] 45 CFR part 84, app. A (addressing § 84.53).

[469] 476 U.S. 610 (1986), (*aff'g Am. Hosp. Ass'n* v. *Heckler,* 585 F. Supp. 541 (S.D.N.Y. 1984).

Subpart G—General Requirements

To accommodate provisions needed to update the Department's section 504 regulation to be consistent with the ADA and to incorporate these provisions in the Department's existing section 504 regulatory framework, the Department is proposing to add a new subpart G—General Requirements. This new subpart will house the provisions dealing with general prohibitions against discrimination, the illegal use of drugs, the maintenance of accessible features, retaliation and coercion, personal devices or services, service animals, mobility devices, and direct threat. In addition, it will address integration.

§ 84.68 General Prohibitions Against Discrimination

The Department proposes several changes to ensure consistency between section 504 and the ADA by revising and adding several paragraphs to the general existing prohibitions contained in § 84.4, Discrimination prohibited. The general prohibitions are now contained in § 84.68, General prohibitions against discrimination. These proposed regulations are intended to be interpreted in the same manner as the corresponding ADA regulatory provisions.[470]

The Department is adopting these changes in order to preserve parity with the ADA regulations given Congress's intent that the ADA and section 504 be interpreted consistently. Both recipients and individuals with disabilities benefit from establishing consistent regulations. The preamble to the general prohibitions section contained at 28 CFR 35.130 of the title II ADA regulations explains that ''[t]he general prohibitions against discrimination in the rule are generally based on the prohibitions in existing regulations implementing section 504 and, therefore, are already familiar to State and local entities covered by section 504. In addition, [this regulation] includes a number of provisions derived from title III of the Act that are implicit to a certain degree in the requirements of regulations implementing section 504.''[471]

Existing § 84.4(a), the general prohibition against discrimination, is now contained in § 84.68(a). The Department has inserted the word ''solely'' in the text of this provision to be consistent with the statute because this regulatory language tracks the general nondiscrimination statement of the statute. This change is a technical amendment and is not intended to alter the Department's 46-year history of interpretation or alter the decades-long reach of the Department's regulations under this rule. As used in this part, solely on the basis of disability is consistent with, and does not exclude, the forms of discrimination delineated throughout the rule.

Paragraphs (b)(1)(i) to (vii) list prohibited actions that apply directly to recipients as well as those with whom it is connected through contractual, licensing, or other arrangements.

Paragraph (b)(1)(i) states that a recipient may not deny a qualified individual with a disability the opportunity to participate in or benefit from an aid, benefit, or service.

Paragraph (b)(1)(ii) states that a recipient may not afford an opportunity that is not equal to or as effective as that given to individuals without disabilities.

Paragraph (b)(1)(iii) states that a recipient may not provide a qualified individual with a disability an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the benefit of or to reach the same level of achievement as that provided to others.

Paragraphs (b)(1)(iv) states that a recipient may not provide different or separate aids, benefits, or services unless necessary to be as effective as provided to others.

Paragraph (b)(1)(v) states that a recipient may not provide significant assistance to an entity that discriminates on the basis of disability.

Paragraph (b)(1)(vi) states that a recipient may not deny the opportunity to be a member of a planning or advisory board.

Paragraph (b)(1)(vii) states that a recipient may not otherwise limit an individual with disabilities in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others.

Paragraph (b)(2) states that a recipient may not deny a qualified individual with a disability the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

Paragraph (b)(3) states that a recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (1) that have the effect of subjecting qualified individuals with disabilities to discrimination or (2) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the program or activity or (3) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

Paragraph (b)(4) prohibits the same actions when determining the site or location of a facility although, as in the title II regulations, the third type of discrimination above is not included.

Proposed§ 84.68(b)(5) states that the regulation applies to recipients' selection of procurement contractors and includes proposed language prohibiting the use of criteria that would subject qualified individuals with disabilities to discrimination on the basis of disability This provision is contained in the Department's section 504 regulations for federally conducted programs at 45 CFR 85.21(b)(5), which were issued in 1988.[472]

Proposed § 84.68(b)(6) includes language prohibiting a recipient from administering a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability and from establishing requirements for the programs or activities of licensees that subject qualified individuals with disabilities to discrimination on the basis of disability.[473] It makes clear that the programs or activities of entities that are licensed or certified by the recipient are not, themselves, covered by the proposed regulation. This provision is also contained in the Department's section 504 regulations for federally conducted programs at 45 CFR 85.21(b)(6).

The Department proposes to add a new paragraph, § 84.68(b)(7), which reflects section 504's longstanding obligation that a recipient make reasonable modifications in policies, practices, or procedures when such modifications are necessary to avoid discrimination on the basis of disability, unless the recipient can demonstrate that making the modifications would fundamentally alter the nature of the program or activity.

The ''reasonable modification'' provision is the same as that in the ADA title II regulations.[474] Despite a body of case law and history of agency practice, the Department's existing section 504

[470] 28 CFR 35.130–139.

[471] 56 FR 35702 (July 26, 1991).

[472] 53 FR 25603 (July 8, 1988).

[473] This proposed provision reflects existing case law. *See, e.g., Ramsay* v. *Nat'l. Bd. Of Med. Examiners,* 968 F.3d 251, 254 (3d Cir. 2020) (affirming the lower court's preliminary injunction requiring reasonable accommodations for a medical exam board licensing exam under section 504 and the ADA). *See also Singh* v. *Prasifka,* No. B302113 (Cal. Ct. Of App. Oct. 22, 2021) (finding that the failure to provide reasonable accommodations for a medical exam required to become a physician violated section 504 and the ADA).

[474] 35 CFR 130(b)(7).

regulation has lacked a specific provision implementing this requirement outside of the employment and education context.[475] Consistent with this case law and agency practice, as well as with the ADA title II regulations, the Department is proposing to include a provision setting forth the requirement for recipients of Federal financial assistance from the Department at § 84.68(b)(7).

To distinguish this requirement in the employment versus the non-employment context and to conform the Department's section 504 regulation to the ADA title II regulation, the regulation uses the term ''reasonable modifications'' when referring to the requirement to modify policies, procedures, and practices outside the employment context and ''reasonable accommodations'' when referring to its use in the employment context.

Although the reasonable modification concept is not contained in the Department's existing section 504 regulations, two major Supreme Court cases make clear that the statute imposes a reasonable modification requirement. Since those cases, the Department has consistently required the provision of reasonable modifications of policies, practices, or procedures when such modifications are necessary to avoid discrimination on the basis of disability, unless the recipient can demonstrate that making the modifications would fundamentally alter the nature of the health service or program.

The obligation to modify policies, practices, or procedures was first enunciated by the Supreme Court in *Southeastern Community College* v. *Davis,* which held that, while section 504 prohibits the exclusion of an otherwise qualified individual with a disability from participation in a federally funded program solely by reason of the individual's disability, that person is not protected by section 504 if, in order to meet essential eligibility standards, the person needs program or policy modifications that would fundamentally alter the nature of the recipient's program.[476] Subsequently, in *Alexander* v. *Choate,* which addressed a section 504 challenge to a State policy reducing the annual number of days of inpatient hospital care covered by the State's Medicaid program, the Court explained that recipients must provide ''meaningful access'' to programs for individuals with disabilities, and noted that ''to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made.'' [477] Since those cases, the Department has consistently required the provision of reasonable modifications of policies, practices, or procedures when such modifications are necessary to avoid discrimination on the basis of disability, unless the recipient can demonstrate that making the modifications would fundamentally alter the nature of the health service or program.[478] Similarly, over the past decades, in keeping with these U.S. Supreme Court decisions, Federal courts and Federal agencies have regularly acknowledged agencies' affirmative obligation to ensure that recipients provide individuals with disabilities reasonable modifications in programs and activities unless the recipient can demonstrate that making these modifications would fundamentally alter the program or activity.[479]

Proposed § 84.68(b)(7) only addresses fundamental alterations but does not mention undue financial and administrative burdens, which is a limitation applied to other sections of the rule. The Department does not propose an express limitation for undue financial and administrative burdens in this reasonable modifications provision because it believes this explicit limitation is unnecessary since the ''reasonableness'' limitation circumscribes the scope of the underlying obligation. The Department believes this approach is appropriate in this section because the degree to which a modification would create a financial or administrative burden could bear on whether the modification is ''reasonable.'' By contrast, other obligations in this proposed rule— § 84.22 (Existing facilities); § 84.81, (Communications) § 84.88 (Web, mobile, and kiosk accessibility); and § 84.92(e), Accessible medical equipment—are framed in categorical terms. An explicit undue burdens limitation applies to those provisions because no ''reasonableness'' limitation is included. This approach is consistent with the Department's understanding of the Supreme Court precedent on limitations discussed above.

Reasonable modifications may include, but are not limited to, permitting the use of supported decision-making or a third-party support, where needed by a person with a disability. Supported decision-making is an approach used to assist individuals with disabilities in making decisions in an informed and accessible way, through the provision of person-centered decision-making that focuses on the wants and needs of the individual receiving support.

Supported decision-making allows an individual with a disability to collaborate with trusted sources and make their own decisions without the need for a substitute decision-maker. Supported decision-making reinforces an individual's autonomy in decision-making, involves the individual in the decision-making process, and recognizes that in some instances assistance may be needed.[480] It is the role of the supporter to help the individual with a disability understand the range of options and the implications of each, leaving the ultimate decision to the individual with a disability.

As defined in the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act,[481]

---

[475] *See* 45 CFR 84.12 (employment) and 84.44 (education).

[476] 442 U.S. 397 (1979).

[477] 469 U.S. 287, 301 (1985).

[478] *See e.g.,* U.S. Dep't of Health & Hum. Servs., Voluntary Resolution Agreement between the U.S. Dep't of Health & Hum. Servs., Off.for Civil Rts. and Citizens Med. Ctr. (Aug. 23, 2011), *https://www.hhs.gov/sites/default/files/ocr/civilrights/activities/agreements/cmcsettlementagmt.pdf* (OCR entered into a settlement agreement with CMC, after finding violations of section 504 and the ADA, when it rejected a child with autism for enrollment in a program based on its concern that the child would need one-on-one care as a reasonable modification.); U.S. Dep't of Health & Hum. Servs., Voluntary Resolution Agreement between the U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts. and R.I. Dep't Children, Youth, & Families (Mar. 30, 2022) *https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/agreements/vra-ri-dcyf/index.html* (requiring the State agency to fulfill its obligations under title II of the ADA and section 504 to provide reasonable modifications and auxiliary aids and services in a timely manner).

[479] Courts have held that both the ADA and section 504 create ''an affirmative obligation to make 'reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services' to enable disabled persons to receive services or participate in programs or activities,'' *Constantine* v. *Rectors & Visitors of George Mason Univ.,* 411 F.3d 474, 488 (4th Cir. 2005) (discussing title II) (quoting 42 U.S.C. 12131(2)). *See also, e.g., Pierce* v. *Dist.of Columbia,* 128 F. Supp. 3d 250, 266 (D.D.C. 2015) (''[T]he express prohibitions against disability-based discrimination in section 504 and Title II include *an affirmative obligation* to make benefits, services, and programs accessible to disabled people.'' (emphasis in original)); *Berardelli* v. *Allied Servs. Inst. of Rehab. Med.,* 900 F.3d 104, 115 (3d Cir. 2018) (discussing the Rehabilitation Act's affirmative obligation ''to make reasonable accommodations or reasonable modifications'').

[480] Nat'l Council on Disability, Beyond Guardianship: Toward Alternatives that Promote Greater Self-Determination for People with Disabilities, 130–31 (2018), *https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf.*

[481] Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA) § 102(31) (UNIF. L. COMM'N 2017). UGCOPAA is intended as a ''comprehensive guardianship statute for the twenty-first century,'' completed by the Uniform Law Association, endorsed by the National Guardianship Association, approved by the

supported decision-making means assistance from one or more persons of an individual's choosing in understanding the nature and consequences of potential personal and financial decisions, including health-related decisions, which enables the individual to make the decisions, and in communicating a decision once made, consistent with the individual's wishes. NCD has recognized the potential autonomy benefits of supported decision-making.[482] In health care, supported decision-making may mean supports and services from friends, family members, and professionals that help an adult with a disability make their own decisions, including assistance monitoring health; obtaining, scheduling, and coordinating service; understanding information and options; making decisions; and communicating those decisions to others.

The supporter's role may include helping an individual to understand the range of possible treatment options and their implications, placing that information in terms they can understand, and helping the individual apply their own values to the decision. In research contexts, supported decision-making may include a supporter providing such assistance in the informed consent process.[483]

As an example of a reasonable modification in supported decision-making, a health care provider may need to modify their policy on disclosing information to third parties about a medical procedure, if the individual with a disability needs their supporter to help understand their treatment options. A human service provider who normally does not share benefit applicant information with third parties may need to make additional copies of information about an individual with a disability's benefits eligibility to share with their supporter so the supporter can help explain the options available.

In the context of human services, supported decision-making may be used to assist an individual with a disability who requires decision-making support to make decisions regarding different options, choose whether or not to continue a particular course of service-provision, and otherwise express their will and preference with the assistance of a supporter to ensure that the individual fully understands the range of options available and the implications of each. Once the individual has made a decision, the supporter can help to translate, explain, or substantiate that position to medical professionals, human services systems, or other relevant entities. In some instances, however, the use of supported decision-making will not require any modification at all. For example, a person with a disability may decide to obtain support for a decision by consulting with others ahead of time, but be in a position to communicate a decision to a provider without any reasonable modifications.

When Congress enacted the ADAAA, it expressly provided that a covered entity need not provide a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability solely under the ''regarded as'' prong.[484] Consistent with Congress' intent that section 504 and the ADA impose similar requirements and be interpreted consistently, the Department proposes to adopt this limitation to reasonable modifications at § 84.68(b)(7)(ii) to ensure parity between section 504 and title II of the ADA. The Department notes, however, that while individuals who meet the definition of disability only under the ''regarded as'' prong are not entitled to reasonable modifications, they are still protected from discrimination under the general prohibitions against discrimination.

Proposed § 84.68(b)(8) prohibits imposing or applying eligibility criteria that screen out or tend to screen out individuals with disabilities or classes of individuals with disabilities from ''fully and equally'' enjoying any program or activity, unless the criteria can be shown to be necessary for the provision of the program or activity being offered. This provision concerning eligibility criteria is contained in the current regulation at § 84.13(a) but there it is only applicable in the employment context.

The title II ADA regulations at § 35.130(b)(8) expanded the application of the provision to all covered services, programs, and activities. In the preamble to the title II ADA regulation, DOJ explained that this language comes directly from the HHS section 504 regulation at 45 CFR 84.13, Employment criteria.[485] Proposed § 84.68(b)(8) tracks that ADA provision.

For example, assume that a researcher employed by an entity receiving Federal financial assistance develops a protocol for use in clinical research evaluating a new intervention for diabetes care. In doing so, the researcher articulates inclusion and exclusion criteria for the study and includes a requirement that study participants must not have a visual impairment, based on the determination that patients who have diabetes-related visual impairments would be medically contraindicated from making use of the intervention. In this case, potential study participants with any form of visual impairment are excluded. A determination as to whether a qualified individual with a disability is eligible to participate in a clinical research program made based on broad-based categorical judgments related to their disability but unrelated to the study screens out individuals with disabilities from participating in the research study without being necessary for the operation of the research program. In contrast, a researcher in similar circumstances who excludes only patients with diabetes-related visual impairments from the study is not likely to be unnecessarily screening out individuals with disabilities, as these patients are medically contraindicated while patients with other forms of visual impairment may not be.

Proposed § 84.68(c) states that nothing in the part prohibits a recipient from providing benefits, services, or advantages beyond those required by this part. This paragraph maintains the longstanding approach of the Department, as reflected in § 84.4(c) of the Department's existing section 504 regulations, as well as DOJ's longstanding approach in its title II regulation. In its title II preamble, DOJ explained the rationale for this provision, noting that the ADA provision is derived from existing section 504 regulations. Those regulations permit programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with disabilities or a given class of individuals with disabilities to be limited to those with disabilities.

In explaining the revisions to the section in the ADA regulations, the title II preamble states that ''section 504 ensures that federally assisted programs are made available to all individuals, without regard to disabilities, unless the Federal program under which the assistance is provided is specifically

American Bar Association, and enacted or partially enacted in a number of states.

[482] Nat'l Council on Disability, Beyond Guardianship: Toward Alternatives that Promote Greater Self-Determination for People with Disabilities, 131 (2018), *https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf.*

[483] Benjamin C. Silverman et al., *Supported Decision-Making Can Advance Clinical Research Participation for People with Disabilities,* 28 Nature Med. 2250 (2022), *https://doi.org/10.1038/s41591-022-02035-3.*

[484] ADAAA section 6(h) (2008); 42 U.S.C. 12201(h).

[485] 56 FR 35705 (July 26, 1991).

limited to individuals with disabilities or a particular class of individuals with disabilities.'' [486] The preamble explains that although based on existing section 504 regulations, the provision has been revised so that it no longer contains the requirement that the covered program or activity be conducted pursuant to a Federal statute or Executive order designed to benefit only individuals with disabilities. Instead, covered entities ''may provide special benefits, beyond those required by the nondiscrimination requirements of this part, that are limited to individuals with disabilities or a particular class of individuals with disabilities, without thereby incurring additional obligations to persons without disabilities or to other classes of individuals with disabilities.'' [487]

Proposed § 84.68(d) states that a recipient shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. This provision is discussed in detail in proposed § 84.76.

Proposed § 84.68(e)(1) states that nothing requires an individual with a disability to accept a modification, aid, service, opportunity, or benefit if the individual chooses not to so accept. As noted above in the discussion of § 84.68(b)(7), the concept of reasonable modifications is derived from section 504 case law.

Proposed § 84.68(e)(2) states that nothing in section 504 authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

Proposed § 84.68(f) includes language that would prohibit a recipient from placing a surcharge on a particular individual with a disability or any group of individuals with disabilities to defray the costs of measures that are required by section 504 or this regulation to ensure nondiscriminatory treatment. In explaining the related ADA provision, DOJ stated in the preamble to the title II ADA regulations that the origin of the provision came from its section 504 regulation which stated that the imposition of the cost of courtroom interpreter services is impermissible under section 504.[488] This provision is an extension of that established section 504 principle.

Proposed § 84.68(g) prohibits discrimination against an individual or an entity because of the known disability of an individual with whom the individual or the entity is known to have a relationship or association. In *McCullum* v. *Orlando Regional Healthcare System, Inc.,* the court said that ''[i]t is widely accepted that under both the [Rehabilitation Act] and the ADA, non-disabled individuals have standing to bring claims when they are injured because of their association with a disabled person.'' [489] Many circuit courts that have analyzed section 504 for associational discrimination have agreed with this interpretation.[490] This interpretation accords with the Department's longstanding approach to this issue under section 504.

Proposed § 84.68(h) allows recipients to impose legitimate safety requirements that are necessary for the safe operation of their programs or activities as long as the safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities. This concept is derived from *School Board of Nassau County, Florida* v. *Arline,*[491] a section 504 case that held that individuals with disabilities cannot be excluded from programs based on concerns that they pose a risk to others unless the recipient can provide current, objective evidence regarding the nature, severity, and duration of the risk and the likelihood that the risk will occur. The basic purpose of section 504 is to ensure that individuals with disabilities are not ''denied jobs or other benefits because of the prejudiced attitudes or ignorance of others.'' [492]

Proposed § 84.68(i) states that this rule does not provide a basis for a claim that an individual without a disability is subject to discrimination because of a lack of disability, including any claim that an individual with a disability was granted a reasonable modification that was denied to an individual without a disability.

§ 84.69 Illegal Use of Drugs

Proposed § 84.4 adopts the ADA's definition of disability. That definition states that a ''physical or mental impairment'' includes drug addiction and alcoholism.[493] Although the existing section 504 regulation at § 84.3(j)(2)(i) does not include drug addiction and alcoholism as physical or mental impairments, the interpretive guidance states that alcoholism and drug addiction are ''physical or mental impairments'' within the meaning of the Rehabilitation Act. Therefore, an individual with alcoholism or drug addiction is included within section 504's definition of an individual with a disability if the impairment substantially limits one or more of their major life activities.[494] Accordingly, while the definition of ''disability'' in this proposed rule adopts the ADA's definition, which states that physical or mental impairments include drug addiction and alcoholism, the inclusion of these impairments is consistent with HHS's longstanding interpretation of its Rehabilitation Act regulation. An individual with a substance or alcohol use disorder is a protected individual with a disability if their impairment substantially limits one of their major life activities.

However, proposed § 84.69 generally excludes from protection individuals engaged in the current illegal use of drugs if a recipient takes action against them based on that current illegal drug use, except as specified in proposed § 84.69(b). The ADA amended the Rehabilitation Act to exclude individuals currently engaging in the illegal use of drugs from section 504 coverage when a covered entity acts on the basis of such use.

Proposed § 84.69(a)(1) states that, except as provided in paragraph (b), this part does not prohibit discrimination based on an individual's current illegal use of drugs. Consistent with the language in section 705(10) of the Rehabilitation Act, the proposed section distinguishes between illegal use of drugs and the legal use of substances, whether or not those substances are ''controlled substances,'' as defined in the Controlled Substances Act (21 U.S.C. 812). Some controlled substances are prescription drugs that have legitimate medical uses. Proposed § 84.69 does not affect use of controlled substances pursuant to a valid

[486] 28 CFR part 35, app. A (addressing 84.130(c)).

[487] *Id.*

[488] 45 CFR part 84, app. A (addressing § 84.130(f)).

[489] 768 F. 3d 1135, 1142 (11th Cir. 2014).

[490] *See e.g., Loeffler* v. *Staten Island Univ. Hosp.,* 582 F.3d 268, 279 (2d Cir. 2009) (permitting associational discrimination claim under section 504); *Addiction Specialists* v. *Twp. of Hampton,* 411 F. 3d 399, 405 (3d Cir. 2005) (''. . . the broad language of the . . . [Rehabilitation Act] evidences a Congressional intent to confer standing on entities like ASI to bring discrimination claims based on their association with disabled individuals.''); *Durand* v. *Fairview Health Servs.,* 902 F.3d 836, 844 (8th Cir. 2018) (recognizing associational standing under ADA and RA as discussed in *Loeffler* and *McCullum*). Despite several circuit court holdings, case law is not unanimous in recognizing associational claims under section 504. In *Todd* v. *Carstarphen,* 236 F. Supp. 3d 1311, 1341–42 (N.D. Ga. 2017), the court distinguished associational claims under title II and title III, finding no associational standing under title II and requiring the Rehabilitation Act associational claims to be analyzed in parallel with the relevant ADA title. That case did acknowledge that it was in tension with existing case law outside of its circuit. *See id.* at 1342 n.59.

[491] 480 U.S. 273 (1987).

[492] *Id.* at 284.

[493] 28 CFR 35.108(b)(2).

[494] 45 CFR part 84, app. A (addressing § 84.3).

prescription under supervision by a licensed health care professional, or other use that is authorized by the Controlled Substances Act or any other provision of Federal law. It does apply to illegal use of those substances, as well as to illegal use of controlled substances that are not prescription drugs. The key question is whether the individual's use of the substance is illegal, not whether the substance has recognized legal uses. Alcohol is not a controlled substance, so use of alcohol is not addressed by this section (although persons with alcohol use disorders are individuals with disabilities, subject to the protections of the statute).

A distinction is made between the use of a substance and the status of being addicted to that substance. Section 84.4, the definition of disability, includes substance use disorder in the list of physical impairments. Since the addiction substantially limits major life activities, addicts are individuals with disabilities protected by the Act. In other words, an individual with a substance use disorder cannot use the fact of their substance use as a defense to an action based on illegal use of drugs. This distinction is not artificial. Congress intended to deny protection to people who engage in the illegal use of drugs, whether or not they are individuals with substance use disorders, but to provide protection to individuals with substance use disorders as long as they are not currently using drugs.

Another distinction is the difficult one between current use and former use. As defined in proposed § 84.10 and 28 CFR 35.104 of the ADA title II regulations, ''current illegal use of drugs'' means ''illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.'' Proposed § 84.69(a)(2) describes the circumstances in which recipients are prohibited from discriminating against an individual who is not engaging in current illegal use of drugs. Paragraph (a)(2)(i) specifies that such an individual who has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully is protected. Paragraph (a)(2)(ii) clarifies that such an individual who is currently participating in a supervised rehabilitation program is protected. Paragraph (a)(2)(iii) provides that such an individual who is erroneously regarded as engaging in current illegal use of drugs is protected.

Paragraph (b)(1) provides an exception to the exclusion of current illegal users of drugs from the protections of section 504. It prohibits exclusion of an individual from the benefits of programs or activities providing health services and services provided under the Rehabilitation Act subchapters I (Vocational Rehabilitation Services), II (Research and Training), and III (Professional Development and Special Projects and Demonstrations) on the basis of that individual's current illegal use of drugs if the individual is otherwise entitled to such services.

The exception is different in some respects than the one contained in the ADA. The ADA prohibits the denial of health and drug rehabilitation services to an individual on the basis of that individual's current illegal use of drugs if the individual is otherwise entitled to such services.[495] However, while section 504, like the ADA, prohibits the denial of health and drug rehabilitation services to such an individual, on the basis of that individual's current illegal use of drugs if the individual is otherwise entitled to such services, section 504 prohibits the denial of other services as well, including vocational rehabilitation services provided under subchapter I of the Rehabilitation Act.[496] Thus, if an individual who is currently using illegal drugs approaches a recipient requesting health or drug rehabilitation services, the recipient must provide those services if the individual is otherwise entitled to such services. Failure to do so would violate the ADA and would also violate section 504.

However, assume that the individual who is currently using illegal drugs is not seeking health or drug rehabilitation services but, instead, is seeking vocational rehabilitation services and is otherwise entitled to these services, and a recipient denies those vocational rehabilitation services on the basis of the individual's current illegal use of drugs. In this situation, proposed § 84.69(b) has been violated because vocational rehabilitation services are provided under subchapter I of the Rehabilitation Act. However, the ADA has not been violated because, in the ADA, the exception that mandates treatment even for current users of illegal drugs applies only to health and drug rehabilitation services. Although § 84.69(a), the general prohibitions paragraph, is added to align with the ADA title II regulations, the statutory language of the ADA is different than the statutory language of the Rehabilitation Act with regard to required provision of services to current illegal drug users. Accordingly, proposed § 84.69(b) reflects that difference.

A recipient may not refuse treatment to an individual in need of the services it provides on the grounds that the individual is illegally using drugs, but it is not required by this section to provide services that it does not ordinarily provide. For example, a health care facility that specializes in a particular type of treatment, such as care of burn victims, is not required to provide drug rehabilitation services, but it cannot refuse to treat an individual's burns on the grounds that the individual is illegally using drugs. This is a longstanding position of the Department under section 504. Appendix A to the existing rule makes clear that denying treatment to an individual with a [substance use disorder] who is otherwise entitled to such treatment for unrelated conditions is prohibited.[497]

Paragraph (b)(2) provides that a drug rehabilitation or treatment program may deny participation to individuals who engage in illegal use of drugs while they are in the program.

Paragraph (c)(1) addresses testing for illegal use of drugs. This paragraph is derived from the Rehabilitation Act at 29 U.S.C. 705(20)(C), and similar language in the title II regulations, which allows recipients to ''adopt or administer reasonable policies or procedures, including but not limited to drug testing,'' designed to ensure that an individual who formerly engaged in the illegal use of drugs is not now engaging in current illegal use of drugs. This paragraph does not authorize inquiries, tests, or other procedures that would disclose use of substances that are not controlled substances or are taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law, because such uses are not included in the definition of ''illegal use of drugs.''

Paragraph (c)(2) states that the section is not to be ''construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.''

§ 84.70 Maintenance of Accessible Features

This provision provides that a recipient must maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by individuals with disabilities. The failure to maintain accessible features can deny equal opportunities,

[495] 42 U.S.C. 12114.

[496] 29 U.S.C. 705 (20)(C)(iii).

[497] 45 CFR part 84, app. A (addressing § 84.3).

and thus discriminate against individuals with disabilities, as surely as the failure to construct those accessible features in the first place. The ADA and the Rehabilitation Act generally are interpreted using the same legal standards and, accordingly, the ADA analysis applies with full force to the Rehabilitation Act.[498] Failure of a recipient to ensure that accessible routes are properly maintained and free of obstructions, or failure to arrange prompt repair of inoperable elevators or other equipment intended to provide access would also violate this part. Similarly, storing excess furniture or supplies in the larger, accessible toilet stall, putting potted plants in front of the elevator buttons in the building lobby, or, in northern climates, placing the ploughed snow in the accessible spaces in the hospital parking lot could make these facilities and the programs they support inaccessible to persons with disabilities.

This provision also addresses the situation where the 2010 Standards reduce either the technical requirements or the number of required accessible elements below that required by UFAS. In such a case, the recipient may choose to reduce the technical requirements or the number of accessible elements in a covered facility in accordance with the requirements of the 2010 Standards.

This paragraph is intended to clarify that temporary obstructions or isolated instances of mechanical failure would not be considered violations of section 504. However, allowing obstructions or ''out of service'' equipment to persist beyond a reasonable period of time would violate this part, as would repeated mechanical failures due to improper or inadequate maintenance.

§ 84.71 Retaliation or Coercion

Proposed § 84.71(a) provides that a recipient shall not discriminate against an individual because that individual has opposed any act or practice made unlawful by this part, or because that individual has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under section 504 or this part.

Proposed § 84.71(b) provides that a recipient shall not coerce, intimidate, threaten, or interfere with any individual in the exercise of his or her rights under this part or because that individual aided or encouraged any other individual in the exercise or enjoyment of any right granted or protected by section 504 or this part.

This provision protects not only individuals who allege a violation of section 504 or this part, but also any individuals who support or assist them. This section applies to all investigations or proceedings initiated under section 504 or this part without regard to the ultimate resolution of the underlying allegations.

§ 84.72 Personal Devices and Services

Proposed § 84.72, Personal devices and services, states that the provision of personal devices and services is not required by the section 504 regulation. The existing section addressing personal devices and services is contained in § 84.44(d)(2), the communications section in Subpart D, Postsecondary Education, which is retained in the proposed rule. Section § 84.72 supplements that section. A wide range of the programs funded by the Department incorporate the provision of personal care services. For example, hospitals, nursing homes, child welfare services, and home and community-based care by their very nature include the provision of personal care devices and services. Where personal services are customarily provided as part of recipient's programs or activities, then these personal services should also be provided to persons with disabilities.

§ 84.73 Service Animals

The Department proposes to add a new ''service animals'' section to its regulation, which tracks the title II regulations. This new regulation is consistent with the recognition by the Third Circuit in *Berardelli* v. *Allied Services Institute of Rehabilitation Medicine*[499] that the ADA's ''service animal regulations, although technically interpreting the ADA, are no less relevant to the interpretation of the RA [Rehabilitation Act].''[500] There are many similar service animal cases that were brought both under section 504 and the ADA.[501] Throughout the years, OCR has processed numerous complaints alleging that exclusions of service animals violated section 504, including instances where service animals were denied entry to hospitals, specialist clinics, and emergency departments.[502] OCR has provided technical assistance to many recipients concerning service animal issues.

As defined in proposed § 84.10, a service animal is ''any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.''

The definition limits service animals to dogs. No other species of animals is

---

[498] *See, e.g., Frame* v. *City of Arlington,* 657 F.3d 215, 223–24 (5th Cir. 2011) (en banc) ('' The ADA and the Rehabilitation Act generally are interpreted in *pari materia.*''); *Liberty Res.* v. *City of Phila.,* Civ. Action 9–3846, *2 n.4 (E.D. Pa. Oct. 27, 2021) (''The court will consider the Rehabilitation Act claims together with the ADA claims because the substantive standards for determining liability are the same.'' (quotation marks and citation omitted)). It further held that ''[p]ractical reasons also demand this result: while a street resurfacing is a discrete act, the failure to maintain a curb ramp is not'').

[499] 900 F. 3d 104 (3d Cir. 2019).

[500] *Id.* at 120.

[501] *See, e.g., C.G.* v. *Saucon Valley Sch. Dist.,* 571 F.Supp.3d 430, 443–44 (E.D. Pa. Nov. 18, 2021) (''C.G. has shown a substantial likelihood of success on the merits because there is a substantial likelihood that George qualifies as a service animal because he has been trained to perform tasks that related to one or more of C.G.'s disabilities.''); *E.F.* v. *Napoleon Cty. Sch.,* No. 12–15507, 15, 32 (E.D. Mich. Sept. 25, 2019) (finding that section 504 and the ADA ''are quite similar in purpose and scope, such that the analysis of a title II ADA claim roughly parallels one brought under Section 504 of the Rehabilitation Act.'' The court further stated that ''. . . E.F. has the right to request a service dog as an accommodation for her disability.''); *Alboniga* v. *Sch. Bd. of Broward Cty.,* 87 F. Supp. 3d 1319, 1345 (S.D. Fla. 2015) (''Defendant is permanently enjoined to provide the minor plaintiff A.M. reasonable accommodation in assisting him with use of his service animal. . . .''); *Hurley* v. *Loma Linda Univ. Med. Ctr.,* No. CV12–5688 DSF, 15, 18 (C.D. Cal. Feb. 12, 2014) (noting that Casey repeatedly asking Hurley for documentation providing that her dog was indeed a service animal ''clearly violated the ADA'' and ''[b]ecause Hurley was subjected to disability discrimination under the ADA, she was also subjected to discrimination under Section 504.'' *Id.* at 18).

[502] For example, one OCR complaint alleged that the recipient refused to allow a service animal when an individual was visiting his son in the hospital. Other complaints have alleged that service animals have been barred from accompanying individuals in hospital emergency rooms and specialty clinics.

included. Limiting the species recognized as service animals provides greater predictability to recipients and provides added assurance of access for individuals with disabilities who use dogs as service animals.

The proposed definition states that a service animal must be ''individually trained to do work or perform tasks for the benefit of an individual with a disability.'' The work or tasks must be directly related to the individual's disability. The definition provides an illustrative and non-exhaustive list of examples of work or tasks. These include alerting individuals who are deaf or hard of hearing to the presence of people or sounds and providing non-violent protection or rescue work. The phrase ''non-violent protection'' is used to exclude so-called ''attack dogs'' or dogs with traditional ''protection training'' as service animals. The proposed regulation also notes that the crime-deterrent effect of a dog's presence, by itself, does not qualify as work or tasks for purposes of the service animal definition.

The proposed definition states that ''the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for purposes of this definition.'' Unless the dog is individually trained to do something that qualifies as work or a task, the animal is a pet or support animal and does not qualify for coverage as a service animal. A pet or support animal may be able to discern that the individual is in distress, but it is what the animal is trained to do in response to this awareness that distinguishes a service animal from a pet or support animal.

An example of a service animal would be a psychiatric service dog that can help some individuals with dissociative identity disorder remain grounded in time or place. This animal does work or performs a task that would qualify it as a service animal as compared to an untrained emotional support animal whose presence affects a person's disability. It is the fact that the animal is trained to respond to the individual's needs that distinguishes an animal as a service animal. The process must have two steps: recognition and response. For example, if a service animal senses that a person is about to experience an exacerbation of their mental health symptoms, and it is trained to respond, for example, by nudging, barking, or removing the individual to a safe location until the episode subsides, then the animal has performed a task or done work on behalf of the individual with the disability, as opposed to merely sensing an event. Other tasks performed by psychiatric service animals may include reminding the individual to take medicine, providing safety checks or room searches for persons with post-traumatic stress disorder, interrupting self-harming behaviors, and removing disoriented individuals from dangerous situations. The difference between an emotional support animal and a psychiatric service animal is the work or tasks that the animal performs.

Proposed § 84.73(a) states that, generally, a recipient shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability. The section reflects a specific application of the general requirement in proposed § 84.68(b)(7) that a recipient make reasonable modifications to its policies, practices, or procedures when such modifications are necessary to avoid discrimination on the basis of disability, unless the modifications would fundamentally alter the nature of the health service, program or activity.

For example, assume that a recipient permits a service animal in a waiting area of a clinic where an individual with severe allergies to dog dander is sitting. As DOJ has explained in guidance entitled ''ADA Requirements: Service Animals,'' ''Allergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals. When a person who is allergic to dog dander and a person who uses a service animal must spend time in the same room or facility, for example, in a school classroom or at a homeless shelter, they both should be accommodated by assigning them, if possible, to different locations within the room or different rooms in the facility.'' [503]

Although permitting the presence of a service animal will usually not constitute a fundamental alteration, there are some exceptions. In its guidance entitled ''Frequently Asked Questions about Service Animals and the ADA,'' [504] DOJ provided the following example: ''[A]t a boarding school, service animals could be restricted from a specific area of a dormitory reserved specifically for students with allergies to dog dander.'' Similarly, as applied to the health care context, for example, at a hospital, a service animal could be restricted from a specific area of patient rooms in a hospital reserved specifically for individuals with allergies to dog dander. A service animal could also be restricted from a class being given at a long-term care facility if it continually barks and interrupts the class as long as other types of noise are likewise not tolerated.

Proposed § 84.73(b) contains two exceptions to the requirement that a recipient permit the use of service animals by individuals with disabilities: (1) if the animal is out of control and the animal's handler does not take effective actions to control it, or (2) if the animal is not housebroken.

There are occasions when service animals are provoked to disruptive or aggressive behavior by agitators or troublemakers, as in the case of a blind individual whose service dog is taunted or pinched. While all service animals are trained to ignore and overcome these types of incidents, misbehavior in response to provocation is not always unreasonable. In circumstances where a service animal misbehaves or responds reasonably to a provocation or injury, the recipient must give the handler a reasonable opportunity to gain control of the animal. Further, if the individual with a disability asserts that the animal was provoked or injured, or if the recipient otherwise has reason to suspect that provocation or injury has occurred, the recipient should seek to determine the facts and, if provocation or injury occurred, the recipient should take effective steps to prevent further provocation or injury, which may include asking the provocateur to leave the recipient's facility.

Proposed § 84.73(c) states that if a recipient properly excludes a service animal under § 84.73(b), it shall give the individual with a disability the opportunity to participate in the program or activity without having the service animal on the premises.

Proposed § 84.73(d) states that a service animal shall be under the control of its handler. It shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (*e.g.,* voice control, signals, or other effective means).

Proposed § 84.73(e) states that a recipient is not responsible for the care or supervision of a service animal. There may be occasions when a person with a disability is confined to bed in a hospital for a period of time and may not be able to walk or feed the service animal. In such cases, if the individual

[503] U.S. Dep't of Justice, ADA Requirements: Service Animals (2010), *www.ada.gov/resources/service-animals-2010-requirements.*

[504] U.S. Dep't of Justice, Frequently Asked Questions about Service Animals and the ADA (2015), *https://archive.ada.gov/regs2010/service_animal_qa.html.*

has a family member, friend, or other person willing to take on these responsibilities in the place of the individual with disabilities, the individual's obligation to be responsible for the care and supervision of the service animal would be satisfied.

Proposed § 84.73(f) states that a recipient shall not ask about the nature or extent of a person's disability. In its guidance entitled ''Frequently Asked Questions about Service Animals and the ADA,'' [505] DOJ explained: ''In situations where it is not obvious that the dog is a service animal, [a recipient] may ask . . . two specific questions: (1) [I]s the dog a service animal required because of a disability? and (2) [W]hat work or task has the dog been trained to perform?'' Generally, these inquiries cannot be made when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability. A recipient shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal.

Proposed § 84.73(g) provides that individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of the recipient's facilities where members of the public, participants in programs or activities, or invitees, as relevant, are allowed to go.

Proposed § 84.73(h) provides that a recipient shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets. If a recipient normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by their service animal.

Proposed § 84.73(i) addresses miniature horses. This provision is added to ensure consistency between this regulation and the regulation under title II of the ADA which has long recognized that use of miniature horses may need to be permitted as a reasonable modification. The section states that a recipient shall make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to work or perform tasks for the benefit of the individual with a disability. The traditional service animal is a dog, which has a long history of guiding individuals who are blind or have low vision, and over time dogs have been trained to perform an even wider variety of services for individuals with all types of disabilities. Miniature horses can be a viable alternative to dogs for individuals with allergies, or for those whose religious beliefs preclude the use of dogs. Also, miniature horses have a longer life span and greater strength as compared to dogs. Specifically, miniature horses can provide service for more than 25 years while dogs can provide service for approximately seven years and, because of their strength, miniature horses can provide services that dogs cannot provide. Accordingly, use of miniature horses reduces the cost involved to retire, replace, and train replacement service animals.

The miniature horse is not one specific breed, but may be one of several breeds, with distinct characteristics that produce animals suited to service animal work. They generally range in height from 24 inches to 34 inches and generally weigh between 70 and 100 pounds. These characteristics are similar to those of large breed dogs. Like dogs, miniature horses can be trained to be housebroken. They are trained to provide a wide array of services, primarily guiding individuals who are blind or have low vision, pulling wheelchairs, providing stability and balance for individuals with disabilities that impair the ability to walk, and supplying leverage that enables a person with a mobility disability to get up after a fall. They are particularly effective for large stature individuals.

The miniature horse is not included in the definition of service animal, which is limited to dogs. However, the proposed section makes it clear that a recipient must make reasonable modifications in policies, practices, or procedures to permit use of a miniature horse by an individual with a disability if the animal has been individually trained to do work or perform tasks for the benefit of the individual with a disability. The recipient may take into account a series of assessment factors in determining whether to allow a miniature horse into a specific facility. These include the type, size, and weight of the miniature horse; whether the handler has sufficient control of the miniature horse; whether the miniature horse is housebroken; and whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation. In addition, paragraphs (c)–(h) of this section, which are applicable to dogs, also apply to miniature horses.

§ 84.74 Mobility Devices

The title II regulations were amended in 2010 to include a section on mobility devices. In 1991 when the initial ADA regulations were published, there was no pressing need to define the terms ''wheelchair'' or ''other power-driven mobility device,'' because relatively few individuals with disabilities were using nontraditional mobility devices in 1991. However, since the 1991 title II regulations and amendments to the ADA regulations in 2010, the choices of mobility devices available to individuals with disabilities have increased dramatically. The ADA regulation, 28 CFR 35.137, on which proposed § 84.74 is modeled, addresses the use of unique mobility devices, concerns about their safety, and the parameters for the circumstances under which these devices must be accommodated. section 504 cases have also addressed power-driven mobility devices.[506] Advances in technology have given rise to new power-driven devices that are not necessarily designed specifically for people with disabilities but are being used by some people with disabilities for mobility. The term ''other power-driven mobility devices'' was developed in the ADA regulations and is adopted here to refer to any mobility device powered by batteries, fuel, or other engines, whether or not they are designed primarily for use by individuals with mobility disabilities, for the purpose of locomotion. The term ''other power-driven mobility devices'' is defined in § 84.10 of this proposed rule. Such devices include Segways®, golf carts, and other devices designed to operate in non-pedestrian areas.

The Department is aware that its recipients have encountered the increased use of ''other power-driven mobility devices,'' such as Segways®. Including regulatory provisions on how recipients should approach allowing such vehicles in a variety of health care settings is necessary to provide access to persons with disabilities who use these devices and also to ensure the safe and efficient operations of the programs and activities.

[505] U.S. Dep't of Justice, Frequently Asked Questions about Service Animals and the ADA (2015), *https://archive.ada.gov/regs2010/service_animal_qa.html.*

[506] *See, e.g., Meagley* v. *City of Little Rock,* Case No. 4:09–cv–226–DPM, 16 (E.D. Ark. Aug. 13, 2010) *aff'd,* 639 F. 3d 384 (8th Cir. 2011). In *Meagley,* the plaintiff rented an electric scooter at a city zoo, the scooter slipped on a bridge, and the plaintiff suffered injuries. The court held that both the ADA and section 504 had been violated, stating that ''Meagley proved, without question, that the City violated her rights under both Title II of the ADA and section 504 of the Rehabilitation Act. The steep-sloped bridge where Meagley's accident occurred did not comply with the ADA Accessibility Guidelines.''

Under this proposed regulation, recipients must allow individuals with disabilities who use these devices into all areas where the public is allowed to go, unless the recipient can demonstrate that the particular type of device cannot be accommodated because of legitimate safety requirements. Such safety requirements must be based on actual risks, not on speculation or stereotypes about a particular class of devices or how individuals will operate them.

The proposed rule at § 84.74(b)(2) lists the factors that recipients must consider in determining whether to permit other power-driven mobility devices on their premises. They include the type, size, weight, dimensions, and speed of the device; the volume of pedestrian traffic (which may vary at different times of the day, week, month, or year); the facility's design and operational characteristics, such as its square footage, whether it is indoors or outdoors, the placement of stationary equipment, or devices, and whether it has storage space for the device if requested by the individual; whether legitimate safety standards can be established to permit the safe operation of the device; and whether the use of the device creates a substantial risk of serious harm to the environment or natural or cultural resources or poses a conflict with Federal land management laws and regulations.

As DOJ has set forth in a guidance document entitled ''Wheelchairs, Mobility Aids, and Other Power-Driven Mobility Devices,'' using these assessment factors, a recipient may decide, for example, that it can allow smaller electric devices like Segways® in a facility, but cannot allow the use of larger electric devices like golf carts for safety reasons, because the facility's corridors or aisles are not wide enough to accommodate these vehicles.[507] It is likely that many recipients will allow the use of Segways® generally, although some may determine that it is necessary to restrict their use during certain hours or on particular days when pedestrian traffic is particularly dense. Large hospitals with multiple departments and specialties may also decide that such devices can be safely and appropriately allowed in certain parts of the facilities, but not in others. It is also likely that recipients will prohibit the use of combustion-powered devices from all indoor facilities and perhaps some outdoor facilities with heavy pedestrian traffic.

Proposed § 84.74(c) addresses the types of questions that a recipient's staff may ask of those using other power-driven mobility devices. Recipients may not ask individuals using such devices about their disability but may ask for a credible assurance that the device is required because of a disability. If the person presents a valid, State-issued disability parking placard or card or a State-issued proof of disability, that must be accepted as credible assurance on its face. However, recipients cannot demand or require the presentation of a valid disability placard or card, or state-issued proof of disability, as a prerequisite for use of a power-driven mobility device, because not all persons with mobility disabilities have such means of proof. If the person does not have this documentation, but states orally that the device is being used because of a mobility disability, that also must be accepted as credible assurance, unless the person is observed doing something that contradicts the assurance. For example, as DOJ's guidance document sets forth, if a person is observed running and jumping, that may be evidence that contradicts the person's assertion of a mobility disability. However, the fact that a person with a disability is able to walk for a short distance does not necessarily contradict a verbal assurance—many people with mobility disabilities can walk but need their mobility device for longer distances or uneven terrain. This is particularly true for people who lack stamina, have poor balance, or use mobility devices because of respiratory, cardiac, or neurological disabilities.

§ 84.75 Direct Threat

Proposed § 84.10 defines ''direct threat'' as a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services. This is similar to the definition in the title II ADA regulations although this proposed definition contains a subsection applicable to employment. Proposed § 84.75 likewise is similar to the direct threat provisions in the title II ADA regulations at 28 CFR 35.139 but, as in the definition, it contains a subsection applicable to employment, which uses a distinct definition of direct threat.

This provision of the ADA regulation is modeled on the section 504 Supreme Court case of *School Board of Nassau County* v. *Arline*.[508] In that case, the Supreme Court established that exclusion of persons with disabilities from programs based on concerns that they pose risk to others can violate section 504 unless the recipient can provide current, objective evidence regarding the nature, severity, and duration of the risk and the likelihood that the risk will occur. Although persons with disabilities are generally entitled to the protection of this part, a person who poses a significant risk to others will not be ''qualified,'' if reasonable modifications to the recipient's policies, practices, or procedures will not eliminate that risk.[509]

The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability. It must be based on an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to determine: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk. This is the test established by the Supreme Court in *Arline*.[510] Such an inquiry is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks. Making this assessment will not usually require the services of a physician. Sources for medical knowledge include guidance from public health authorities, such as the U.S. Public Health Service, the Centers for Disease Control, and the National Institutes of Health, including the National Institute of Mental Health. These principles have been the law since *Arline* was decided in 1987, and this proposed section would merely codify them into regulatory text.

[507] *ADA Requirements: Wheelchairs, Mobility Aids, and Other Power-Driven Mobility Devices*, U.S. Dep't of Justice, Civil Rts. Div., *https://www.ada.gov/resources/opdmds/* (last updated Jan. 2014).

[508] 480 U.S. 273 (1987).

[509] *Id. at* 288 n.16.

[510] *Id.* at 287–88.

In the medical treatment context, when determining whether a recipient is required to treat an individual with a disability, the recipient must assess whether an individual poses a direct threat to the health or safety of others. Proposed § 84.56(b)(1) prohibits denial of medical treatment based on bias or stereotypes about a patient's disability.[511] A recipient cannot refuse to treat patients they would normally treat but for the patient having a separate disability (for which the recipient does not normally provide treatment). For example, an Ebola specialist who refuses to treat an Ebola patient—who also has HIV—on the basis of the patient's HIV status cannot refuse to treat the patient because of an assessment that the individual poses a direct threat to physician's health or safety unless there are no reasonable modifications that could mitigate the risk.

§ 84.76 Integration

The current section 504 regulation includes an ''integration mandate'' that requires recipients of Federal funds to administer programs and activities ''in the most integrated setting appropriate to the . . . needs'' of the person with a disability.[512] The ADA title II regulation similarly requires a public entity to ''administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.'' [513] In the decades since the Department's initial integration mandate language was published in the 1977 section 504 regulation, a substantial body of case law has developed with respect to obligations of covered entities to serve individuals with disabilities in the most integrated setting appropriate to the qualified person's needs under section 504 and title II of the ADA. The respective integration obligations under section 504 and the ADA have been interpreted consistently, with claims brought under both laws ''generally treated identically.'' [514] The Department proposes to update the section 504 regulation consistent with cases from the U.S. Supreme Court and lower courts, as well as DOJ's interpretation of the integration mandate under title II,[515] adding greater specificity to the obligations of recipients to serve persons with disabilities in the most integrated setting appropriate.

In *Olmstead* v. *L.C.,* the Supreme Court established that unjustified isolation is a form of discrimination under the title II integration mandate. [516] As the Court interpreted the law, public entities are required to provide community-based services to persons with disabilities when such services are appropriate,[517] the affected persons do not oppose community-based treatment, and the placement in a community setting can be reasonably accommodated, taking into account the resources available to the entity and the needs of others who are receiving disability services from the entity.[518] Since *Olmstead,* courts have interpreted analysis of the integration mandate of the ADA and section 504 consistently.[519] The proposed rule applies *Olmstead* in the context of section 504. The most integrated setting is defined in proposed § 84.10 as ''a setting that provides individuals with disabilities the opportunity to interact with nondisabled persons to the fullest extent possible; is located in mainstream society; offers access to community activities and opportunities at times, frequencies and with persons of an individual's choosing; and affords individuals choice in their daily life activities. This language is consistent with the description of ''most integrated setting'' in title II guidance.[520]

HHS has played a significant role in implementation of the *Olmstead* decision for decades. Through the Medicaid program, HHS is also the nation's primary funder of home and community-based services (HCBS). OCR has intervened and assisted in scores of *Olmstead* complaints, many of which involved State agencies administering long-term services and supports. OCR has received complaints filed by or on behalf of a wide range of individuals, including individuals with physical, psychiatric, intellectual, and developmental disabilities, and individuals of all ages. OCR also coordinates with DOJ on *Olmstead* complaints, including through consultations, case referrals (both to and from DOJ) and collaboration on cases. As a result of OCR's efforts, many individuals have transitioned from an institution to the community, and many individuals have avoided unnecessary institutionalization. OCR has also played an important role in providing technical assistance to states and other entities about the integration mandate. Despite this work, *Olmstead* issues continue to comprise a significant

---

[511] The medical treatment provisions of this rule involve a straightforward application of the general prohibitions against disability discrimination and, therefore, do not alter the direct threat analysis in any way.

[512] 45 CFR 84.4(b)(2).

[513] 28 CFR 35.130(d).

[514] *See* U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead* v. *L.C.,* note 4 (2020), *https://www.ada.gov/olmstead/q&a_olmstead.htm* (last visited June 18, 2022); *see also, e.g., Gorman* v. *Bartch,* 152 F.3d 907, 912 (8th Cir. 1998) (''cases interpreting either are applicable and interchangeable.''); *Pashby* v. *Delia,* 709 F.3d 307, 321 (4th Cir. 2013) (''We consider their Title II and section 504 claims together because these provisions impose the same integration requirements.''). *See also Radaszewski ex Rel. Radaszewski* v. *Maram,* 383 F.3d 599, 607 (7th Cir. 2004); *Frederick L.* v. *Dep't of Public Welfare of Pennsylvania,* 364 F.3d 487, 491 (3d Cir. 2004); *Fisher* v. *Oklahoma Health Care Auth.,* 335 F.3d 1175, 1179 n. 3 (10th Cir. 2003); *Bruggeman ex Rel. Bruggeman* v. *Blagojevich,* 324 F.3d 906, 912 (7th Cir. 2003); *M.R.* v. *Dreyfus,* 697 F.3d 706, 733 (9th Cir. 2012).

[515] U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead* v. *L.C.* (2020), *https://www.ada.gov/olmstead/q&a_olmstead.htm* (last visited Feb. 22, 2023).

[516] 527 U.S. 581 (1999).

[517] Courts and the Department of Justice have recognized that the ''appropriateness'' of community-based services is not necessarily limited to the determination of a treating professional. DOJ's Olmstead guidance states ''An individual may rely on a variety of forms of evidence to establish that an integrated setting is appropriate. A reasonable, objective assessment by a public entity's treating professional is one, but only one, such avenue . . . People with disabilities can also present their own independent evidence of the appropriateness of an integrated setting, including, for example, that individuals with similar needs are living, working and receiving services in integrated settings with appropriate supports. This evidence may come from their own treatment providers, from community-based organizations that provide services to people with disabilities outside of institutional settings, or from any other relevant source.'' U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead* v. *L.C.* (2020), Question 4 *https://www.ada.gov/olmstead/q&a_olmstead.htm* (last visited Feb. 22, 2023). This guidance is consistent with court holdings that the public entity's determination of appropriateness is not required for the individual with a disability to show that a community based setting is appropriate. *See Frederick L.* v. *Dep't of Pub. Welfare,* 157 F.Supp.2d 509, 539–40 (E.D.Pa. 2001) (denying defendants' motion to dismiss Olmstead claims and rejecting the argument that Olmstead ''require[s] a formal recommendation for community placement.''); *Disability Advocates, Inc.* v. *Paterson,* 653 F.Supp.2d 184, 258–59 (E.D.N.Y. 2009) (requiring a determination by treating professionals, who are contracted by the State, ''would eviscerate the integration mandate'' and ''condemn the placements of [individuals with disabilities in adult homes] to the virtually unreviewable discretion'' of the State and its contractors); *Day* v. *DC,* 894 F. Supp. 2d 1, 23–24 (D.D.C. 2012) (rejecting District's assertion that plaintiffs must be subject to the District's determination of whether or not such services are appropriate to meet their needs).

[518] *Olmstead,* 527 U.S. at 607.

[519] *See, e.g., Guggenberger* v. *Minn.,* 198 F. Supp. 3d 973, 1024 (D. Minn. 2016) (applying same analysis to title II and section 504 integration mandate claims).

[520] 28 CFR pt. 35, app. A (2010) (addressing § 35.130); *see also* U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead* v. *L.C.* (2020), *https://www.ada.gov/olmstead/q&a_olmstead.htm* (last visited June 18, 2022).

portion of disability-related complaints received by OCR.

Additionally, changes in the administration of health services and long-term services and supports necessitate rulemaking to address unnecessary segregation in evolving service models. In recent years, there has been a growing shift away from traditional fee-for-service health care towards alternative payment models and other new approaches. Many recipients have adopted pay-for-performance frameworks and contract with third-party entities, such as accountable care organizations, pharmaceutical benefit managers, and managed care organizations, for the delivery or management of services to individuals with disabilities. The growing reliance on managed care in State Medicaid programs and other changes, such as quality incentives, quality assurance activities, and risk-sharing arrangements, necessitate addressing unnecessary segregation in these emerging models in this proposed rule.

The COVID–19 public health emergency underscored the importance of the integration mandate. During the pandemic, community services to people with disabilities have frequently been disrupted, forcing many to enter or remain in segregated settings that elevated their risk of infection and death and isolated them from the broader community.[521] Such segregation is not made permissible by virtue of a public emergency. The Department notes that civil rights protections, including the integration mandate, remain applicable during public health emergencies, natural disasters, and other public crisis.[522] While the Department is also proposing an integration mandate provision under Section 1557, that provision relates to benefit design in health insurance coverage or other health-related coverage. The proposed integration provision in this rule does not relate to benefit design or other health insurance coverage issues. The obligations in this proposed provision include many that are also articulated in Section 1557, but also extend to a broader range of programs and activities by recipients of Federal financial assistance.

The Department proposes a new § 84.76 articulating the obligations of recipients under section 504 to serve individuals with disabilities in the most integrated setting appropriate to their needs, as mandated in proposed § 84.68(d).

Application

Proposed § 84.76(a) clarifies that the integration mandate applies to programs or activities that receive Federal financial assistance from the Department and to recipients that operate such programs and activities.

Although the specific factual context of the *Olmstead* decision involved residential services financed through the Medicaid program, the integration mandate by its terms has always been applied more broadly to any administration of programs or activities by a recipient. The integration mandate has been applied to State and local government service systems that rely on a range of residential and non-residential settings, including nursing facilities,[523] publicly and privately operated mental health facilities,[524] Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF–IIDs)[525] and board and care homes.[526] Courts and DOJ have also applied *Olmstead* to segregated non-residential settings such as sheltered employment programs.[527] Segregation can occur in residential services, day and employment services, and other services that people with disabilities may receive. For example, a recipient State agency that provides employment or day habilitation services to individuals with disabilities only in congregate settings may violate section 504. Consistent with this longstanding body of precedent and administrative pronouncements and the existing section 504 regulation, we propose to apply the requirement to administer a program or activity in the most integrated setting appropriate to the person's needs to all programs and activities of recipients of HHS funding.

The Department also notes that although the plaintiffs in *Olmstead* had intellectual and mental health disabilities, the integration mandate applies to all types of disabilities. Courts and Federal enforcement agencies have applied *Olmstead* in cases involving people with a wide range of disabilities, including people with intellectual and developmental disabilities, other mental disabilities, physical disabilities, older adults with disabilities, and children with complex medical needs.[528] OCR has received *Olmstead* complaints filed by or on behalf of a wide range of individuals, including individuals with physical and mental disabilities.

[521] *See* Nat'l Council on Disability, 2021 Progress Report: The Impact of COVID–19 on People with Disabilities, 89–91 (2021), *https://ncd.gov/progressreport/2021/2021-progress-report; see also, e.g.,* Scott D. Landes et al., *Covid–19 Outcomes Among People With Intellectual and Developmental Disability Living in Residential Group Homes in New York State,* 13 Disability & Health J. 13, no. 4 (2020); Scott D. Landes et al., *Covid–19 Outcomes Among People With Intellectual and Developmental Disability in California: The Importance of Type of Residence and Skilled Nursing Care Needs,* 14 Disability & Health J. 14, no. 2 (2021) (COVID–19 death rates were consistently higher for people with IDD living in congregate residential settings (such as group homes) and receiving 24/7 nursing services.).

[522] *See, e.g.,* U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., FAQs for Healthcare Providers during the COVID–19 Public Health Emergency: Federal Civil Rights Protections for Individuals with Disabilities under section 504 and Section 1557 (Feb. 4, 2022), *https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/disabilty-faqs/index.html.*

[523] *See, e.g., Radaszewski ex Rel. Radaszewski* v. *Maram,* 383 F. 3d 599 (7th Cir. 2004); *Brantley* v. *Maxwell-Jolly,* 656 F. Supp. 2d 1161 (N.D. Cal. 2009); *Vaughn* v. *Walthall,* 968 F. 3d 814 (7th Cir. 2020).

[524] *See, e.g., Pa. Protection and Advocacy, Inc.* v. *Pa. Dep't of Pub. Welfare,* 402 F. 3d 374 (3d Cir. 2005); *Martin* v. *Taft,* 222 F. Supp. 2d 940, 981 (D. Ohio 2002); *United States* v. *Miss.,* 400 F. Supp. 3d 546 (S.D. Miss. 2019); *Frederick L.* v. *Dep't of Pub. Welfare of Pa.* 364 F. 3d 487 (3d Cir. 2004); *Guggenberger* v. *Minn,* 198 F. Supp. 3d 973 (D. Minn. 2016).

[525] *See, e.g., ARC of Wash. State, Inc.* v. *Braddock,* 427 F. 3d 615 (9th Cir. 2005); *Ball* v. *Kasich,* 244 F. Supp. 3d 662 (S.D. Ohio 2017).

[526] *See, e.g., Pashby* v. *Delia,* 709 F. 3d 307 (4th Cir. 2013).

[527] *See U.S.* v. *R.I.,* 1:14–CV–00175 (D.R.I. 2014); *U.S.* v. *R.I. and City of Providence,* 1:13–CV–00442 (D.R.I. 2013); *Lane* v. *Brown* (formerly *Lane* v. *Kitzhaber*), 166 F. Supp. 1180 (D. Or. 2016); *Steward* v. *Roppe Corp,* 3:18–CV–2905 (N.D. Oh. Nov. 12, 2020).

[528] *See, e.g., Townsend* v. *Quasim,* 328 F. 3d 511 (9th Cir. 2003) (finding covered disabilities included diabetic peripheral vascular disease and bilateral amputation); *Davis* v. *Shah,* 821 F. 3d 231 (2d Cir. 2016) (plaintiff had multiple sclerosis, paraplegia, lymphedema, cellulitis, psoriatic arthritis, peripheral neuropathy, and trans-metatarsal amputation.); *U.S.* v. *State of Fla.,* 1:13–cv–61576, (S.D. Fla. 2013) (children with complex medical needs); *Vaughn* v. *Walthall,* 968 F. 3d 814 (7th Cir. 2020) (quadriplegia); *M.R.* v. *Dreyfus,* 663 F. 3d 1100 (9th Cir. 2011) (one plaintiff had IDD, daily seizures, scoliosis, cerebral palsy, hypothyroidism, and mood disorder; second plaintiff had spinal stenosis, congestive heart failure, emphysema, hepatitis B and C, chronic bacterial infections, neuropathy in both hands and feet, high blood pressure, depression, and bipolar disorder; third plaintiff had diabetes, congenital glaucoma, macular degeneration, and clinical depression); *Steimel* v. *Wernert,* 823 F. 3d 902 (7th Cir. 2016) (first plaintiff had cerebral palsy; second plaintiff had cerebral palsy and ID; third and fourth plaintiffs had cerebral palsy, additional plaintiffs had intellectual and developmental disabilities); *Fisher* v. *Okla. Health Care Auth.,* 335 F. 3d 1175 (10th Cir. 2003) (wheelchair user with insulin-dependent diabetes, hypertension, asthma, congestive heart failure, residual bilateral paresis, and deep-vein thrombosis; second plaintiff used a wheelchair, had cerebral palsy, and had two strokes; third plaintiff had difficulty walking and standing and had acute mixed connective tissue disease with seizure disorder, residual from a stroke and cardiac malfunction); *Rogers* v. *Cohen,* No. 5:18–CV–193–D (E.D.N.Y. Feb. 25, 2019) (first plaintiff had cerebral palsy; second plaintiff had a rare chromosomal abnormality that caused her to be intellectually and physically disabled).

Discriminatory Action Prohibited

Proposed § 84.76(b) articulates the integration obligation in broad terms, indicating that a recipient of Federal financial assistance shall administer a program or activity in the most integrated setting appropriate to the needs of a qualified person with a disability. Administering a program or activity in a manner that results in unnecessary segregation of persons with disabilities—including through the failure to make reasonable modifications to policies, practices, or procedures, as required in proposed § 84.68(b)(7)—constitutes discrimination under this section.

Recipients cannot avoid their obligations under section 504 and *Olmstead* by characterizing as a ''new service'' those services that they currently or plan to in the future offer only in institutional settings. Where a recipient provides a service, it cannot discriminate against individuals with disabilities in the provision of that service, including through denial of access to the most integrated setting appropriate for their needs. Once a recipient chooses to provide certain services, it must do so in a nondiscriminatory fashion by ensuring access to such services in the most integrated setting appropriate to the needs of the qualified individual.[529]

Segregated Settings

Proposed § 84.76(c) describes characteristics of segregated settings. In the context of the integration mandate, segregation means the unnecessary separation of people with disabilities from people without disabilities. Unnecessary segregation may occur in a variety of settings, such as board-and-care homes, sheltered workshops, and other congregate settings populated exclusively or primarily with individuals with disabilities. It is not limited to residential institutions such as a psychiatric hospital, an Intermediate Care Facility, or a nursing home. DOJ provides guidance that ''[s]egregated settings include, but are not limited to: (1) congregate settings populated exclusively or primarily with individuals with disabilities; (2) congregate settings characterized by regimentation in daily activities, lack of privacy or autonomy, policies limiting visitors, or limits on individuals' ability to engage freely in community activities and to manage their own activities of daily living; or (3) settings that provide for daytime activities primarily with other individuals with disabilities.'' [530] Such settings may be in compliance with applicable regulations under Medicaid or another payer but may nonetheless not meet their obligations under the integration requirement, as discussed in more detail below.

Even in smaller, disability-specific congregate settings located in mainstream society, regimentation in daily activities, lack of privacy or autonomy, policies limiting visitors, or limits on individuals' ability to engage freely in community activities and to manage their own activities of daily living may further isolate and segregate people with disabilities.[531] All of these sorts of restrictions limit the opportunity for people with disabilities to interact as members of the community with nondisabled individuals.

We note that these characteristics need not be present for a setting to be considered segregated.

- *Integration Question 1: In the discussion in the preamble of the proposed definition of* ''*most integrated setting,*'' *we solicit comments on whether the definition should be expanded.*

Examples of Discrimination on the Basis of Disability

Proposed § 84.76(d) includes a non-exhaustive list of actions that may lead to unnecessary segregation and violate this section to the extent that such actions result in unnecessary segregation, or serious risk of unnecessary segregation, of persons with disabilities. These include: (1) establishing or applying policies and practices that limit or condition individuals with disabilities' access to the most integrated setting appropriate to their needs; [532] (2) providing greater benefits or benefits under more favorable terms in segregated settings than integrated settings; [533] (3) establishing or applying more restrictive eligibility rules and requirements for individuals with disabilities in integrated settings than for individuals with disabilities in segregated settings; and (4) failure to provide community-based services as alternatives to institutional services that results in institutionalization, placement in a segregated setting, or serious risk of institutionalization. This category includes, but is not limited to planning, service system design, funding, or service implementation practices that result in such risk. Individuals with disabilities need not wait until the harm of institutionalization or segregation occurs to assert their right to avoid unnecessary segregation.[534] These examples are all drawn from existing case law and Federal agency guidance.[535]

For example, a policy that individuals with mental health disabilities residing in institutional settings have access to additional hours of services not made available to individuals with comparable mental health disabilities residing in community-based settings may constitute a violation of section 504's integration mandate if it leads to unnecessary institutionalization or serious risk of such institutionalization.[536] As another example, a hospital or acute care provider that routinely discharges persons with serious health disabilities into nursing homes due to inadequate discharge planning procedures that fail to assess patients for home-based supportive services and refer them to community-based providers, might be in violation of section 504's integration mandate, based on discharge practices that result in serious risk of unnecessary

[529] *See* U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead* v. *L.C.,* Question 8 (2020), *https://www.ada.gov/olmstead/q&a_olmstead.htm; see also, e.g., Steimel* v. *Wernert,* 823 F.3d 902, 914 (7th Cir. 2016).

[530] *See* U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead* v. *L.C.,* Question 1 (2020), *https://www.ada.gov/olmstead/q&a_olmstead.htm* (last visited Feb. 13, 2023).

[531] U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead* v. *L.C.,* Question 1 (2020), *https://www.ada.gov/olmstead/q&a_olmstead.htm* (last visited Feb. 13, 2023); *See also Disability Advocates Inc.* v. *Patterson,* 653 F. Supp. 2d 184 (E.D.N.Y. 2009) (finding adult care facilities, although physically located in the community, were segregated settings because they failed to allow free interaction between disabled and non-disabled individuals).

[532] *Olmstead* v. *L.C.,* 527 U.S. 581 (1999).

[533] *Fisher* v. *Oklahoma Health Care Auth.,* 335 F.3d 1175 (10th Cir. 2003) (finding State's decision to cease providing unlimited, medically-necessary prescription benefits for participants in community-based Medicaid program while continuing to provide such benefits to disabled persons who had been institutionalized, could place participants in community-based program with high prescription drug costs and limited monthly income at high risk for premature entry into nursing homes).

[534] *See e.g., M.R.* v. *Dreyfus,* 697 F.3d 706, 733 (9th Cir. 2012) (finding a reduction in service hours for personal care assistance may pose a serious risk of institutionalization).

[535] *See e.g.,* U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead* v. *L.C.,* Question 1 (2020), *https://www.ada.gov/olmstead/q&a_olmstead.htm.*

[536] *See, e.g., Pashby* v. *Delia,* 709 F. 3d 307 (4th Cir. 2013) (finding stricter eligibility requirements for personal care services for individuals residing in their own homes compared to those residing in adult care homes violated the integration mandate).

placement within an institution or other segregated setting.

Protections from discrimination on the basis of disability are violated by policies that place individuals at serious risk of institutionalization or segregation. *Fisher* v. *Oklahoma Health Care Authority,* decided shortly after *Olmstead,* recognized that the integration mandate prohibited practices that place individuals at serious risk of institutionalization. In *Fisher,* the Tenth Circuit held that ''disabled persons . . . who stand imperiled with segregation'' were not required to already be institutionalized to assert claims under *Olmstead*.[537] Instead, the court held, they need only show that they were ''at high risk for premature entry.'' [538] In the years since *Fisher,* numerous courts have applied *Olmstead* to protect individuals at risk of unnecessary segregation.[539] They have also held that the integration mandate extends not only to a serious risk of institutionalization but also to a serious risk of unjustified isolation.[540]

DOJ has promulgated guidance stating the ADA's integration mandate extends ''to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated settings.'' [541] Proposed § 84.76(d)(4) makes clear that the same obligation would apply under section 504 to recipients of HHS funding. In *Davis* v. *Shah,* the Second Circuit cited the DOJ guidance to make clear that ''a plaintiff 'need not wait until the harm of institutionalization or segregation occurs or is imminent' in order to bring a claim. . . .'' [542]

The Department proposes to codify this longstanding case law and DOJ guidance. A recipient could place individuals with disabilities at serious risk of unnecessary segregation in a variety of ways. It could do so by failing to provide services that are necessary for those individuals to live, work, and receive services in community-based settings. A recipient could also create such a risk by cutting services or budgets where those cuts will likely cause a decline in health, safety, or welfare that would lead to an individual's placement in an institution or other segregated setting. Examples include failing to provide services or alternatives other than institutional care to people with urgent needs who are on waiting lists for community services,[543] or a recipient's decision to deny or reduce services on which people with disabilities rely to live, work, and recreate independently in the community.[544] While the ADA and section 504 do not require a recipient to provide services at a specified standard of care or tailored to an individual's needs, a recipient cannot discriminate by providing some services only in less integrated settings.[545]

Service reductions resulting from budget cuts—even where permitted under Medicaid and other public program rules—may violate the integration mandate if they create a serious risk of institutionalization or segregation.[546] In making such service reductions, recipients have a duty to take reasonable steps to avoid placing individuals at risk of institutionalization or segregation. For example, recipients may be required to make exceptions to the service reductions or to provide alternative services to individuals who would be forced into institutions as a result of the cuts. If providing alternative services, recipients must ensure that those services are actually available and that individuals can

[537] *Fisher* v. *Okla. Health Care Auth.,* 335 F.3d 1175 (10th Cir. 2003).

[538] *Id.* at 1185, quoting Joint App. at 70.

[539] *See, e.g., Steimel* v. *Wernert,* Nos. 15–2377, 15–2389, 2016 WL 2731505, 8 (7th Cir. May 10, 2016) (holding that at-risk claims were ripe because the State's provided services were inadequate to prevent life-threatening gaps in care.)); *Pashby* v. *Delia,* 709 F.3d 307, 317 (4th Cir. 2013) (holding that at-risk claims were ripe even though plaintiffs had not perfected administrative appeals of service reductions because plaintiffs' claim focused not on the outcome of their individual appeals, but on the state's decision to reduce services); *Guggenberger* v. *Minn.* 198 F. Supp. 3d 973 (D. Minn. 2016) (holding that the state's denial to young adults with disabilities living with parental caregivers of ''essential Waiver Services based on Defendants' purported mismanagement and administration'' presented a decision ripe for judicial review); U.S. Dep't of Justice, Statement of Interest of the United States, *Ball* v. *Kasich,* 244 F. Supp 3d 662 (S.D. Oh. 2017), *https://www.ada.gov/olmstead/documents/ball_kasich_soi.pdf.2017*), *https://archive.ada.gov/olmstead/documents/ball_kasich_soi.pdf. But see E.B. ex rel. M.B.* v. *Cuomo,* 16–CIV–735 (W.D. NY, July 11, 2020).

[540] *See, e.g., Guggenberger* v. *Minn.,* 198 F. Supp. 3d 973, 1029, n. 22 (D. Minn. 2016) In *Guggenberger,* the court held that ''the integration mandate also applies to non-institutional segregated settings.'' The court concluded that the plaintiffs ''have plausibly alleged that they are not living, working, and receiving services'' in 'a setting that enables [them] to interact with nondisabled persons to the fullest extent possible,' '' *Id.* at 1030–31, *quoting* 28 CFR pt. 35, app. B (1977) (addressing § 35.130)).

[541] *See* U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act (emphasis added) and *Olmstead* v. *L.C.,* Note 4 (2020), *https://www.ada.gov/olmstead/q&a_olmstead.htm* (last visited June 18, 2022).

[542] In *Davis* v. *Shah,* 821 F.3d 231, 262–63 (2d Cir. 2016), the court adopted as its standard the DOJ *Olmstead* guidance. The court quoted DOJ: ''a plaintiff ''need not wait until the harm of institutionalization or segregation occurs or is imminent'' to bring a claim under the ADA. Plaintiff establishes a ''sufficient risk of institutionalization to make out an *Olmstead* violation if a public entity's failure to provide community services . . . will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution.''

[543] *See, e.g., Olmstead* v. *L.C.,* 527 U.S. 581, 605–06 (1999) (''If . . . the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a *waiting list that moved at a reasonable pace* not controlled by the State's endeavors to keep its institutions fully occupied, the reasonable modifications standard would be met. (*emphasis added*)). *See also Makin* v. *Haw.,* 114 F.Supp.2d 1017, 1034 (D. Haw. 1999), a case decided 11 months after *Olmstead,* in which the court found that individuals in the community on the waiting list for community-based services offered through Hawaii's Medicaid program could challenge administration of program for violating title II integration mandate because the program could potentially force the plaintiffs into institutions; *Cruz* v. *Dudek,* No. 10–23048–CIV, 2010 WL 4284955 (S.D. Fla. Oct. 12, 2010), *report and recommendation adopted sub nom. Cruz* v. *Arnold,* No. 10–23048–CIV, 2010 WL (finding that plaintiffs on waiting list for services met burden for a preliminary injunction based on imminent risk of institutionalization.); *Arc of Wash. State* v. *Braddock,* 427 F. 3d 615, 621 (9th Cir. 2005) (finding no violation of the ADA by the state of Washington because ''there is a waiting list that admits new participants when slots open up.'' The court further stated that ''all Medicaid-eligible disabled persons will have an opportunity to participate in the program once space becomes available, based solely on their mental-health needs and position on the waiting list'').

[544] *See, e.g., Steimel* v. *Wernert,* 823 F.3d 902, 913 (7th Cir. 2016) (holding that at-risk claims were ripe because the plaintiffs ''have provided evidence that they need constant supervision and, despite their best efforts, the services [the state] provided . . . have proved inadequate to prevent life-threatening gaps in care.''); *Pashby* v. *Delia,* 709 F.3d 307, 317 (4th Cir. 2013) (holding that the state's denial to young adults with disabilities living with parental caregivers of ''essential Waiver Services based on Defendants' purported mismanagement and administration'' presented a decision ripe for judicial review. ''[T]here is nothing in the plain language of the regulations that limits protection to persons who are currently institutionalized'').

[545] *See Radaszewski ex rel. Radaszewski* v. *Maram,* 383 F.3d 599, 611 (7th Cir. 2004)(''Although a State is not obliged to create entirely new services or to otherwise alter the substance of the care that it provides to Medicaid recipients in order to accommodate an individual's desire to be cared for at home, the integration mandate may well require the State to make reasonable modifications to the form of existing services in order to adapt them to community-integrated settings.'').

[546] *See, e.g., M.R.* v. *Dreyfus,* 663 F. 3d 1100 (9th Cir. 2011) (finding across-the-board service reductions in Medicaid personal assistance services posed a serious risk of institutionalization); *Oster* v. *Lightbourne,* No. C 09–4668 CW, 36 (N.D. Cal. Mar. 2, 2012) (finding a twenty percent reduction in service hours ''will compromise the health and well-being of . . . recipients such that they will be at serious risk of institutionalization''); *Steimel* v. *Wernert,* 823 F. 3d 902 (7th Cir. 2016) (holding that a changed cap in waiver services hours, which dramatically curtailed plaintiffs' ability to participate in community activities, violated integration mandate); U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead* v. *L.C.,* Question 9 (2020) *https://www.ada.gov/olmstead/q&a_olmstead.htm https://www.ada.gov/olmstead/q&a_olmstead.htm* (last visited Feb.13, 2023).

actually secure them to avoid institutionalization or segregation.[547] Budget cuts or other otherwise permissible actions may also violate obligations under section 504's integration mandate if they result in more favorable access to services in segregated settings than in integrated settings.

Civil Rights Obligations as Distinct From Medicaid Law and Regulations

The Medicaid program, established in Title XIX of the Social Security Act, is a voluntary, joint Federal-State program. Under the program, the Federal Government matches a portion of expenses incurred by participating states for expenditures for Medicaid beneficiaries. State participation in the Medicaid program is not mandatory, but if a State chooses to participate, the Social Security Act requires it to comply with Federal statutory and regulatory requirements—and all states participate in the program.[548] Among other functions, Medicaid is the major source of financing for long-term services and supports provided to people with disabilities to facilitate living independently in the community. The majority of home and community-based services are provided through section 1915(c) Medicaid waivers, as well as through Medicaid State plan authorities (such as 1915(i), (j) and (k)), and section 1115 Medicaid demonstrations. States have significant discretion in how they design these programs, including setting eligibility requirements and limitations for home and community-based waiver services. Unlike Medicaid State plan benefits, waiver enrollment can be capped, resulting in waiting lists when the number of people seeking services exceeds the amount of available funding. HHS and DOJ have made clear that obligations under the integration mandate ''are independent from the requirements of the Medicaid program,'' [549] and courts have also recognized this distinction.[550]

For example, a State might violate the integration mandate, but not the Medicaid law or implementing regulations, by making cuts to HCBS programs while at the same time increasing funding to institutional services. The section 504 proposed rule would not change the requirements of the Medicaid program in the Social Security Act or in Medicaid regulations, nor would it require CMS to assess compliance with section 504 as part of their work approving Medicaid proposals (*i.e.,* Medicaid waivers, State plans, and demonstrations).

CMS regularly communicates to states that they have separate and independent obligations under Medicaid and other civil rights laws. For example, CMS explicitly articulates that compliance with the Medicaid statute and rules is a separate determination and obligation from compliance with the ADA and section 504, in both its initial and final approval letters for State Transition Plans (STPs) [551] under the HCBS settings rule.

A State may violate the integration mandate in administering its system of services, including approved HCBS services under Medicaid waivers or other authorities, if it does so in a manner that unnecessarily segregates people with disabilities and fails to make available sufficient services in integrated, community-based settings.[552] Section 504 does not require states to create new programs to assist people with disabilities,[553] nor does it require states to provide a particular standard of care or level of benefits.[554] However, states must adhere to the disability nondiscrimination requirements—including the integration mandate—with regard to the services they in fact

[547] *See* U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead* v. *L.C.,* Question 9 (2020) *https://www.ada.gov/olmstead/q&a_olmstead.htm https://www.ada.gov/olmstead/q&a_olmstead.htm* (last visited Feb.13, 2023).

[548] 42 U.S.C. 1396a.

[549] *See* U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead* v. *L.C.,* Question 7 (2020), *https://www.ada.gov/olmstead/q&a_olmstead.htm* (last visited Feb.13, 2023) *citing* U.S. Dep't of Health & Hum. Servs., Ctrs. for Medicare & Medicaid Servs., *Olmstead* Update No. 4, 4 (Jan. 10, 2001), *https://www.cms.gov/smdl/downloads/smd011001a.pdf;* U.S. Dep't of Health & Hum. Servs., Ctrs. for Medicare & Medicaid Servs, Medicaid Program: Home and Community-Based State Plan Services, 79 FR 3016 (Jan. 16, 2014), *https://www.federalregister.gov/documents/2014/01/16/2014-00487/medicaid-program-state-plan-home-and-community-based-services-5-year-period-for-waivers-provider* (In the preamble to the final HCBS settings rule, CMS makes clear that ''this regulation change does not alleviate states' independent obligations under the Americans with Disabilities Act or the Supreme Court's Olmstead decision.''); U.S. Dep't of Health & Hum. Servs., Ctrs. for Medicare & Medicaid Servs, Instructions, Technical Guidance and Review Criteria: Application for a § 1915(c) Home and Community Based-Waiver, 15 (2019), *https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/instructions_technicalguide_v3.6_66.pdf* (''Although this is guidance with respect to the Medicaid program, we note that states have obligations pursuant to the Americans with Disabilities Act, section 504 of the Rehabilitation Act, and the Supreme Court's *Olmstead* decision interpreting the integration regulations of those statutes. Approval of any Medicaid Waiver action does not in any way address the State's independent obligations under the Americans with Disabilities Act or the Supreme Court's Olmstead decision.'').

[550] In *Davis* v. *Shah,* 821 F.3d 231, 264 (2d Cir. 2016), the court discussed the separate obligations of the ADA and Medicaid Act, noting ''New York's conceded discretion to decide whether to provide coverage of orthopedic footwear and compression stockings under the Medicaid Act, 42 U.S.C.S. § 1396 *et seq.,* does not affect its duty to provide those services in a non-discriminatory manner under the Americans with Disabilities Act (ADA). A state's duties under the ADA are wholly distinct from its obligations under the Medicaid Act.''). In *Wilborn* v. *Martin,* 965 F. Supp. 2d 834, 847 (M.D. Tenn. 2013), the court noted that CMS approval is independent from obligations under the ADA and Rehabilitation Act (RA, explaining ''[. . .] the ADA and the RA stand independent of the Medicaid statute and simply require consideration of an individual enrollee's medical needs and the impact of providing such needs for similarly situated enrollees.''

[551] *See, e.g.,* U.S. Dep't of Health & Hum. Servs., Ctrs. for Medicare & Medicaid Servs, Alabama Initial Approval (Feb. 21, 2017), *https://www.medicaid.gov/sites/default/files/2019-12/al-initial-approval_0.pdf* (''[i]t is important to note that CMS' initial approval of an STP solely addresses the state's compliance with the applicable Medicaid authorities. CMS' approval does not address the state's independent and separate obligations under the Americans with Disabilities Act, section 504 of the Rehabilitation Act, or the Supreme Court's Olmstead decision.''); *see also* U.S. Dep't of Health & Hum. Servs., Ctrs. for Medicare & Medicaid Servs, Alaska Final Approval (Aug. 22, 2018), *https://www.medicaid.gov/sites/default/files/2019-12/ak-final-appvl_0.pdf.*

[552] *See* 28 CFR 35.130(b),(d). *See also Steimel* v. *Wernert,* 823 F.3d 902 (7th Cir. 2016) (finding that a reduction of Medicaid waiver hours, which results in a loss of ability to participate in the community and increases the risk of medical complications, puts plaintiffs at risk of institutionalization in violation of the integration mandate).

[553] *See e.g., Rodriguez* v. *City of New York,* 197 F.3d 611, 615–16 (2d Cir. 1999) (neither the ADA nor the Rehabilitation Act compels the City to offer safety monitoring to people with disabilities so that they can remain at home, where safety monitoring was not an existing Medicaid service offered.); *Alexander* v. *Choate,* 469 U.S. 287, 303 (Jan. 9, 1985).

[554] The integration mandate imposes neither a ''standard of care'' nor ''a certain level of benefits to individuals with disabilities.'' *Olmstead,* 527 U.S. at 603 n. 14; *Amundson ex rel. Amundson* v. *Wisconsin Dep't of Health Servs.,* 721 F.3d 871, 875 (7th Cir. 2013) (holding that the ADA does not support ''a claim of absolute entitlement'' to Medicaid benefits); *see also Cohon ex rel. Bass* v. *New Mexico Dep't of Health,* 646 F.3d 717, 729 (10th Cir. 2011) (holding that ADA did not give plaintiff ''legal entitlement'' to specific requested services and that she did not state an Olmstead claim because she failed to allege that the program would lead to her unjustified isolation or premature institutionalization); *Rodriguez* v. *City of New York,* 197 F.3d at 619 (noting that ''*Olmstead* reaffirms that the ADA does not mandate the provision of new benefits.'').

provide.[555] In addition, states may be required to offer in an integrated setting services that are only offered in a segregated setting. Proposed § 84.76(d)(2) includes as an example of a specific prohibition ''providing greater benefits or benefits under more favorable terms in segregated settings than in integrated settings.'' The type and level of services needed and what services the State provides are fact-specific inquiries.

Providing services beyond what a State currently provides under its Medicaid program may not be a fundamental alteration, and the ADA and section 504 may require states to provide those services, under certain circumstances. For example, the fact that a State is permitted to ''cap'' the number of individuals it serves in a particular waiver program under Medicaid does not exempt the State from serving additional people in the community to comply with the ADA or other laws.[556] This same logic applies to recipients under section 504, who may be in violation of their obligations under section 504's integration mandate even when they are in compliance with the requirements of other public programs, such as terms and conditions for participation for providers participating in Medicare, Federal requirements for State Medicaid agencies, and other requirements distinct from those of the integration mandate. For example, a long-term care facility may violate section 504 if the facility continues an individual's inpatient placement when the individual could live in a more integrated setting and desires to do so.[557] To comply with the integration mandate, inpatient facilities may be required to discharge patients in such circumstances. In the process of planning for such discharges, inpatient facilities (including hospitals) may be required to develop individualized treatment and discharge plans and coordinate with local community-based service providers to ensure that ongoing services, like personal care, without which an individual is at risk of institutionalization and which are offered in the inpatient setting, are available to the individual in the community.

Limitations

A recipient's obligation under the integration mandate to provide services in the most integrated setting appropriate for the needs of a qualified individual is not unlimited. A recipient may be excused in instances where it can prove that the requested modification would result in a ''fundamental alteration'' of its service, program, or activity.[558] Proposed paragraph (e) provides that a recipient may establish a defense to the application of this section if it can demonstrate that a requested modification would fundamentally alter the nature of its program or activity. However, the recipient bears the burden of establishing that a requested modification to its program or activity to facilitate access to the most integrated setting would constitute a fundamental alteration.[559] For a recipient like a State, a showing of a fundamental alteration would require showing ''that, in the allocation of available resources, immediate relief for plaintiffs would be inequitable, given the responsibility the State [or local government] has taken for the care and treatment of a large and diverse population of persons [with disabilities].'' [560]

When section 504 was enacted in 1973, Congress recognized the shift to provide services to people with disabilities in the community instead of in institutions and to integrate people with disabilities into society. Congress' express goal was, in part, ''to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society.'' [561] The interpretive guidance to the existing regulation explains that the phrase ''most integrated setting appropriate'' was added to existing § 84.4(b)(2), contained in § 84.68(d) of the proposed rule, to reinforce the concept that the provision of unnecessarily separate or different services is discriminatory.[562] The only qualification to be covered by the HHS section 504 regulations is that an entity be a recipient of Federal financial assistance from HHS. Accordingly, a number of individual providers who are not public entities are covered by section 504.

For example, in the 2016 ''Guidance and Resources for Long Term Care Facilities,'' the Department described application of section 504's integration mandate to these recipients:

> Long-term care facilities receive Federal financial assistance by participating in programs such as Medicare and Medicaid. Section 504 prohibits discrimination based on disability, including the unnecessary segregation of persons with disabilities. Unjustified segregation can include continued placement in an inpatient facility when the resident could live in a more integrated setting. This concept was set forth in the Olmstead decision, which interpreted the same requirements in the Americans with Disabilities Act.[563]

- *Integration Question 2: We seek comment on what may constitute a fundamental alteration for recipients who are not public entities, for example, an individual skilled nursing facility responsible for identifying and preparing individuals who can and want to be discharged to available community-based services.*

Subpart H—Communications

Communication failures in the context of the receipt of health and human services can be life-altering or even life-ending.[564] Ensuring that

[555] *See Olmstead* v. *L.C.,* 527 U.S. at 603; *see also Radaszewski* v. *Maram,* 383 F.3d at 609 (citing *Olmstead* v. *L.C.,* 527 U.S. at 603 n. 14, for the principle ''that States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide'') (''While 'a State is not obligated to create new services,' it 'may violate Title II when it refuses to provide an existing benefit to a disabled person that would enable that individual to live in a more community-integrated setting.' '').

[556] *See* U.S. Dep't of Justice, Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead* v. *L.C.,* Question 7 (2020), *https://www.ada.gov/olmstead/q&a_olmstead.htm* (last visited Feb. 13, 2023).

[557] U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., Guidance and Resources for Long Term Care Facilities: Using the Minimum Data Set to Facilitate Opportunities to Live in the Most Integrated Setting (May 20, 2016).

[558] *Olmstead* v. *L.C.,* 527 U.S. at 603 (1999) (quoting 28 CFR 35.130(b)(7)).

[559] 28 CFR 35.130(b)(7)(i)(''A public entity shall make reasonable modifications . . . *unless the public entity can demonstrate* that making the modification would fundamentally alter the nature of the service, program, or activity.'') (emphasis added). *See also Brown* v. *D.C.,* 928 F. 3d 1070, 1077 (D.C. Cir. 2019) (''Although the *[Olmstead]* Court did not expressly declare that the State bears the burden of proving the unreasonableness of a requested accommodation . . . we believe it does . . .''); *Steimel* v. *Wernert,* 823 F. 3d 902, 914–16 (7th Cir. 2016) (''It is the state's burden to provide that the proposed changes would fundamentally alter their programs.'').

[560] *Olmstead* v. *L.C.,* 527 U.S. at 604–07. A public entity raising a fundamental alteration defense based on an Olmstead plan must show that it has developed a comprehensive, effectively working Olmstead plan and that it is implementing the plan.

[561] 29 U.S.C. 701(b)(1).

[562] 45 CFR part 84, app. A (addressing § 84.4(b)(2)).

[563] U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., Guidance and Resources for Long Term Care Facilities: Using the Minimum Data Set to Facilitate Opportunities to Live in the Most Integrated Setting (May 20, 2016).

[564] The Joint Commission on Accreditation of Healthcare Organizations found that communication failures were involved in over 70 percent of patient safety events that result in death, permanent harm, or severe temporary harm. Katherine Dingley et al., *Improving Patient Safety Through Provider Communication Strategy Enhancements,* Advances in Patient Safety: New Directions and Alternative Approaches (Vol. 3: Performance & Tools) (2008), *https://www.ncbi.nlm.nih.gov/books/NBK43663/.* When asked to select contributing factors to patient care errors, nurses cited communication issues with physicians as one

Continued

communications with individuals with disabilities are as effective as communications with others (commonly referred to as ''effective communication'') helps to avoid such communication failures and protect the health of individuals with disabilities. Over the years, OCR has received numerous complaints alleging that recipients have failed to ensure effective communication to individuals with disabilities or failed to provide appropriate auxiliary aids and services to individuals with disabilities in both the health care and social services context.[565] In many of these cases, OCR identified compliance concerns with Federal nondiscrimination laws and entered into agreements with recipients to address these concerns.

One such example is the VRA between OCR and a health system, that OCR announced on January 16, 2020.[566] In this case, OCR initiated a compliance review following receipt of a complaint that the health system's clinic and hospital failed to provide adequate or timely American Sign Language (ASL) interpreter services despite multiple requests. This complaint, combined with allegations from additional patients, led OCR to conduct a review of the health system's policies and procedures regarding its obligations to ensure effective communication under section 504 and section 1557. The VRA led to the health system strengthening its provision of auxiliary aids and services while placing additional emphasis on effective communication.

Similarly, OCR reached a VRA with a health institute following a 2017 complaint alleging that it failed to provide a qualified ASL interpreter to a deaf six-year-old child requiring physical therapy, in violation of both section 504 and section 1557.[567] The complaint was one of five alleging that the health institute had failed to provide effective communication to individuals who are deaf or hard of hearing. As a result of the resolution, the health institute agreed to take steps to improve its review and assessment of sign language interpreters, provide staff training with OCR's technical assistance, and submit reports to OCR regarding its ongoing compliance activities.[568]

Notwithstanding OCR's extensive enforcement activities in this area, including through complaint resolutions, compliance reviews, and the provision of technical assistance, ineffective communication with individuals with disabilities remains a persistent and significant discrimination issue.[569] Many of the complaints OCR receives involve the denial of or limited access to HHS-funded services for individuals who are deaf or hard of hearing or who are blind or have low vision. Data from the Centers for Disease Control and Prevention indicates that individuals with disabilities comprise more than 26 percent of adults in the nation, over 10% of whom have a hearing or vision disability.[570]

The Department is proposing to remove a limitation that currently appears in § 84.52(d) (a subsection being replaced by this Communications subpart, the auxiliary aids provision in the Health, Welfare, and other Social Services subpart. That subsection contains special rules for recipients with less than 15 employees.

Section 84.52(d) directs that the obligation to provide auxiliary aids is mandatory for recipients with 15 or more employees, but indicates that Departmental officials may require recipients employing fewer than 15 persons to comply with this requirement ''when [compliance] would not significantly impair the ability of the recipient to provide its benefits or services.'' The Department is proposing to remove this limitation for several reasons. First, this limitation is of minimal consequence because the vast majority of recipients of Federal financial assistance from the Department are already required by either title II or title III of the ADA to provide auxiliary aids or services in order to ensure effective communication. Second, all recipients, regardless of size, are not required, in providing effective communication, to take any action that the recipient can demonstrate would result in a fundamental alteration to the program or activity or pose undue financial and administrative burdens. Third, the Department already has the discretion whether to impose these obligations on recipients with fewer than 15 employees, and as of December 19, 2000, has required all recipients with fewer than fifteen employees to provide auxiliary aids to individuals with disabilities where the provision of such aids would not significantly impair the ability of the recipient to provide its benefits or services.[571] Finally, given that Congress specifically intended that the principles of the ADA guide the policies, practices, and procedures developed under the Rehabilitation Act, the Department believes the removal of this limitation better serves the purpose shared by both the ADA and Rehabilitation Act to enable individuals with disabilities to ''enjoy full inclusion and integration into the economic, political, social, cultural, and educational mainstream of American society.'' [572]

The Department has investigated and resolved numerous complaints regarding effective communication over the decades by recipients with fewer than fifteen employees. The importance of ensuring that individuals with disabilities are able to understand and engage in health and human services programs and activities drives this proposed change.

The current regulations implementing section 1557 require certain covered entities to ensure effective communication for individuals with

---

of the two most highly contributing factors, according to the National Council of State Boards of Nursing reports.

[565] For example, since 2015, OCR has received 523 self-identified effective communication complaints. These numbers are based on allegations made by complainants in OCR's system of record, not findings by OCR on the merits after investigations.

[566] Examples of these resolution agreements appear on OCR's website. U.S. Dep't of Health & Human Servs., Off. For Civil Rts., Recent Civil Rights Resolution Agreements & Compliance Reviews, *https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/agreements/index.html* (last visited Feb. 13, 2023). *See e.g.,* U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., HHS OCR Secures Voluntary Resolution with CHRISTUS Trinity Mother Frances Health System to Strengthen its Provision of Auxiliary Aids and Services to Individuals Who Are Deaf or Hard of Hearing (Jan. 16, 2020), *https://www.hhs.gov/about/news/2020/01/16/hhs-ocr-secures-voluntary-resolution-with-christus-trinity.html?language=en.*

[567] *See* U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., Maryland Orthopedic Practice Agrees to Provide Deaf 6-year-old a Qualified Interpreter (July 24, 2019), *https://www.hhs.gov/about/news/2019/07/24/maryland-orthopedic-practice-agrees-provide-deaf-6-year-old-qualified-interpreter.html?language=en.*

[568] These examples are illustrative of some of the enforcement activities OCR has undertaken concerning allegations of effective communication discrimination. OCR periodically receives hundreds of complaints alleging discrimination based on effective communication. For examples of additional enforcement activities regarding effective communication, *see* U.S. Dep't of Health & Hum. Servs., Off. for Civil Rts., Effective Communication in Hospitals—Disability; Enforcement Success Stories Involving Persons who are Deaf or Hard of Hearing, *https://www.hhs.gov/civil-rights/for-individuals/special-topics/hospitals-effective-communication/selected-complaint-investigations-resolution-agreements/index.html.*

[569] *See, e.g.,* Nicole D. Agaronnik et al., *Communicating with Patients with Disability: Perspectives of Practicing Physicians,* 34 J. of Gen. Internal Med. 34(7), 1139–45 (2019), *https://doi.org/10.1007/s11606-019-04911-0; see also* Tyler G. James et al., *Communication Access in Mental Health and Substance Use Treatment Facilities for Deaf American Sign Language Users,* 41 Health Aff. 1417 (Oct. 2022), *https://doi.org/10.1377/hlthaff.2022.00408.*

[570] U.S. Dep't of Health & Hum. Servs., Ctrs. for Disease Control & Prevention, Disability Impacts All of Us (Sept. 16, 2020), *www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html.*

[571] 65 CFR 79368.

[572] 29 U.S.C. 701(a)(3).

disabilities.[573] Because noncompliance in this area is so harmful to individuals with disabilities, OCR included provisions setting out specific and comprehensive standards relating to effective communication and the provision of auxiliary aids and services in the section 1557 final rule,[574] which incorporated the effective communication and auxiliary aids provisions from the ADA title II regulation.[575] In particular, the section 1557 final rule recognized that effective communication helps ensure equal opportunities in the health care setting, leading to better health outcomes for individuals with disabilities.[576] Likewise, this proposed section recognizes the important role that effective communication plays in ensuring equal opportunities in both health and human service programs and activities.

Part of effective communication is ensuring that individuals with disabilities, including those with cognitive, neurological, and psychiatric disabilities, have the appropriate information necessary to make health care decisions. Communication between a person seeking medical treatment and their health care provider is a basic component of health care and in some circumstances leads to a formal process of granting of permission for treatment, usually referred to as informed consent. The information being provided may include information on the names and details of procedures or treatment that the health care provider recommends, other available alternatives, and the risks and benefits of the treatment and other options, including foregoing any treatment. The success of this process requires the person seeking treatment to understand the options and make an informed choice in determining the course of treatment. Research suggests that methods of communication, along with the quality of the interactions between the provider and the patient with a cognitive disability, play more important roles in the patient's ability to make informed decisions than intellectual and adaptive functioning.[577] The Department is concerned that some providers erroneously believe that certain patients with disabilities, especially those with cognitive, neurological, or psychiatric disabilities, are unable to understand discussions concerning their health care, and instead of communicating directly with the patient, communicate only with family members or companions. In instances where providers base these communication decisions on stereotypes or misconceptions about the patient's ability to understand or make medical decisions, they deny the patient autonomy and control over their health care. Fundamental concepts of Federal disability rights laws, including rights to effective communication and reasonable modifications, require that individuals with disabilities, including those with cognitive, neurological, and psychiatric disabilities are afforded the information needed to have an equal opportunity to make informed health care decisions.[578]

Effective communication for patients with cognitive, neurological, and psychiatric disabilities may require auxiliary aids and services or strategies different from those employed with patients with other disabilities. For example, while an individual who is deaf or hard of hearing may require an ASL interpreter to effectively communicate with a provider, an individual with a cognitive disability may require additional time with the provider to ask questions and receive plain language answers about a specific health care decision.

A specific type of auxiliary aid or service may be the acquisition or modification of equipment or devices, including for augmentative and alternative communication, and the provision of training and assistance to the individual with a disability on how to use them. Augmentative and alternative communications devices include, but are not limited to, speech generating devices, single-message devices, computers, tablets, smartphones, amplification devices, telecommunications devices, voice amplifiers, artificial phonation devices, picture and symbol boards, paper-based aids, and other equipment or devices used to compensate for impairments to speech-language production or comprehension, including spoken and written modes of communication.

In some instances, the use of augmentative and alternative communication is necessary for individuals with certain disabilities that impair speech production and comprehension to access vital health and human services programs and activities. Often, the most effective way for recipients to ensure effective communication is to provide training on the use of this equipment.

Section 504 also requires recipients to provide reasonable modifications to policies, practices, or procedures to individuals with disabilities when necessary to avoid discrimination unless the modification would fundamentally alter the nature of the program or activity at issue. Reasonable modifications may include modifications to how a provider communicates with or delivers information to a patient with a disability. For example, a reasonable modification for a patient with a mental disability may be to allow a third-party support person to join the conversation and allow that person to assist the patient in understanding their options and coming to an independent decision on how to proceed. The person with a disability may be in a supported decision-making arrangement with the third-party support person, but no such formal role is required.

Another reasonable modification may be for the recipient to provide information in a format that is accessible to individuals with cognitive, developmental, intellectual, or neurological disabilities such as through plain language. NCD has urged the Department to issue guidance to medical professionals requesting that they explain procedures and draft documents in plain language to better serve patients with disabilities.[579] Under some circumstances, plain language may be a reasonable modification to remove barriers between individuals with certain disabilities and the information necessary to make informed health and human services decisions. Information written in plain language may afford individuals with

[573] *See* 45 CFR 92.102, requiring that health programs or activities receiving FFA from the Department, programs or activity administered by an Executive agency, and entities established under Title I of the ACA, provide appropriate auxiliary aids and services irrespective of size.

[574] *See* 45 CFR 92.102. For a discussion of how adults with communication disabilities experience poorer health outcomes, *see* Michelle L. Stransky et al., *Adults with Communication Disabilities Experience Poorer Health and Healthcare Outcomes Compared to Persons Without Communication Disabilities,* 33 J. of G. Internal Med. 33(12), 2147–55 (2018), *http://dx.doi.org/10.1007/s11606-018-4625-1*.

[575] *See* 85 FR 37160, 37213–215 (preamble addressing comments on effective communication provisions).

[576] 85 FR 37160, 37213.

[577] William F. Sullivan, *Supporting Adults with Intellectual and Developmental Disabilities to Participate in Health Care Decision Making,* 64 Can. Fam. Physician (Suppl 2): S32–S36 (Apr. 2018), *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5906782/*.

[578] *See* 28 CFR 35.160 (effective communication requirements for public entities); 28 CFR 35.130(b)(7) (requirement for public entities to make reasonable modifications); 45 CFR 84.52(d) (requirement to provide auxiliary aids in health, welfare, and other social services); 45 CFR 92.105 (requirement for certain health programs and activities to make reasonable modifications); 45 CFR 92.102 (effective communication requirements for certain health programs and activities).

[579] Nat'l Council on Disability, Beyond Guardianship: Toward Alternatives that Promote Greater Self-Determination (Mar. 22, 2018), *https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf*.

certain disabilities an equal opportunity to comprehend important service, program, or activity information. Sometimes, a plain language oral explanation, instead of a written one, may be a sufficient modification. However, in many circumstances, it may be a fundamental alteration of the nature of a recipient's program or activity to require extensive technical documents to be produced in plain language.

- *Communications Question 1: The Department requests comment on the importance of providing information in plain language for individuals with cognitive, developmental, intellectual, or neurological disabilities.*
- *Communications Question 2: Additionally, the Department requests comment on whether plain language is more appropriately considered a reasonable modification that an individual must request, or if it should be considered an auxiliary aid or service.*

§ 84.77 General

The Department proposes to add a new subpart H to the section 504 implementing regulations to address ongoing communication issues. The new provisions reflect the same requirements concerning effective communication adopted by the Department in the 2020 section 1557 Final Rule, which are based on the effective communication requirements of title II of the ADA.[580] Proposed § 84.77(a)(1), requires that a recipient take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others in such programs or activities. Proposed § 84.77(a)(2), as well as the definition section at § 84.10, defines a companion as a family member, friend, or associate of an individual seeking access to a program or activity of a recipient, who, along with such individual, is an appropriate person with whom the recipient should communicate. The proposed text at § 84.77(b)(1) requires that a recipient provide appropriate auxiliary aids and services to individuals with disabilities, where necessary to afford such individuals an equal opportunity to access the benefit or service in question. Section 84.77(b)(2) states that the type of auxiliary aid or services needed will vary in accordance with various factors. That paragraph further provides that, in determining what types of auxiliary aids and services are necessary, a recipient shall give primary consideration to the request of the individual with a disability. In addition, it states that to be effective auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.[581]

Proposed § 84.77(c) states that recipients are not allowed to require an individual with a disability to bring another individual to interpret for them and provides limited exceptions where accompanying adults or children may be used to interpret or facilitate communication.

Section 84.77(d) proposes requirements for recipients that choose to provide qualified interpreters via Video Remote Interpreting (VRI) services. These requirements set certain usability standards for the instances where VRI services are appropriate auxiliary aids and services for communication.

§ 84.78 Telecommunications

This section contains requirements for recipients that communicate by telephone with applicants and beneficiaries with disabilities. Specifically, the section would require recipients to use telecommunications systems that ensure effective communication. When a recipient uses an automated-attendant system, that system must provide effective real-time communication with individuals using auxiliary aids and services. In addition, a recipient must respond to telephone calls from a telecommunications relay service established under title IV of the ADA in the same manner that it responds to other telephone calls.

§ 84.79 Telephone Emergency Services

Proposed § 84.79 states that telephone emergency services, including 911 services, shall provide direct access to individuals who use TTY's and computer modems.

§ 84.80 Information and Signage

Proposed § 84.80 provides specific requirements for information and signage to ensure that interested persons can obtain information as to the existence and location of accessible services, activities, and facilities while also pointing users to accessible entrances.

§ 84.81 Duties

Proposed § 84.81 provides that, in meeting its communication requirements, a recipient is not required to take any action that would result in a fundamental alteration in the nature of its program or activity or undue financial and administrative burdens.

This paragraph does not establish an absolute defense; it does not relieve a recipient of all obligations to individuals with disabilities. Although a recipient is not required to take actions that would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with disabilities receive the benefits or services provided by the recipient.

It is the Department's view that compliance with the communications requirements in subpart H, like compliance with the corresponding provisions of the ADA title II regulation and the section 504 regulations for federally conducted programs, would in most cases not result in a fundamental alteration or undue financial and administrative burdens on a recipient. In determining whether financial and administrative burdens are undue, all recipient resources available for use in the funding and operation of the program or activity should be considered. The burden of proving that compliance with any section in this subpart would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the recipient.

The decision that compliance would result in such alteration or burdens must be made by the head of the recipient or their designee and must be accompanied by a written statement of the reasons for reaching that conclusion. The Department recognizes the difficulty of identifying the official responsible for this determination, given the variety of organizational forms that may be taken by recipients and their components. The intention of this paragraph is that the determination must be made by a high level official or senior leader who has budgetary authority and responsibility for making spending decisions.

Subpart K—Procedures

Subpart G is redesignated as subpart K. Section 84.61, Procedures, is retained and redesignated as § 84.98. That section states that the procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to this part. Those procedures are found at 45 CFR 80.6 through 80.10 and part 81. They include a requirement that recipients cooperate with the

[580] 45 CFR 92.102, 28 CFR 35.160.

[581] Section 1557 also requires that certain recipients and State Exchanges provide appropriate auxiliary aids and services. 45 CFR 92.102.

Department when it seeks to obtain compliance with this part (45 CFR 80.6(a)); keep records that the Department finds necessary to determine compliance (45 CFR 80.6(b)); permit access by the Department to sources of information necessary to determine compliance (45 CFR 80.6(c)); and provide information about the regulations to beneficiaries and participants (45 CFR 80.6(d)). The regulations also provide that the Department shall conduct periodic compliance reviews to determine compliance (45 CFR 80.7(a)) and will accept written complaints filed not more than 180 days from the alleged discrimination (45 CFR 80.7(b)). In addition, the Department will conduct a prompt investigation when any information indicates a possible failure to comply with this part. (45 CFR 80.7(a)(c)).

IV. Executive Order 12866 and Related Executive Orders on Regulatory Review

A. Regulatory Impact Analysis Summary

a. Statement of Need

In this proposed rule, the Department proposes to revise its existing section 504 regulation on nondiscrimination obligations for recipients of Federal financial assistance. More than 40 years have passed since the Department originally issued regulations implementing section 504, with only limited changes in the decades since. During that time, major legislative and judicial developments have shifted the legal landscape of disability discrimination protections under section 504, including statutory amendments to the Rehabilitation Act, the enactment of the ADA and the ADAAA, the ACA, and Supreme Court and other significant court cases. Section 504 should be updated and interpreted consistently with these developments and overlapping laws in order to bring the regulations into conformity with current law and to protect against discrimination on the basis of disability.

b. Overall Impact

We have examined the impacts of the proposed rule under Executive Order (E.O.) 12866, as amended by E.O. 14094; E.O. 13563; the Regulatory Flexibility Act (5 U.S.C. 601–612); and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). E.O. 12866 and E.O. 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). This proposed rule is a significant regulatory action under section 3(f)(1) of E.O. 12866.

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because the costs of the proposed rule are small relative to the revenue of recipients, including covered small entities, and because even the smallest affected entities would be unlikely to face a significant impact, we propose to certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (Section 202(a)) generally requires the Department 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 $165 million, using the most current (2021) Implicit Price Deflator for the Gross Domestic Product. This proposed rule is not subject to the Unfunded Mandates Reform Act because it falls under an exception for regulations that establish or enforce any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.[582]

The Background and Reasons for the Proposed Rulemaking sections at the beginning of this preamble contain a summary of this proposed rule and describe the reasons it is needed.

Below is a summary of the results and methodology from our Regulatory Impact Analysis (RIA). A complete copy of this RIA will be available at *https://www.hhs.gov/sites/default/files/sec-504-rehab-act-npr-ria.pdf* as well the Federal Government's online rulemaking portal (*www.regulations.gov*). Interested parties are encouraged to review the full RIA, and to provide data and other information responsive to requests for comment posed in the RIA, also included in the Request for Comment section in this document.

c. Summary of Costs and Benefits

Section 504 has applied to medical care providers that receive Federal financial assistance from the Department for approximately fifty years. The Department issued regulatory language detailing specific requirements for health care providers in 1977.[583] The health care sector in the United States is quite broad, encompassing about 490,000 providers of ambulatory health care services and 3,044 hospitals. It includes 168,459 offices of physicians; 124,384 offices of dentists; 141,853 offices of other health care practitioners; 7,192 medical and diagnostic laboratories; 24,619 home health care service providers; and 19,625 outpatient care centers. Most of these entities receive Federal financial assistance. For example, the Department estimates that approximately 92% of doctors, 43% of dentists, and all hospitals receive Federal financial assistance from the Department and are thus subject to section 504. The Department's section 504 NPRM applies to this universe of recipients, updating the Department's original regulation and adding new provisions in several areas. This section 504 NPRM does not apply to health care programs and activities conducted by the Department. Those programs and activities are covered by part 85 of section 504, which covers federally conducted (as opposed to federally assisted) programs or activities.[584] While a majority of the estimated costs associated with this proposed rule concern health care providers, the proposed rule covers all recipients of HHS funding.

The RIA considers the various proposed sections and quantifies several categories of costs that we anticipate recipients may incur. The RIA quantifies benefits people with disabilities are expected to receive due to higher percentages of accessible Medical Diagnostic Equipment (yielding improved health outcomes) at recipients' locations and discusses unquantified significant benefits and costs the proposed rule is expected to generate that could not be quantified or monetized (due to lack of data or for other methodological reasons). The RIA also quantifies benefits that will result from accessible web content and mobile applications while addressing unquantified benefits the proposed rule is expected to accrue.

[582] 2 U.S.C. 1503(2).

[583] For example, all recipients have been required to construct new facilities and alter existing facilities in an accessible manner, make changes to ensure program accessibility, provide alternate means of communication for persons who are blind, deaf, have low vision, or are hard of hearing (*e.g.,* sign language interpreters, materials in Braille or on tape), and prohibited from denying or limiting access to their health care programs or from otherwise discriminating against qualified persons with a disability in their health care programs or activities.

[584] 45 CFR 85.

Table 1 below summarizes RIA results with respect to the likely incremental monetized benefits and costs, on an annualized basis. All monetized benefits and costs were estimated for a 10-year time horizon using discount rates of 7 and 3 percent.

TABLE 1—ANNUALIZED VALUE OF MONETIZED COSTS AND BENEFITS UNDER THE PROPOSED RULE OVER A FIVE-YEAR PERIOD

[In 2021 dollars]

	7-Percent discount rate (in millions)	3-Percent discount rate (in millions)
Monetized Incremental Costs		
Subpart I—Web, Mobile, and Kiosk Accessibility	1,478.0	1,422.7
Subpart J—Accessible Medical Equipment	352.6	347.1
§ 84.56—Medical Treatment	12.4	12.1
§ 84.57—Value Assessment Methods	0.1	0.1
§ 84.60—Child Welfare	0.1	0.1
Total Monetized Incremental Costs *	1,843.2	1,782.0
Monetized Incremental Benefits		
Subpart I—Web, Mobile, and Kiosk Accessibility	1,736.3	1,799.6
Subpart J—Accessible Medical Equipment	128.1	128.1
Total Monetized Incremental Benefits *	1,864.3	1,927.7

(* **Note:** Totals may not sum due to rounding.)

Quantified incremental costs concerning Accessible Medical Equipment under subpart J come from updating policies and procedures, acquiring accessible Medical Diagnostic Equipment (MDE), and ensuring staff are qualified to successfully operate accessible MDE. Quantified incremental costs concerning Web, Mobile, and Kiosk Accessibility under subpart I come from reviewing and updating existing web content and mobile apps while ensuring ongoing conformance with listed standards.

Additional costs for provisions under § 84.56—Medical Treatment, § 84.57—Value Assessment Methods, and § 84.60—Child Welfare, are calculated based on limited revisions to policies and procedures and training for employees on provisions that largely restate existing obligations and explicitly apply them to specific areas of health and human services. The RIA requests comment on more extensive transition and ongoing costs.

Concerning the proposed provisions to ensure consistency with the ADA, statutory amendments to the Rehabilitation Act, and Supreme Court and other significant court cases, the RIA finds that these proposed provisions will likely result in no additional costs to recipients.

Regarding costs, the RIA finds that the proposed rule would result in annualized costs over a 5-year time horizon of $1,782.0 million or $1,843.2 million, corresponding to a 3% or a 7% discount rate. The RIA separately reports a full range of cost estimates of about $1,615.5 million to $2,143.7 million at a 3% discount rate, and a range of cost estimates of about $1,674.5 million to $2,213.3 million at a 7% discount rate.

For quantified benefits, the RIA quantifies the benefits that people with disabilities are expected to receive due to higher percentages of accessible Medical Diagnostic Equipment (yielding improved health outcomes) at recipients' locations and more accessible web content, mobile apps, and kiosks. The RIA concludes that the proposed rule would result in total annualized benefits of $1,927.7 million at a 3% discount rate and $1,864.3 million at a 7% discount rate.

In addition to these quantified benefit estimates, the RIA includes discussions of potential unquantified benefits under the rule. Generally, the RIA anticipates that the proposed rule will result in a myriad of benefits for individuals with disabilities as a result of greater access to necessary health and human service programs and activities as well as limitations to discriminatory actions. Analogously, some costs have been quantified, while for others, the RIA requests comment that would facilitate more thorough estimation.

The RIA discusses both quantitatively and qualitatively the regulatory alternatives the Department has considered in an attempt to achieve the same statutory and regulatory goals while imposing lower costs on society.

B. Regulatory Flexibility Act—Initial Small Entity Analysis

The Department has examined the economic implications of this proposed rule as required by the Regulatory Flexibility Act. This analysis, as well as other sections in this Regulatory Impact Analysis, serves as the Initial Regulatory Flexibility Analysis, as required under the Regulatory Flexibility Act.

The Department deems that a proposed rule has a significant economic impact on a substantial number of small entities whenever the rule generates a change in revenues of more than 3% for 5% or more of small recipients.

The U.S. Small Business Administration (SBA) maintains a Table of Small Business Size Standards Matched to North American Industry Classification System Codes (NAICS).[585] We have used SBA yearly revenues thresholds for 2019, which for

[585] The most current version became effective on October 1, 2022. *See* U.S. Small Bus. Admin., Table of Size Standards, (last updated Oct. 1, 2022), *https://www.sba.gov/document/support-table-size-standards.* In our analyses, which pertain to 2019, we used the version effective in the 2019 calendar year. We note that CEs' distribution by SBA size—namely, the fraction of CEs that are small by SBA standards—did not change in any meaningful way in the past decades.

recipients ranged between $8 million[586] and $41.5 million.[587]

As reported in the RIA, 97.4% of all firms in the Health Care and Social Assistance sector (NAICS 62) are small. With the exception of Hospitals (Subsector 622), at least 9 out 10 of all recipients within each Health Care and Social Assistance NAICS code are small.

Most firms—98.3%—in the Pharmacies and Drug Stores (NAICS 446110) group are small as well. About 60% of Direct Health and Medical Insurance Carriers (NAICS 524114) are small. About 60% of Colleges, Universities, and Professional Schools (NAICS 611310) are small.

Hence, almost all non-government recipients (*i.e.,* private firms), under the scope of the proposed rule are small businesses.

Moreover, the fraction of total small firms in each NAICS that falls under the smallest size group (fewer than 5 employees) is greater than 5% for all relevant NAICS.

As a consequence, it is sufficient to investigate the impact of the proposed rule on the average recipient in the smallest size group to determine whether the proposed rule may generate a change in revenues of more than 3%. We need to determine whether the average firm in the smallest size group will experience a reduction in revenues greater than 3%.

Below we discuss the two reasons for our conclusion that firms in the smallest groups will not experience a 3% reduction in revenues. Hence, we propose to certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.

As for the first reason, we note that, with the exception of a handful of HMO Medical Centers (NAICS 621491) and about 24,500 Child Day Care Services (NAICS 624410) firms, the yearly average revenues (in 2019 dollars) for a recipient belonging to the smallest size group—for each 6-digit NAICS separately—are $160,000 or more.

Three percent of this sum is about $5,000, which we deem is enough to finance purchase of the limited set of inexpensive MDE the smallest entities typically need and training.

The average yearly revenue for a Child Day Care Services firm in the smallest size group (fewer than five employees) is about $98,000. As we expect that recipients in this group will incur only Child Welfare training costs (less than 1 hour per year, or less than $60 in costs), we conclude that the impact of the proposed rule is less than 3% of revenues (about $3,000 for these small recipients) for recipients in this group.

Even among the smallest recipient groups within the 6-digit NAICS groups that private recipients belong to, the typical (median) yearly revenue is about $300,000 for podiatrists' offices (the maximum is $0.5 million for general hospitals, the lowest is $98,000 for Child Day Care Services), which signals that in many cases the 3% revenue threshold is about $10,000. Costs of the proposed rule are mostly proportional to the size of the recipient, and typical recipients in the smallest size group (fewer than 5 employees) are not expected to incur $10,000 incremental costs.

In addition, we estimate that the obligation to ensure that web content and mobile applications for the Department's recipients that are small providers (those with fewer than fifteen employees) will be less than 3% of their revenues. We note that the vast majority of the Department's recipients are small providers and estimate that most of these small providers (approximately 85.9%) have websites. The websites of these small providers are typically one domain with up to a few thousand pages and limited visitors per month. Thus, the Department estimates that for a cost of approximately $440 per year these recipients will be able to ensure that their websites can be made accessible and kept accessible each year. The Department welcomes comments on the cost implications of subpart I for its recipients, particularly its small recipients.

As for the second reason, we stress that the proposed rule includes exemptions meant to ease the burden on small firms, including exemption when incremental compliance costs are an undue financial burden, and the ability to meet accessibility requirements via alternative, inexpensive methods (like reassignment of services to alternate accessible locations or home visits for MDE requirements).

C. Executive Order 13132: Federalism

As required by Executive Order 13132 on Federalism, the Department has examined the effects of provisions in the proposed regulation on the relationship between the Federal Government and the states. The Department has concluded that the proposed regulation has federalism implications but notes that State law will continue to govern unless displaced under standard principles of preemption.

The proposed regulation attempts to balance State autonomy with the necessity to create a Federal benchmark that will provide a uniform level of nondiscrimination protection across the country. It is recognized that the states generally have laws that relate to nondiscrimination against individuals on a variety of bases. Such State laws continue to be enforceable, unless they prevent application of the proposed rule. The proposed rule explicitly provides that it is not to be construed to supersede State or local laws that provide additional protections against discrimination on any basis articulated under the regulation. Provisions of State law relating to nondiscrimination that are ''more stringent'' than the proposed Federal regulatory requirements or implementation specifications will continue to be enforceable.

Section 3(b) of Executive Order 13132 recognizes that national action limiting the policymaking discretion of states will be imposed only where there is constitutional and statutory authority for the action and the national activity is appropriate considering the presence of a problem of national significance. Discrimination issues in relation to health care are of national concern by virtue of the scope of interstate health commerce.

Section 4(a) of Executive Order 13132 expressly contemplates preemption when there is a conflict between exercising State and Federal authority under a Federal statute. Section 4(b) of the Executive Order authorizes preemption of State law in the Federal rule making context when ''the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute.'' The approach in this regulation is consistent with these standards in the Executive Order in superseding State authority only when such authority is inconsistent with standards established pursuant to the grant of Federal authority under the statute.

Section 6(b) of Executive Order 13132 includes some qualitative discussion of substantial direct compliance costs that State and local governments would

[586] The $8 million yearly 2019 revenue threshold applies to several NAICS, including 621340, Offices of Physical, Occupational and Speech Therapists and Audiologists, and 624410, Child Day Care Services. These $8 million yearly 2019 revenue thresholds have been increased for three NAICS: 621340, Offices of Physical, Occupational and Speech Therapists and Audiologists (to $11 million); 621399, Offices of All Other Miscellaneous Health Practitioners (to $ 9 million) and 624410, Child Day Care Services (to 8.5 million).

[587] The $41.5 million yearly 2019 revenue threshold applies to Hospitals (NAICS 622), Direct Health and Medical Insurance Carriers (NAICS 524114) and Kidney Dialysis Centers (NAICS 621492). These thresholds have not changed in SBA's October 1, 2022 update. The $41.5 million yearly revenue threshold remains the highest value for recipients considered in our analyses.

incur as a result of a proposed regulation. We have considered the cost burden that this proposed rule would impose on State and local government recipients and estimate State and local government annualized costs will be about $576.4 million per year (2021 dollars) at a 3% discount rate and $600.6 million at a 7% discount rate.

These costs represent the sum of costs for compliance with all provisions applying to State and local governments, namely those for subpart I (about 38% of costs for all recipients, *i.e.,* public and private entities altogether), subpart J (about 10% of costs for all recipients), section 84.56—Medical Treatment (about 10% of costs for all recipients), 100% of costs for section 84.57—Value Assessment Methods (only public entities—Medicaid agencies—bear these costs), and section 84.60—Child Welfare (about 4% of costs of all recipients).

In addition, the Department is aware that DOJ has issued a Preliminary Regulatory Impact Analysis to accompany its rule proposing requirements for public entities covered by title II of the ADA and that its requirements are consistent with this Department's subpart I. DOJ examined the costs of its proposal for all public entities covered by title II and stated that the rule will not be unduly burdensome or costly for public entities. Because this Department's rule is consistent with the DOJ proposed rule, we believe that the DOJ analysis provides further support for our belief that subpart I will not be unduly burdensome or costly for the Department's recipients that are public entities.

The Department welcomes comments about the potential federalism implications of the proposed rule and on the proposed rule's effects on State and local governments.

D. Paperwork Reduction Act

This proposed rule contains information collection requirements that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA).[588] Under the PRA, agencies are required to submit to OMB for review and approval any reporting or record-keeping requirements inherent in a proposed or final rule and are required to publish such proposed requirements for public comment. The PRA requires agencies to provide a 60-day notice in the **Federal Register** and solicit public comment on a proposed collection of information before it is submitted to OMB for review and approval.

Section 3506(c)(2)(A) of the PRA requires that the Department solicit comment on the following issues:

1. Whether the information collection is necessary and useful to carry out the proper functions of the agency;
2. The accuracy of the agency's estimate of the information collection burden;
3. The quality, utility, and clarity of the information to be collected; and
4. Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

The PRA requires consideration of the time, effort, and financial resources necessary to meet the information collection requirements referenced in this section.

- *Paperwork Reduction Act Question 1: The Department invites public comment on its assumptions as they relate to the PRA requirements summarized in this section and explicitly invites comment from potential respondents regarding the burden estimate we ascribe to these requirements, including a discussion of respondents' basis for their computation.*

This Notice of Proposed Rulemaking does not modify several longstanding collections of information that have been required since 1977: § 84.5, (assurances); § 84.6(c) (self-evaluation); § 84.7(a)(designation of responsible employee and adoption of grievance procedures; § 84.22 (e) (existing facilities: transition plan); and § 84.61, redesignated as § 84.98 (Procedures). The Notice of Proposed Rulemaking slightly modifies one longstanding collection of information required since 1977 to align more closely with the requirement under title II of the ADA:[589] § 84.8 (notice). With regard to assurances, § 84.5, OCR has previously obtained PRA approval (OMB control # 0945–0008) for this reporting requirement via an updated HHS Form 690 (Consolidated Civil Rights Assurance Form), separate from this rulemaking. The requirement to sign and submit an assurance of compliance currently exists under section 504 and other civil rights regulations (Title VI, section 1557, Title IX, and the Age Act). Since the Department provides an online portal through which covered entities submit an attestation of Assurance of Compliance, the Department has determined that this requirement imposes no additional reporting or recordkeeping requirements under the PRA.

Like the assurances section, all of the other sections listed above are being retained from the current section 504 rule issued in 1977. Section 84.61, redesignated as § 84.98, states that the procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to this part. The provision raising potential PRA issues is the requirement that recipients maintain records that the Department finds necessary to determine compliance. However, that section, like all of the others listed above, has existed since the original section 504 regulations were enacted in 1977. Accordingly, these sections impose no additional burden on recipients since they have been subject to this regulation since that time.

The notice requirement outlined in proposed § 84.8 implicates the third-party disclosure provisions of the PRA implementing regulations, which compels an agency to request comment and submit for OMB review any agency regulation that requires an individual ''to obtain or compile information for the purpose of disclosure to members of the public or the public at large, through posting, notification, labeling or similar disclosure. . . .''

Table 6 of the Regulatory Impact Analysis reports that there are about 453,084 recipients covered by this rulemaking. We estimate the burden for responding to the proposed § 84.8 notice requirement assuming a single response per recipient, and that administrative or clerical support personnel will spend 34 minutes (0.5667 of an hour) to respond.[590] The estimated total number of hours to respond is 256,763 (0.567 × 453,084).

[588] 44 U.S.C. 3501 *et seq.*

[589] *See* 28 CFR 35.106.

[590] We rely on the hourly estimate for a similar notice provision in the NPRM for 45 CFR 92.10. 87 FR 47824, 47908 (Aug. 4, 2022).

Regulation burden	Number of recipients	Number of responses per recipient	Total responses	Burden hours per response	Total burden hours
§ 84.8	453,084	1	453,084	.5667	256,763

- *Paperwork Reduction Act Question 2: The Department invites public comment on burdens associated with the third-party disclosure requirement under proposed § 84.8, including a discussion of respondents' basis for their computation.*

E. Unfunded Mandates Reform Act

Section 4(2) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1503(2), excludes from coverage under that Act any proposed or final Federal regulation that ''establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.'' Accordingly, this rulemaking is not subject to the provisions of the Unfunded Mandates Reform Act.

F. National Technology Transfer and Advancement Act of 1995

The National Technology Transfer and Advancement Act of 1995 (NTTAA) directs that, as a general matter, all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, which are private, generally nonprofit organizations that develop technical standards or specifications using well-defined procedures that require openness, balanced participation among affected interests and groups, fairness and due process, and an opportunity for appeal, as a means to carry out policy objectives or activities.[591] In addition, the NTTAA directs agencies to consult with voluntary, private sector, consensus standards bodies and requires that agencies participate with such bodies in the development of technical standards when such participation is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources.[592]

The Department is proposing to adopt the Accessibility Standards for Accessible Medical Diagnostic Equipment issued by the U.S. Access Board to apply to the purchase and lease of medical equipment by recipients of HHS funds that provide health care services and programs. These Standards were adopted by the U.S. Access Board in 2017 after a five-year review period that included an Advisory Committee, composed of representatives from the health care industry, architects, persons with disabilities, and organizations representing a variety of interested stakeholders. The Standards were developed after extensive notice-and-comment. The development of these standards was required by Section 510 of the Rehabilitation Act of 1973, as amended, and were developed with the participation of the Food and Drug Administration. They have gained wide recognition in the United States. The Department is unaware of any privately developed standards created with the same wide participation and open process. As a result, the Department believes that it is appropriate to use these Standards for its section 504 rule.

- *NTAA Question 1: The Department seeks public comment on these standards [Accessibility Standards for Accessible Medical Diagnostic Equipment] and whether there are any other standards for accessible medical diagnostic equipment that the Department should consider.*

The Department is proposing to adopt the Web Content Accessibility Guidelines 2.1 Level AA as the accessibility standard to apply to web content and mobile apps of recipients. WCAG 2.1 was developed by the W3C®, which has been the principal international organization involved in developing protocols and guidelines for the web. The W3C® develops a variety of technical standards and guidelines, including ones relating to privacy, internationalization of technology, and accessibility. Thus, the Department believes it is complying with the NTTAA in selecting WCAG 2.1 as the applicable accessibility standard.

- *NTTAA Question 2: The Department seeks public comment on the selection of WCAG 2.1 as the accessibility standard applicable to web content and mobile apps of recipients and whether there are other standards that the Department should consider.*

Note that this question is similar to the questions asked in ''Web Accessibility Question 4.''

G. Executive Order 12250 on Leadership and Coordination of Nondiscrimination Laws

Pursuant to E.O. 12250, the Attorney General has the responsibility to ''review . . . proposed rules . . . of the Executive agencies'' implementing nondiscrimination statutes such as section 504 ''in order to identify those which are inadequate, unclear or unnecessarily inconsistent.'' [161] E.O. 12250 does not apply to the 504 provisions relating to equal employment, which are reviewed and coordinated by the Equal Employment Opportunity Commission. *See* E.O. 12250 (DOJ Coordination authority) at 1–503 and E.O. 12067 (EEOC Coordination authority). The Attorney General has delegated the E.O. 12250 functions to the Assistant Attorney General for the Civil Rights Division for purposes of reviewing and approving proposed rules. 28 CFR 0.51. The Department will coordinate with DOJ to review and approve this proposed rule prior to publication in the **Federal Register**.

V. Effective Date

The Department proposes that the effective date be 60 days after publication of the Final Rule.

VI. Request for Comment

The Department seeks comment on all issues raised by the proposed regulation.

List of Subjects in 45 CFR Part 84

Adoption and foster care, Civil rights, Childcare, Child welfare, Colleges and universities, Communications, Disabled, Discrimination, Emergency medical services, Equal access to justice, Federal financial assistance, Grant programs, Grant programs—health, Grant programs—social programs, Health, Health care, Health care access, Health facilities, Health programs and activities, Individuals with disabilities, Integration, Long term care, Medical care, Medical equipment, Medical facilities, Nondiscrimination, Public health.

For the reasons set forth in the preamble, the Department of Health and Human Services proposes to amend 45 CFR part 84 as follows:

[591] Public Law 104–113, section 12(d)(1) (15 U.S.C. 272 Note).

[592] *Id.* at 12(d)(1).

Title 45—Public Welfare

PART 84—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

■ 1. The authority citation for part 84 is revised to read as follows:

Authority: 29 U.S.C. 794.

Subpart G also issued under 21 U.S.C. 1174; 42 U.S.C. 4581.

■ 2. Revise the heading for part 84 to read as set forth above.

Subpart A—General Provisions

■ 3. Revise § 84.1 to read as follows:

§ 84.1 Purpose and broad coverage.

(a) *Purpose.* The purpose of this part is to implement section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of disability in any program or activity receiving Federal financial assistance.

(b) *Broad coverage.* The definition of ''disability'' in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of section 504. The primary object of attention in cases brought under section 504 should be whether entities receiving Federal financial assistance have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of ''disability.'' The question of whether an individual meets the definition of ''disability'' under this part should not demand extensive analysis.

■ 4. Revise § 84.2 to read as follows:

§ 84.2 Application.

(a) This part applies to each recipient of Federal financial assistance from the Department and to the recipient's programs or activities that involve individuals with disabilities in the United States. This part does not apply to the recipient's programs or activities outside the United States that do not involve individuals with disabilities in the United States.

(b) The requirements of this part do not apply to the ultimate beneficiaries of any program or activity operated by a recipient of Federal financial assistance.

(c) Any provision of this part held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this part and shall not affect the remainder thereof or the application of the provision to other persons not similarly situated or to other dissimilar circumstances.

§ 84.10 [Removed]

■ 5. Remove § 84.10.

§ 84.3 [Redesignated as § 84.10]

■ 6. Redesignate § 84.3 as § 84.10.

■ 7. Add new § 84.3 to read as follows:

§ 84.3 Relationship to other laws.

This part does not invalidate or limit the remedies, rights, and procedures of any other Federal laws, or State or local laws (including State common law) that provide greater or equal protection for the rights of individuals with disabilities, or individuals associated with them.

■ 8. Revise § 84.4 to read as follows:

§ 84.4 Disability.

(a) *Definition*—(1) *Disability* means, with respect to an individual:

(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment as described in paragraph (f) of this section.

(2) *Rules of construction.* (i) The definition of ''disability'' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of section 504.

(ii) An individual may establish coverage under any one or more of the three prongs of the definition of ''disability'' in paragraph (a)(1) of this section, the ''actual disability'' prong in paragraph (a)(1)(i) of this section, the ''record of'' prong in paragraph (a)(1)(ii) of this section, or the ''regarded as'' prong in paragraph (a)(1)(iii) of this section.

(iii) Where an individual is not challenging a recipient's failure to provide reasonable modifications, it is generally unnecessary to proceed under the ''actual disability'' or ''record of'' prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the ''regarded as'' prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the ''actual disability'' or ''record of'' prong regardless of whether the individual is challenging a recipient's failure to provide reasonable modifications.

(b) *Physical or mental impairment*—(1) *Definition.* (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(ii) Any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disability.

(2) *Physical or mental impairment* includes, but is not limited to, contagious and noncontagious diseases and conditions such as the following: orthopedic, visual, speech and hearing impairments, and cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, dyslexia and other specific learning disabilities, Attention Deficit Hyperactivity Disorder, Human Immunodeficiency Virus infection (whether symptomatic or asymptomatic), tuberculosis, substance use disorder, alcohol use disorder, and long COVID.

(3) Physical or mental impairment does not include homosexuality or bisexuality.

(c) *Major life activities*—(1) *Definition.* Major life activities include, but are not limited to:

(i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, writing, communicating, interacting with others, and working; and

(ii) The operation of a major bodily function, such as the functions of the immune system, special sense organs and skin, normal cell growth, and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive systems. The operation of a major bodily function includes the operation of an individual organ within a body system.

(2) *Rules of construction.* (i) In determining whether an impairment substantially limits a major life activity, the term major shall not be interpreted strictly to create a demanding standard.

(ii) Whether an activity is a major life activity is not determined by reference to whether it is of central importance to daily life.

(d) *Substantially limits*—(1) *Rules of construction.* The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity.

(i) The term ''substantially limits'' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of section 504. ''Substantially limits'' is not meant to be a demanding standard.

(ii) The primary object of attention in cases brought under section 504 should be whether recipients have complied with their obligations and whether discrimination has occurred, not the extent to which an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment substantially limits a major life activity should not demand extensive analysis.

(iii) An impairment that substantially limits one major life activity does not need to limit other major life activities to be considered a substantially limiting impairment.

(iv) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(v) An impairment is a disability within the meaning of this part if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment does not need to prevent, or significantly or severely restrict, the individual from performing a major life activity to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(vi) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term ''substantially limits'' shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for substantially limits applied prior to the ADAAA.

(vii) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence. Nothing in this paragraph (d)(1) is intended, however, to prohibit or limit the presentation of scientific, medical, or statistical evidence in making such a comparison where appropriate.

(viii) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity. Ordinary eyeglasses or contact lenses are lenses that are intended to fully correct visual acuity or to eliminate refractive error.

(ix) The six-month ''transitory'' part of the ''transitory and minor'' exception in paragraph (f)(2) of this section does not apply to the ''actual disability'' or ''record of'' prongs of the definition of ''disability.'' The effects of an impairment lasting or expected to last less than six months can be substantially limiting within the meaning of this section for establishing an actual disability or a record of a disability.

(2) *Predictable assessments.* (i) The principles set forth in the rules of construction in this section are intended to provide for generous coverage and application of section 504's prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under section 504.

(ii) Applying these principles, the individualized assessment of some types of impairments as set forth in paragraph (d)(2)(iii) of this section will, in virtually all cases, result in a determination of coverage under paragraph (a)(1)(i) of this section (the ''actual disability'' prong) or paragraph (a)(1)(ii) of this section (the ''record of'' prong). Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(iii) For example, applying these principles it should easily be concluded that the types of impairments set forth in paragraphs (d)(2)(iii)(A) through (K) of this section will, at a minimum, substantially limit the major life activities indicated. The types of impairments described in this paragraph may substantially limit additional major life activities (including major bodily functions) not explicitly listed in paragraphs (d)(2)(iii)(A) through (K).

(A) Deafness substantially limits hearing;

(B) Blindness substantially limits seeing;

(C) Intellectual disability substantially limits brain function;

(D) Partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function;

(E) Autism Spectrum Disorder substantially limits brain function;

(F) Cancer substantially limits normal cell growth;

(G) Cerebral palsy substantially limits brain function;

(H) Diabetes substantially limits endocrine function;

(I) Epilepsy, muscular dystrophy, and multiple sclerosis each substantially limits neurological function;

(J) Human Immunodeficiency Virus (HIV) infection substantially limits immune function; and

(K) Major depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia each substantially limits brain function.

(3) *Condition, manner, or duration.* (i) At all times taking into account the principles set forth in the rules of construction, in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the conditions under which the individual performs the major life activity; the manner in which the individual performs the major life activity; or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

(ii) Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.

(iii) In determining whether an individual has a disability under the ''actual disability'' or ''record of'' prongs of the definition of ''disability,'' the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For

example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in one or more major life activities, including, but not limited to, reading, writing, speaking, or learning because of the additional time or effort he or she must spend to read, write, speak, or learn compared to most people in the general population.

(iv) Given the rules of construction set forth in this section, it may often be unnecessary to conduct an analysis involving most or all of the facts related to condition, manner, or duration. This is particularly true with respect to impairments such as those described in paragraph (d)(2)(iii) of this section, which by their inherent nature should be easily found to impose a substantial limitation on a major life activity, and for which the individualized assessment should be particularly simple and straightforward.

(4) *Mitigating measures* include, but are not limited to:

(i) Medication, medical supplies, equipment, appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;

(ii) Use of assistive technology;

(iii) Reasonable modifications or auxiliary aids or services as defined in this part;

(iv) Learned behavioral or adaptive neurological modifications; or

(v) Psychotherapy, behavioral therapy, or physical therapy.

(e) *Has a record of such an impairment*—(1) *General.* An individual has a record of such an impairment if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(2) *Broad construction.* Whether an individual has a record of an impairment that substantially limited a major life activity shall be construed broadly to the maximum extent permitted by section 504 and should not demand extensive analysis. An individual will be considered to fall within this prong of the definition of ''disability'' if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population or was misclassified as having had such an impairment. In determining whether an impairment substantially limited a major life activity, the principles articulated in paragraph (d)(1) of this section apply.

(3) *Reasonable modification.* An individual with a record of a substantially limiting impairment may be entitled to a reasonable modification if needed and related to the past disability.

(f) *Is regarded as having such an impairment.* The following principles apply under the ''regarded'' as prong of the definition of ''disability'' in paragraph (a)(1)(iii) of this section:

(1) Except as set forth in paragraph (f)(2) of this section, an individual is ''regarded as having such an impairment'' if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity, even if the recipient asserts, or may or does ultimately establish, a defense to the action prohibited by section 504.

(2) An individual is not ''regarded as having such an impairment'' if the recipient demonstrates that the impairment is, objectively, both ''transitory'' and ''minor.'' A recipient may not defeat ''regarded as'' coverage of an individual simply by demonstrating that it subjectively believed the impairment was transitory and minor; rather, the recipient must demonstrate that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment), objectively, both ''transitory'' and ''minor.'' For purposes of this section, ''transitory'' is defined as lasting or expected to last six months or less.

(3) Establishing that an individual is ''regarded as having such an impairment'' does not, by itself, establish liability. Liability is established under section 504 only when an individual proves that a recipient discriminated on the basis of disability within the meaning of section 504.

(g) *Exclusions.* The term ''disability'' does not include—

(1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) Compulsive gambling, kleptomania, or pyromania; or

(3) Psychoactive substance use disorders resulting from current illegal use of drugs.

§ 84.6 [Amended]

■ 9. In § 84.6 remove the word(s) in the left column in the following table and add in its place the word(s) in the right column wherever it occurs:

Handicap	Disability
handicapped persons	persons with disabilities

■ 10. Revise § 84.8 to read as follows:

§ 84.8 Notice.

A recipient shall make available to employees, applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the programs or activities of the recipient, and make such information available to them in such manner as the head of the recipient or his or her designee finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this part.

■ 11. Amend newly redesignated § 84.10 as follows:

■ a. Remove the alphabetical paragraph designations and arrange the definitions in alphabetical order;

■ b. Add definitions in alphanumerical order for ''2004 ADA Accessibility Guidelines (ADAAG)'', ''2010 Standards'', and ''ADA'';

■ c. Remove the definition for ''Applicant for assistance'' and add in its place a definition for ''Applicant'';

■ d. Add definitions in alphabetical order for ''Architectural Barriers Act'', ''archived web content'', and ''auxiliary aids and services'';

■ e. Add definitions in alphabetical order for ''companion'', ''conventional electronic devices'', ''current illegal use of drugs'', ''direct threat'', ''disability'', and ''drug'';

■ f. Remove the definition of ''Education of the Handicapped Act'';

■ g. Add a definition in alphabetical order for ''Existing facility'';

■ h. Revise the definitions of ''facility'' and ''Federal financial assistance'';

■ i. Add a definition in alphabetical order for ''foster care'';

■ j. Remove the definitions of ''handicap'', ''handicapped person'';

■ k. Add definitions in alphabetical order for ''illegal use of drugs'' and ''individual with a disability'', ''kiosks'', ''medical diagnostic equipment MDE'', ''mobile applications (apps)'', ''most integrated setting'', ''other power-driven mobility device,'' and ''parents'';

■ l. Revise the definition of ''program or activity'';

■ m. Add definitions in alphabetical order for ''prospective parents'', ''qualified individual with a disability'', ''qualified interpreter'', and ''qualified reader'';

■ n. Remove the definition of ''qualified handicapped person'';
■ o. Revise the definition of ''section 504'';
■ p. Add definitions in alphabetical order for ''service animal'', ''Standards for Accessible Medical Diagnostic Equipment (''Standards for Accessible MDE'')'', and ''State'';
■ q. Remove the definition of ''the Act''; and
■ r. Add definitions in alphabetical order for ''ultimate beneficiary'', ''video remote interpreting (VRI)'', ''WCAG 2.1'', ''web content'', and ''wheelchair''.

The additions and revisions read as follows:

§ 84.10 Definitions.

2004 ADA Accessibility Guidelines (ADAAG) means the requirements set forth in appendices B and D to 36 CFR 1191 (2009).

2010 Standards means the 2010 ADA Standards for Accessible Design, which consist of the 2004 ADAAG and the requirements contained in 28 CFR 35.151.

ADA means the Americans with Disabilities Act (Pub. L. 101–336, 104 Stat. 327, 42 U.S.C. 12101–12213 and 47 U.S.C. 225 and 611), including changes made by the ADA Amendments Act of 2008 (Pub. L. 110–325), which became effective on January 1, 2009.

Applicant means one who submits an application, request, or plan required to be approved by the designated Department official or by a primary recipient, as a condition of eligibility for Federal financial assistance.

Architectural Barriers Act means the Architectural Barriers Act (42 U.S.C. 4151–4157), including the Architectural Barriers Act Accessibility Standards at 41 CFR 102–76.60 *et seq.*

Archived web content means web content that—

(1) Is maintained exclusively for reference, research, or recordkeeping;

(2) Is not altered or updated after the date of archiving; and

(3) Is organized and stored in a dedicated area or areas clearly identified as being archived.

Auxiliary aids and services include:

(1) Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

(2) Qualified readers; taped texts; audio recordings; Braille materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

Companion means a family member, friend, or associate of an individual seeking access to a program or activity of a recipient, who, along with such individual, is an appropriate person with whom the recipient should communicate.

Conventional electronic documents means web content or content in mobile apps that is in the following electronic file formats: portable document formats (PDF), word processor file formats, presentation file formats, spreadsheet file formats, and database file formats.

Current illegal use of drugs means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

* * * * *

Direct threat means:

(1) Except as provided in paragraph (2) of this definition, a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services as provided in § 84.75.

(2) With respect to employment as provided in § 84.12, the term as defined by the Equal Employment Opportunity Commission's regulation implementing title I of the Americans with Disabilities Act of 1990, at 29 CFR 1630.2(r).

* * * * *

Disability means:

(1) Except as provided in paragraph (2) of this definition, the definition of *disability* found at § 84.4.

(2) With respect to employment, the definition of *disability* found at 29 CFR 1630.2:

Drug means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

Existing facility means a facility in existence on any given date, without regard to whether the facility may also be considered newly constructed or altered under this part.

Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

Federal financial assistance means any grant, cooperative agreement, loan, contract (other than a direct Federal procurement contract or a contract of insurance or guaranty), subgrant, contract under a grant or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel;

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government;

(4) Any other thing of value by way of grant, loan, contract, or cooperative agreement.

Foster care means 24-hour substitute care for children placed away from their parents or guardians and for whom the State agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, childcare institutions, and pre-adoptive homes. A child is in foster care in accordance with this definition regardless of whether the foster care facility is licensed and payments are made by the State or local agency for the care of the child, whether adoption subsidy payments are being made prior to the finalization of an adoption, or whether there is Federal matching of any payments that are made.

Illegal use of drugs means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). The term illegal use of drugs does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

Individual with a disability means a person who has a disability. The term *individual with a disability* does not include an individual who is currently engaging in the illegal use of drugs, when a recipient acts on the basis of such use.

Kiosks means self-service transaction machines made available by recipients at set physical locations for the independent use of patients or program participants in health and human service programs or activities. They often consist of a screen and an input device—either a keyboard, touch screen, or similar device—onto which the program participant independently types in or otherwise enters information. In health and human service programs, recipients often make kiosks available so that patients or program participants can check in, provide information for the receipt of services, procure services, have their vital signs taken, or perform other similar actions.

Medical diagnostic equipment MDE means equipment used in, or in conjunction with, medical settings by health care providers for diagnostic purposes. MDE includes, for example, examination tables, examination chairs (including chairs used for eye examinations or procedures, and dental examinations or procedures), weight scales, mammography equipment, x-ray machines, and other radiological equipment commonly used for diagnostic purposes by health professionals.

Mobile applications (apps) means software applications that are downloaded and designed to run on mobile devices, such as smartphones and tablets.

Most integrated setting means a setting that provides individuals with disabilities the opportunity to interact with non-disabled persons to the fullest extent possible; is located in mainstream society; offers access to community activities and opportunities at times, frequencies and with persons of an individual's choosing; and affords individuals choice in their daily life activities.

Other power-driven mobility device means any mobility device powered by batteries, fuel, or other engines—whether or not designed primarily for use by individuals with mobility disabilities—that is used by individuals with mobility disabilities for the purpose of locomotion, including golf cars, electronic personal assistance mobility devices (EPAMDs), such as the Segway® PT, or any mobility device designed to operate in areas without defined pedestrian routes, but that is not a wheelchair within the meaning of this section. This definition does not apply to Federal wilderness areas; wheelchairs in such areas are defined in section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).

Parents means biological or adoptive parents or legal guardians, as determined by applicable State law.

Program or activity means all of the operations of any entity described in paragraphs (1) through (4) of this definition, any part of which is extended Federal financial assistance:

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 7801), system of career and technical education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3) of this definition.

Prospective parents means individuals who are seeking to become foster or adoptive parents.

Qualified individual with a disability means:

(1) Except as provided in paragraphs (2), (3), and (4) of this definition, an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a recipient; and

(2) With respect to employment, an individual with a disability who meets the definition of ''qualified'' in the Equal Employment Opportunity Commission's regulation implementing title I of the Americans with Disabilities Act of 1990, 29 CFR 1630.2(m).

(3) With respect to childcare, preschool, elementary, secondary, or adult educational services, a person with a disability—

(i) Of an age during which nondisabled persons are provided such services;

(ii) Of any age during which it is mandatory under State law to provide such services to persons with a disability; or

(iii) To whom a State is required to provide a free appropriate public education under the Individuals with Disabilities Education Act; and

(4) With respect to postsecondary and career and technical education services, a person with a disability who with or without reasonable modifications to policies, practices, or procedures, or the provision of auxiliary aids and services, meets the academic and technical requirements for receipt of services or the participation in the recipient's program or activity;

Qualified interpreter means an interpreter who, via an on-site appearance or through a video remote interpreting (VRI) service, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators.

Qualified reader means a person who is able to read effectively, accurately, and impartially using any necessary specialized vocabulary.

* * * * *

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended.

Service animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be

directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with mental and neurological disabilities by preventing or interrupting impulsive or harmful behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.

Standards for Accessible Medical Diagnostic Equipment (''Standards for Accessible MDE'') means the standards at 36 CFR part 1195, promulgated by the Architectural and Transportation Barriers Compliance Board (Access Board) under section 510 of the Rehabilitation Act of 1973, as amended, in effect as of the date of promulgation of the final version of this rule, found in the appendix to 36 CFR part 1195.

State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

Ultimate beneficiary means one among a class of persons who are entitled to benefit from, or otherwise participate in, a program or activity receiving Federal financial assistance and to whom the protections of this part extend. The ultimate beneficiary class may be the general public or some narrower group of persons.

Video remote interpreting (VRI) service means an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection that delivers high-quality video images as provided in § 84.77(d).

WCAG 2.1 means the Web Content Accessibility Guidelines (WCAG) 2.1, W3C® Recommendation 05 June 2018, *https://www.w3.org/TR/2018/REC-WCAG21-20180605/* [*https://perma.cc/UB8A-GG2F*]. WCAG 2.1 is incorporated by reference elsewhere in this part (see §§ 84.84 and 84.86).

Web content means information or sensory experience—including the encoding that defines the content's structure, presentation, and interactions—that is communicated to the user by a web browser or other software. Examples of web content include text, images, sounds, videos, controls, animations, and conventional electronic documents.

Wheelchair means a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor, or of both indoor and outdoor locomotion. This definition does not apply to Federal wilderness areas; wheelchairs in such areas are defined in section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).

■ 12. Revise subpart B to read as follows:

Subpart B—Employment Practices

Sec.
84.16 Discrimination prohibited.
84.17–84.20 [Reserved]

Subpart B—Employment Practices

§ 84.16 Discrimination prohibited.

(a) No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any program or activity receiving Federal financial assistance from the Department.

(b) The standards used to determine whether paragraph (a) of this section has been violated shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12111 *et seq.,* and, as such sections relate to employment, the provisions of sections 501 through 504 and 511 of the ADA of 1990, as amended (codified at 42 U.S.C. 12201–12204, 12210), as implemented in the Equal Employment Opportunity Commission's regulation at 29 CFR part 1630.

§§ 84.17–84.20 [Reserved]

Subpart C—Program Accessibility

■ 13. Revise § 84.21 to read as follows:

§ 84.21 Discrimination prohibited.

Except as otherwise provided in § 84.22, no qualified individual with a disability shall, because a recipient's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the programs or activities of a recipient, or be subjected to discrimination by any recipient.

■ 14. Amend § 84.22 by:

■ a. Revising paragraphs (a) and (b);

■ b. Removing the words ''handicapped person'' and adding in its place the words ''person with a disability'' wherever they occur in paragraph (c);

■ c. Removing the words ''handicapped persons'' and adding in their place the words ''persons with disabilities'' wherever they occur in paragraphs (e) introductory text, (e)(1), and (f); and

■ d. Adding paragraph (g).

The revisions and addition read as follows:

§ 84.22 Existing facilities.

(a) *General.* A recipient shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not—

(1) Necessarily require a recipient to make each of its existing facilities accessible to and usable by individuals with disabilities; or

(2) Require a recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens. In those circumstances where a recipient's personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the recipient has the burden of proving that compliance with this paragraph (a) would result in such an alteration or burdens The decision that compliance would result in such alteration or burdens must be made by the head of the recipient or their designee after considering all the recipient's resources available for use in the funding and operation of the program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the recipient shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the recipient.

(b) *Methods.* A recipient may comply with the requirements of this section through such means as redesign or acquisition of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with

disabilities. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A recipient shall, in making alterations to existing buildings, meet the accessibility requirements of § 84.23. In choosing among available methods for meeting the requirements of this section, a recipient shall give priority to those methods that offer programs and activities to qualified individuals with disabilities in the most integrated setting appropriate.

* * * * *

(g) *Safe harbor.* Elements that have not been altered in existing facilities on or after [EFFECTIVE DATE OF FINAL RULE], and that comply with the corresponding technical and scoping specifications for those elements in the American National Standard Specification (ANSI A117.1–1961(R1971) for facilities constructed between June 3, 1977, and January 18, 1991) or for those elements in the Uniform Federal Accessibility Standards (UFAS), appendix A to 41 CFR 101–19.6 (July 1, 2002 ed.), 49 FR 31528, app. A (Aug. 7, 1984), for those facilities constructed between January 18, 1991, and [EFFECTIVE DATE OF FINAL RULE] are not required to be modified to comply with the requirements set forth in the 2010 Standards.

■ 15. Revise § 84.23 to read as follows:

§ 84.23 New construction and alterations.

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after June 3, 1977.

(b) *Alterations.* Each facility or part of a facility altered by, on behalf of, or for the use of a recipient in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after June 3, 1977.

(c) *Accessibility standards and compliance dates for recipients that are public entities.* (1) The accessibility standards and compliance dates in this subsection apply to recipients that are public entities. Public entities are any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government; and The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act). (45 U.S.C. 541.)

(2) If physical construction or alterations commenced after June 3, 1977, but before January 18, 1991, then construction and alterations subject to this section shall be deemed in compliance with this section if they meet the requirements of the ANSI Standards (ANSI A117.1–1961(R1971) (ANSI). Departures from particular requirements of ANSI by the use of other methods are permitted when it is clearly evident that equivalent access to the facility or part of the facility is provided.

(3) If physical construction or alterations commence on or after January 18, 1991, but before [EFFECTIVE DATE OF FINAL RULE], then new construction and alterations subject to this section shall be deemed in compliance with this section if they meet the requirements of the Uniform Federal Accessibility Standards (UFAS). Departures from particular requirements of UFAS by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(4) For physical construction or alterations that commence on or after [EFFECTIVE DATE OF FINAL RULE] but before [DATE ONE YEAR FROM PUBLICATION DATE OF FINAL RULE IN THE **FEDERAL REGISTER**], then new construction and alterations subject to this section may comply with either UFAS or the 2010 Standards. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(5) If physical construction or alterations commence on or after [DATE ONE YEAR FROM PUBLICATION DATE OF FINAL RULE IN THE **FEDERAL REGISTER**], then new construction and alterations subject to this section shall comply with the 2010 Standards.

(6) For the purposes of this section, ceremonial groundbreaking or razing of structures prior to site preparation do not commence physical construction or alterations.

(d) *Accessibility standards and compliance dates for recipients that are private entities.* (1) The accessibility standards and compliance dates in this subsection apply to recipients that are private entities. Private entities are any person or entity other than a public entity.

(2) New construction and alterations subject to this section shall comply with ANSI if the date when the last application for a building permit or permit extension is certified to be complete by a State, county, or local government or, in those jurisdictions where the government does not certify completion of applications, if the date when the last application for a building permit or permit extension is received by the State, county, or local government between June 3, 1977 and January 18, 1991, or if no permit is required, if the start of physical construction or alterations occurs between June 3, 1977 and January 18, 1991.

(3) New construction and alterations subject to this section shall comply with UFAS if the date when the last application for a building permit or permit extension is certified to be complete by a State, county, or local government (or, in those jurisdictions where the government does not certify completion of applications, if the date when the last application for a building permit or permit extension is received by the State, county, or local government) is on or after January 18, 1991, and before [EFFECTIVE DATE OF FINAL RULE], or if no permit is required, if the start of physical construction or alterations occurs on or after January 18, 1991, and before [EFFECTIVE DATE OF FINAL RULE].

(4) New construction and alterations subject to this section shall comply either with UFAS or the 2010 Standards if the date when the last application for a building permit or permit extension is certified to be complete by a State, county, or local government (or, in those jurisdictions where the government does not certify completion of applications, if the date when the last application for a building permit or permit extension is received by the State, county, or local government) is on or after [EFFECTIVE DATE OF FINAL RULE], and before [DATE ONE YEAR FROM PUBLICATION DATE OF FINAL RULE IN THE **FEDERAL REGISTER**], or if no permit is required, if the start of physical construction or alterations occurs on or after [EFFECTIVE DATE OF FINAL RULE], and before [DATE ONE YEAR FROM PUBLICATION DATE OF FINAL RULE IN THE **FEDERAL REGISTER**].

(5) New construction and alterations subject to this section shall comply with the 2010 Standards if the date when the last application for a building permit or permit extension is certified to be complete by a State, county, or local

government (or, in those jurisdictions where the government does not certify completion of applications, if the date when the last application for a building permit or permit extension is received by the State, county, or local government) is on or after [DATE ONE YEAR FROM PUBLICATION DATE OF FINAL RULE IN THE **FEDERAL REGISTER**], or if no permit is required, if the start of physical construction or alterations occurs on or after [DATE ONE YEAR FROM PUBLICATION DATE OF FINAL RULE IN THE **FEDERAL REGISTER**].

(6) For the purposes of this section, ceremonial groundbreaking or razing of structures prior to site preparation do not commence physical construction or alterations.

(e) *Noncomplying new construction and alterations.* (1) Newly constructed or altered facilities or elements covered by paragraph (a) or (b) of this section that were constructed or altered between June 3, 1977, and January 18, 1991, and that do not comply with ANSI shall be made accessible in accordance with the 2010 Standards.

(2) Newly constructed or altered facilities or elements covered by paragraph (a) or (b) of this section that were constructed or altered on or after January 18, 1991 and before [DATE ONE YEAR FROM PUBLICATION DATE OF FINAL RULE IN THE **FEDERAL REGISTER**], and that do not comply with UFAS shall before [DATE ONE YEAR FROM PUBLICATION DATE OF FINAL RULE IN THE **FEDERAL REGISTER**], be made accessible in accordance with either UFAS, or the 2010 Standards.

(3) Newly constructed or altered facilities or elements covered by paragraph (a) or (b) of this section that were constructed or altered before [DATE ONE YEAR FROM PUBLICATION DATE OF FINAL RULE IN THE **FEDERAL REGISTER**] and that do not comply with ANSI (for facilities constructed or altered between June 3, 1977, and January 18, 1991) or UFAS (for facilities constructed or altered on or after January 18, 1991) shall, on or after [DATE ONE YEAR FROM PUBLICATION DATE OF FINAL RULE IN THE **FEDERAL REGISTER**], be made accessible in accordance with the 2010 Standards.

(f) *Public buildings or facilities requirements.* New construction and alterations of buildings or facilities undertaken in compliance with the 2010 Standards will comply with the scoping and technical requirements for a ‘‘public building or facility’’ regardless of whether the recipient is a public entity as defined in 28 CFR 35.104 or a private entity.

(g) *Compliance with the Architectural Barriers Act of 1968.* Nothing in this section relieves recipients whose facilities are covered by the Architectural Barriers Act, from their responsibility of complying with the requirements of that Act and any implementing regulations.

(h) *Mechanical rooms.* For purposes of this section, section 4.1.6(1)(g) of UFAS will be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of individuals with physical disabilities.

■ 16. Revise the heading of subpart D to read as follows:

Subpart D—Childcare, Preschool, Elementary and Secondary, and Adult Education

■ 17. Revise § 84.31 to read as follows:

§ 84.31 Application of this subpart.

Subpart D applies to childcare, preschool, elementary and secondary, and adult education programs or activities that receive Federal financial assistance and to recipients that operate, or that receive Federal financial assistance for the operation of, such programs or activities.

§§ 84.32 through 84.37 [Removed and Reserved]

■ 18. Remove and reserve §§ 84.32 through 84.37.

■ 19. Revise § 84.38 to read as follows:

§ 84.38 Childcare, Preschool, Elementary and Secondary, and Adult Education.

A recipient to which this subpart applies that provides childcare, preschool, elementary and secondary, or adult education may not, on the basis of disability, exclude qualified individuals with disabilities and shall take into account the needs of such persons in determining the aids, benefits, or services to be provided.

§ 84.39 [Removed and Reserved]

■ 20. Remove and reserve § 84.39.

Subpart E—Postsecondary Education

§ 84.42 [Amended]

■ 21. Amend § 84.42 by:

■ a. Removing the word ‘‘handicap’’ and adding in its place the word ‘‘disability’ in paragraphs (a) and (b)(3)(i);

■ b. Removing the words ‘‘handicapped persons’’ and adding in their place the words ‘‘individuals with disabilities’’ in paragraphs (a), (b)(1), and (b)(2) introductory text (two times);

■ c. Removing the words ‘‘handicapped person’’ and adding in their place the words ‘‘individual with a disability’’ in paragraph (b)(4); and

■ d. Removing the word ‘‘handicapped’’ and adding in its place the word ‘‘disabled’’ in paragraph (c) introductory text.

§ 84.43 [Amended]

■ 22. Amend § 84.43 by:

■ a. Removing the words ‘‘handicapped student’’ and adding in its place the words ‘‘student with disabilities’’ in paragraphs (a) and (c);

■ b. Removing the word ‘‘handicap’’ and adding in its place the word ‘‘disability’’ in paragraphs (a) and (c); and

■ c. Removing the words ‘‘handicapped persons’’ and adding in their place the words ‘‘individuals with disabilities’’ in paragraph (b).

§ 84.44 [Amended]

■ 23. Amend § 84.44 by:

■ a. Removing the word ‘‘handicap’’ and adding in its place the word ‘‘disability’’ in paragraphs (a) and (c);

■ b. Removing the word ‘‘handicapped’’ and adding in its place the word ‘‘disabled’’ in its place in paragraph (a);

■ c. Removing the words ‘‘handicapped students’’ and adding in their place the words ‘‘students with disabilities’’ in two places in paragraph (b); and

■ d. Removing the words ‘‘handicapped student’’ and adding in its place the words ‘‘student with disabilities’’ in paragraph (d)(1).

§ 84.45 [Amended]

■ 24. Amend § 84.45 by:

■ a. Removing the words ‘‘nonhandicapped students’’ and adding in their place two times the words ‘‘students without disabilities’’ in paragraph (a);

■ b. Removing the words ‘‘handicapped students’’ and adding in their place the words ‘‘students with disabilities’’ in paragraph (a);

■ c. Removing the words ‘‘handicapped students’ ’’ and adding in their place the words ‘‘students with disabilities’ ’’ in paragraph (a); and

■ d. Removing the word ‘‘handicap’’ and adding in its place the word ‘‘disability’’ in paragraph (b).

§ 84.46 [Amended]

■ 25. Amend § 84.46 by:

■ a. Removing the word ‘‘handicap’’ and adding in its place the word ‘‘disability’’ wherever it occurs in paragraph (a);

■ b. Removing the words ‘‘handicapped persons’’ and adding in its place the

words ''individuals with disabilities'' in two places in paragraph (a)(1);

■ c. Removing the words ''nonhandicapped persons'' and adding in their place the words ''individuals without disabilities'' in paragraph (a)(1).

§ 84.47 [Amended]

■ 26. Amend § 84.47 by:

■ a. Removing the word ''handicap'' and adding in its place the word ''disability'' in paragraphs (a)(1) and (b);

■ b. Removing the words ''handicapped students'' and adding in their place the words ''students with disabilities'' in paragraphs (a)(1) and (2) and paragraph (b);

■ c. Removing the words ''handicapped student'' and adding in their place the words ''student with disabilities'' in paragraph (a)(2);

■ d. Removing the words ''handicapped persons'' and adding in its place the words ''individuals with disabilities'' in paragraph (b); and

■ e. Removing the words ''nonhandicapped students'' and adding in their place the words ''students without disabilities'' in paragraph (b).

Subpart F—Health, Welfare, and Social Services

§ 84.52 [Amended]

■ 27. Amend § 84.52 by:

■ a. Removing the words ''handicapped person'' and adding in its place the words ''individual with a disability'' in paragraphs (a)(1) through (3);

■ b. Removing the words ''handicapped persons'' and adding in its place the words ''individuals with disabilities'' in paragraphs (a)(2) and (4), in two places in paragraph (a)(5), and in paragraph (b); and

■ c. Removing paragraphs (c) and (d).

■ 28. Revise § 84.53 to read as follows:

§ 84.53 Individuals with substance and alcohol use disorders.

A recipient to which this subpart applies that operates a general hospital or outpatient facility may not discriminate in admission or treatment against an individual with a substance or alcohol use disorder or individual with an alcohol use disorder who is suffering from a medical condition, because of the person's drug or alcohol use disorder.

■ 29. Revise § 84.54 to read as follows:

§ 84.54 Education of institutionalized persons.

A recipient to which this subpart applies and that provides aids, benefits, or services to persons who are institutionalized because of disability shall ensure that each qualified individual with disabilities, as defined in § 84.10, in its program or activity is provided an appropriate education, consistent with the Department of Education section 504 regulations at 34 CFR 104.33(b). Nothing in this section shall be interpreted as altering in any way the obligations of recipients under subpart D of this part.

§ 84.55 [Amended]

■ 30. Amend § 84.55 by:

■ a. Removing the words ''handicapped infants'' and adding in their place the words ''infants with disabilities'' in paragraph (a); and

■ b. Removing and reserving paragraphs (b) through (e).

■ 31. Add §§ 84.56 and 84.57 to read as follows:

§ 84.56 Medical treatment.

(a) *Discrimination prohibited.* No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in medical treatment under any program or activity that receives Federal financial assistance, including in the allocation or withdrawal of any good, benefit, service.

(b) *Specific prohibitions.* The general prohibition in paragraph (a) of this section includes the following specific prohibitions:

(1) *Denial of medical treatment.* A recipient may not deny or limit medical treatment to a qualified individual with a disability when the denial is based on:

(i) Bias or stereotypes about a patient's disability;

(ii) Judgments that the individual will be a burden on others due to their disability, including, but not limited to caregivers, family, or society; or

(iii) A belief that the life of a person with a disability has lesser value than the life of a person without a disability, or that life with a disability is not worth living.

(2) *Denial of treatment for a separate symptom or condition.* Where a qualified individual with a disability or their authorized representative seeks or consents to treatment for a separately diagnosable symptom or medical condition (whether or not that symptom or condition is a disability under this part or is causally connected to the individual's underlying disability), a recipient may not deny or limit clinically appropriate treatment if it would be offered to a similarly situated individual without an underlying disability.

(3) *Provision of medical treatment.* A recipient may not, on the basis of disability, provide a medical treatment to an individual with a disability where it would not provide the same treatment to an individual without a disability, unless the disability impacts the effectiveness, or ease of administration of the treatment itself, or has a medical effect on the condition to which the treatment is directed.

(c) *Construction*—(1) *Professional judgment in treatment.* (i) Nothing in this section requires the provision of medical treatment where the recipient has a legitimate, nondiscriminatory reason for denying or limiting that service or where the disability renders the individual not qualified for the treatment.

(ii) These circumstances include those in which the recipient typically declines to provide the treatment to any individual, or reasonably determines based on current medical knowledge or the best available objective evidence that such medical treatment is not clinically appropriate for a particular individual. The criteria in paragraphs (b)(1)(i) through (iii) of this section are not a legitimate nondiscriminatory reason for denying or limiting medical treatment and may not be a basis for a determination that an individual is not qualified for the treatment, or that a treatment is not clinically appropriate for a particular individual.

(2) *Consent.* (i) Nothing in this section requires a recipient to provide medical treatment to an individual where the individual, or their authorized representative, does not consent to that treatment.

(ii) Nothing in this section allows a recipient to discriminate against a qualified individual with a disability on the basis of disability in seeking to obtain consent from an individual or their authorized representative for the recipient to provide, withhold, or withdraw treatment.

(3) *Providing information.* Nothing in this section precludes a provider from providing an individual with a disability or their authorized representative with information regarding the implications of different courses of treatment based on current medical knowledge or the best available objective evidence.

§ 84.57 Value assessment methods.

A recipient shall not, directly or through contractual, licensing, or other arrangements, use any measure, assessment, or tool that discounts the value of life extension on the basis of disability to deny or afford an unequal opportunity to qualified individuals with disabilities with respect to the eligibility or referral for, or provision or withdrawal of any aid, benefit, or service, including the terms or conditions under which they are made available.

■ 32. Add § 84.60 to read as follows:

§ 84.60 Children, parents, caregivers, foster parents, and prospective parents in the child welfare system.

(a) *Discriminatory actions prohibited.* (1) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any child welfare program or activity that receives Federal financial assistance.

(2) Under the prohibition set forth in the previous subsection, discrimination includes:

(i) Decisions based on speculation, stereotypes, or generalizations that a parent, caregiver, foster parent, or prospective parent, because of a disability, cannot safely care for a child; and

(ii) Decisions based on speculation, stereotypes, or generalizations about a child with a disability.

(b) *Additional prohibitions.* The prohibitions in paragraph (a) of this section apply to actions by a recipient of Federal financial assistance made directly or through contracts, agreements, or other arrangements, including any action to:

(1) Deny a qualified parent with a disability custody or control of, or visitation to, a child;

(2) Deny a qualified parent with a disability an opportunity to participate in or benefit from reunification services is equal to that afforded to persons without disabilities;

(3) Terminate the parental rights or legal guardianship of a qualified individual with a disability; or

(4) Deny a qualified caregiver, foster parent, companion, or prospective parent with a disability the opportunity to participate in or benefit from child welfare programs and activities.

(c) *Parenting evaluation procedures.* A recipient to which this subpart applies shall establish procedures for referring individuals who, because of disability, need or are believed to need adapted services or reasonable modifications, and shall ensure that tests, assessments, and other evaluation materials, are tailored to assess specific areas of disability-related needs, and not merely those which are designed to provide a single general intelligence quotient.

§ 84.61 [Removed]

■ 33. Remove § 84.61.

■ 34. Revise subpart G to read as follows:

Subpart G—General Requirements

Sec.

84.68 General prohibitions against discrimination.
84.69 Illegal use of drugs.
84.70 Maintenance of accessible features.
84.71 Retaliation or coercion.
84.72 Personal devices and services.
84.73 Service animals.
84.74 Mobility devices.
84.75 Direct threat.
84.76 Integration.

Subpart G—General Requirements

§ 84.68 General prohibitions against discrimination.

(a) No qualified individual with a disability shall, solely on the basis of disability, be excluded from participation in or be denied the benefits of the programs or activities of a recipient, or be subjected to discrimination by any recipient.

(b)(1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others.

(iii) Provide a qualified individual with a disability an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the benefit or to reach the same level of achievement as that provided to others.

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the recipient's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A recipient may not deny a qualified individual with a disability the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration—

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same state.

(4) A recipient may not, in determining the site or location of a facility, make selections—

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to individuals with disabilities.

(5) A recipient, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A recipient may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a recipient establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by the recipient are not, themselves, covered by this part.

(7)(i) A recipient shall make reasonable modifications in policies, practices, or procedures when such modifications are necessary to avoid discrimination on the basis of disability, unless the recipient can demonstrate that making the modifications would fundamentally alter the nature of the program or activity.

(ii) A recipient is not required to provide a reasonable modification to an individual who meets the definition of

''disability'' solely under the ''regarded as'' prong of the definition of disability in this part.

(8) A recipient shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the program or activity being offered.

(c) Nothing in this part prohibits a recipient from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

(d) A recipient shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e)(1) Nothing in this part shall be construed to require an individual with a disability to accept a modification, aid, service, opportunity, or benefit provided under section 504 or this part which such individual chooses not to accept.

(2) Nothing in section 504 or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(f) A recipient may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by section 504 or this part.

(g) A recipient shall not exclude or otherwise deny equal programs or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(h) A recipient may impose legitimate safety requirements necessary for the safe operation of its programs or activities. However, the recipient must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

(i) Nothing in this part shall provide the basis for a claim that an individual without a disability was subject to discrimination because of a lack of disability, including a claim that an individual with a disability was granted a reasonable modification that was denied to an individual without a disability.

§ 84.69 Illegal use of drugs.

(a) *General.* (1) Except as provided in paragraph (b) of this section, this part does not prohibit discrimination against an individual based on that individual's current illegal use of drugs.

(2) A recipient shall not discriminate on the basis of illegal use of drugs against an individual who is not engaging in current illegal use of drugs and who—

(i) Has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully;

(ii) Is participating in a supervised rehabilitation program; or

(iii) Is erroneously regarded as engaging in such use.

(b) *Services provided under the Rehabilitation Act.* (1) A recipient shall not exclude an individual on the basis of that individual's current illegal use of drugs from the benefits of programs and activities providing health services and services provided under subchapters I, II, and III of the Rehabilitation Act, if the individual is otherwise entitled to such services.

(2) A drug rehabilitation or treatment program may deny participation to individuals who engage in illegal use of drugs while they are in the program.

(c) *Drug testing.* (1) This part does not prohibit the recipient from adopting or administering reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual who formerly engaged in the illegal use of drugs is not now engaging in current illegal use of drugs.

(2) Nothing in paragraph (c) of this section shall be construed to encourage, prohibit, restrict, or authorize the conduct of testing for the illegal use of drugs.

§ 84.70 Maintenance of accessible features.

(a) A recipient shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by section 504 or this part.

(b) This section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs.

(c) For a recipient, if the 2010 Standards reduce the technical requirements or the number of required accessible elements below the number required by UFAS, the technical requirements or the number of accessible elements in a facility subject to this part may be reduced in accordance with the requirements of the 2010 Standards.

§ 84.71 Retaliation or coercion.

(a) A recipient shall not discriminate against any individual because that individual has opposed any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under section 504 or this part.

(b) A recipient shall not coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of their having exercised or enjoyed, or on account of their having aided or encouraged any other individual in the exercise or enjoyment of any right granted or protected by section 504 or this part.

§ 84.72 Personal devices and services.

This part does not require a recipient to provide to individuals with disabilities personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study; or services of a personal nature including assistance in eating, toileting, or dressing.

§ 84.73 Service animals.

(a) *General.* Generally, a recipient shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability.

(b) *Exceptions.* A recipient may ask an individual with a disability to remove a service animal from the premises if—

(1) The animal is out of control and the animal's handler does not take effective action to control it; or

(2) The animal is not housebroken.

(c) *If an animal is properly excluded.* If a recipient properly excludes a service animal under paragraph (b) of this section, it shall give the individual with a disability the opportunity to participate in the program or activity without having the service animal on the premises.

(d) *Animal under handler's control.* A service animal shall be under the control of its handler. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the

handler's control (*e.g.,* voice control, signals, or other effective means).

(e) *Care or supervision.* A recipient is not responsible for the care or supervision of a service animal.

(f) *Inquiries.* A recipient shall not ask about the nature or extent of a person's disability but may make two inquiries to determine whether an animal qualifies as a service animal. A recipient may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A recipient shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. Generally, a recipient may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (*e.g.,* the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).

(g) *Access to areas of the recipient.* Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of the recipient's facilities where members of the public, participants in programs or activities, or invitees, as relevant, are allowed to go.

(h) *Surcharges.* A recipient shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets. If a recipient normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by their service animal.

(i) *Miniature horses*—(1) *Reasonable modifications.* A recipient shall make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability.

(2) *Assessment factors.* In determining whether reasonable modifications in policies, practices, or procedures can be made to allow a miniature horse into a specific facility, a recipient shall consider—

(i) The type, size, and weight of the miniature horse and whether the facility can accommodate these features;

(ii) Whether the handler has sufficient control of the miniature horse;

(iii) Whether the miniature horse is housebroken; and

(iv) Whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.

(3) *Other requirements.* Paragraphs (c) through (h) of this section, which apply to service animals, shall also apply to miniature horses.

§ 84.74 Mobility devices.

(a) *Use of wheelchairs and manually-powered mobility aids.* A recipient shall permit individuals with mobility disabilities to use wheelchairs and manually-powered mobility aids, such as walkers, crutches, canes, braces, or other similar devices designed for use by individuals with mobility disabilities in any areas open to pedestrian use.

(b) *Use of other power-driven mobility devices*—(1) *Requirement.* A recipient shall make reasonable modifications in its policies, practices, or procedures to permit the use of other power-driven mobility devices by individuals with mobility disabilities, unless a recipient can demonstrate that the class of other power-driven mobility devices cannot be operated in accordance with legitimate safety requirements that a recipient has adopted pursuant to § 84.68(h).

(2) *Assessment factors.* In determining whether a particular other power-driven mobility device can be allowed in a specific facility as a reasonable modification under paragraph (b)(1) of this section, a recipient shall consider—

(i) The type, size, weight, dimensions, and speed of the device;

(ii) The facility's volume of pedestrian traffic (which may vary at different times of the day, week, month, or year);

(iii) The facility's design and operational characteristics, *e.g.,* whether its program or activity is conducted indoors, its square footage, the density and placement of stationary devices, and the availability of storage for the device, if requested by the user.

(iv) Whether legitimate safety requirements can be established to permit the safe operation of the other power-driven mobility device in the specific facility;

(v) Whether the use of the other power-driven mobility device creates a substantial risk of serious harm to the immediate environment or natural or cultural resources, or poses a conflict with Federal land management laws and regulations; and

(c) *Inquiry about disability*—(1) *Requirement.* A recipient shall not ask an individual using a wheelchair or other power-driven mobility device questions about the nature and extent of the individual's disability.

(2) *Inquiry into use of other power-driven mobility device.* A recipient may ask a person using an other power-driven mobility device to provide a credible assurance that the mobility device is required because of the person's disability. A recipient in permitting the use of an other power-driven mobility device by an individual with a mobility disability shall accept the presentation of a valid, State-issued, disability parking placard or card, or other State-issued proof of disability as a credible assurance that the use of the other power-driven mobility device is for the individual's mobility disability. In lieu of a valid, State-issued disability parking placard or card, or State-issued proof of disability, a recipient shall accept as a credible assurance a verbal representation, not contradicted by observable fact, that the other power-driven mobility device is being used for a mobility disability. A ''valid'' disability placard or card is one that is presented by the individual to whom it was issued and is otherwise in compliance with the state of issuance's requirements for disability placards or cards.

§ 84.75 Direct threat.

(a) This part does not require a recipient to permit an individual to participate in or benefit from the programs or activities of that recipient when that individual poses a direct threat.

(b) Except as provided in paragraph (c) of this section, in determining whether an individual poses a direct threat, a recipient must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

(c) In determining whether an individual poses a direct threat in employment, the recipient must make an individualized assessment according to the Equal Employment Opportunity Commission's regulation implementing title I of the Americans with Disabilities Act of 1990, at 29 CFR 1630.2(r).

§ 84.76 Integration.

(a) *Application.* This provision applies to programs or activities that receive Federal financial assistance from

the Department and to recipients that operate such programs or activities.

(b) *Discriminatory action prohibited.* A recipient shall administer a program or activity in the most integrated setting appropriate to the needs of a qualified person with a disability. Administering a program or activity in a manner that results in unnecessary segregation of persons with disabilities constitutes discrimination under this section.

(c) *Segregated setting.* A segregated setting is one in which people with disabilities are unnecessarily separated from people without disabilities. Segregated settings are populated exclusively or primarily with individuals with disabilities, and may be characterized by regimentation in daily activities; lack of privacy or autonomy; and policies limiting visitors or limiting individuals' ability to engage freely in community activities and to manage their own activities of daily living.

(d) *Specific prohibitions.* The general prohibition in paragraph (b) of this section includes but is not limited to the following specific prohibitions, to the extent that such action results in unnecessary segregation, or serious risk of such segregation, of persons with disabilities.

(1) Establishing or applying policies or practices that limit or condition individuals with disabilities' access to the most integrated setting appropriate to their needs;

(2) Providing greater benefits or benefits under more favorable terms in segregated settings than in integrated settings;

(3) Establishing or applying more restrictive rules and requirements for individuals with disabilities in integrated settings than for individuals with disabilities in segregated settings; or

(4) Failure to provide community-based services that results in institutionalization or serious risk of institutionalization. This category includes, but is not limited to planning, service system design, funding, or service implementation practices that result in institutionalization or serious risk of institutionalization. Individuals with disabilities need not wait until the harm of institutionalization or segregation occurs to assert their right to avoid unnecessary segregation.

(e) *Fundamental alteration.* A recipient may establish a defense to the application of this section if it can demonstrate that a requested modification would fundamentally alter the nature of its program or activity.

■ 35. Add subpart H to read as follows:

Subpart H—Communications

Sec.
84.77 General.
84.78 Telecommunications.
84.79 Telephone emergency services.
84.80 Information and signage.
84.81 Duties.

Subpart H—Communications

§ 84.77 General.

(a)(1) A recipient shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.

(2) For purposes of this section, "companion" means a family member, friend, or associate of an individual seeking access to a program or activity of a recipient, who, along with such individual, is an appropriate person with whom the recipient should communicate.

(b)(1) The recipient shall furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities, including applicants, participants, beneficiaries, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a program or activity of a recipient.

(2) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a recipient shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

(c)(1) A recipient shall not require an individual with a disability to bring another individual to interpret for him or her.

(2) A recipient shall not rely on an adult accompanying an individual with a disability to interpret or facilitate communication except—

(i) In an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available; or

(ii) When the individual with a disability specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.

(3) A recipient shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public when there is no interpreter available.

(d). When the recipient chooses to provide qualified interpreters via video remote interpreting services (VRI), it shall ensure that it provides—

(1) Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;

(2) A sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers, and the participating individual's face, arms, hands, and fingers, regardless of their body position;

(3) A clear, audible transmission of voices; and

(4) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI.

§ 84.78 Telecommunications.

(a) Where a recipient communicates by telephone with applicants and beneficiaries, text telephones (TTYs) or equally effective telecommunications systems shall be used to communicate with individuals who are deaf or hard of hearing or have speech impairments.

(b) When a recipient uses an automated-attendant system, including, but not limited to, voice mail and messaging, or an interactive voice response system, for receiving and directing incoming telephone calls, that system must provide effective real-time communication with individuals using auxiliary aids and services, including TTYs and all forms of FCC-approved telecommunications relay systems, including internet-based relay systems.

(c) A recipient shall respond to telephone calls from a telecommunications relay service established under title IV of the ADA in the same manner that it responds to other telephone calls.

§ 84.79 Telephone emergency services.

Telephone emergency services, including 911 services, shall provide

direct access to individuals who use TTY's and computer modems.

§ 84.80 Information and signage.

(a) A recipient shall ensure that interested persons, including persons with impaired vision or hearing can obtain information as to the existence and location of accessible services, activities, and facilities.

(b) A recipient shall provide signage at all inaccessible entrances to each of its facilities, directing users to an accessible entrance or to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each accessible entrance of a facility.

§ 84.81 Duties.

This subpart does not require a recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens. In those circumstances where a recipient's personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the recipient has the burden of proving that compliance with this subpart would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the recipient or their designee after considering all the recipient's resources available for use in the funding and operation of the program or activity and must be accompanied by a written statement of reasons for reaching that conclusion. If an action required to comply with this part would result in such an alteration or such burdens, the recipient shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the recipient.

■ 36. Add subpart I to read as follows:

Subpart I—Web, Mobile, and Kiosk Accessibility

84.82 Application.
84.83 Accessibility of kiosks.
84.84 Requirements for web and mobile accessibility.
84.85 Exceptions.
84.86 Conforming alternate versions.
84.87 Equivalent facilitation.
84.88 Duties.
84.89 [Reserved]

Subpart I—Web, Mobile, and Kiosk Accessibility

§ 84.82 Application.

This subpart applies to all programs or activities that receive Federal financial assistance from the Department.

§ 84.83 Accessibility of kiosks.

No qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity of a recipient provided through kiosks.

§ 84.84 Requirements for web and mobile accessibility.

(a) *General.* A recipient shall ensure that the following are readily accessible to and usable by individuals with disabilities:

(1) Web content that a recipient makes available to members of the public or uses to offer programs or activities to members of the public; and

(2) Mobile apps that a recipient makes available to members of the public or uses to offer programs or activities to members of the public.

(b) *Requirements.* (1) Effective [DATE TWO YEARS AFTER PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**], a recipient with fifteen or more employees shall ensure that the web content and mobile apps it makes available to members of the public or uses to offer programs or activities to members of the public comply with Level A and Level AA success criteria and conformance requirements specified in WCAG 2.1, unless the recipient can demonstrate that compliance with this section would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens.

(2) Effective [DATE THREE YEARS AFTER PUBLICATION OF FINAL RULE IN THE **FEDERAL REGISTER**], a recipient with fewer than fifteen employees shall ensure that the web content and mobile apps it makes available to members of the public or uses to offer programs or activities to members of the public comply with Level A and Level AA success criteria and conformance requirements specified in WCAG 2.1, unless the recipient can demonstrate that compliance with this section would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens.

(3) WCAG 2.1 is incorporated by reference into this section with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. All approved incorporation by reference (IBR) material is available for inspection at HHS and at the National Archives and Records Administration (NARA). Contact HHS, OCR at: Phone line: (202) 545–4884; Email: *504@hhs.gov*; Mail: Office for Civil Rights, U.S. Department of Health and Human Services, 200 Independence Ave. SW, Room 509F, HHH Building, Washington, DC 20201. For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations.html* or email *fr.inspection@nara.gov.* The material may be obtained from the World Wide Web Consortium (W3C®) Web Accessibility Initiative (''WAI''), 401 Edgewater Place, Suite 600, Wakefield, MA 01880; phone: (339) 273–2711; email: *contact@w3.org;* website: *www.w3.org/TR/2018/REC-WCAG21-20180605/* [*https://perma.cc/UB8A-GG2F*].

§ 84.85 Exceptions.

The requirements of § 84.84 do not apply to the following:

(a) *Archived web content.* Archived web content as defined in § 84.10.

(b) *Preexisting conventional electronic documents.* Conventional electronic documents created by or for a recipient that are available on a recipient's website or mobile app before the date the recipient is required to comply with this rule, unless such documents are currently used by members of the public to apply for, gain access to, or participate in a recipient's programs or activities.

(c) *Web content posted by a third party.* Web content posted by a third party that is available on a recipient's website.

(d) *Linked third-party web content.* Third-party web content linked from the recipient's website, unless the recipient uses the third-party web content to allow members of the public to participate in or benefit from the recipient's programs or activities.

(e) *Postsecondary institutions: password-protected class or course content.* Except as provided in paragraphs (e)(1) and (2) of this section, course content available on a recipient's password-protected or otherwise secured website for admitted students enrolled in a specific course offered by a postsecondary institution.

(1) This exception does not apply if a recipient is on notice that an admitted student with a disability is pre-registered in a specific course offered by a postsecondary institution and that the student, because of a disability, would

be unable to access the content available on the recipient's password-protected or otherwise secured website for the specific course. In such circumstances, all content available on the recipient's password-protected or otherwise secured website for the specific course must comply with the requirements of § 84.84 by the date the academic term begins for that course offering. New content added throughout the term for the course must also comply with the requirements of § 84.84 at the time it is added to the website.

(2) This exception does not apply once a recipient is on notice that an admitted student with a disability is enrolled in a specific course offered by a postsecondary institution after the start of the academic term and that the student, because of a disability, would be unable to access the content available on the recipient's password-protected or otherwise secured website for the specific course. In such circumstances, all content available on the recipient's password-protected or otherwise secured website for the specific course must comply with the requirements of § 84.84 within five business days of such notice. New content added throughout the term for the course must also comply with the requirements of § 84.84 at the time it is added to the website.

(f) *Elementary and secondary schools: password-protected class or course content.* Except as provided in paragraphs (f)(1) through (4) of this section, class or course content available on a recipient's password-protected or otherwise secured website for students enrolled, or parents of students enrolled, in a specific class or course at an elementary or secondary school.

(1) This exception does not apply if the recipient is on notice of the following: a student with a disability is pre-registered in a specific class or course offered by an elementary or secondary school and that the student, because of a disability, would be unable to access the content available on the recipient's password-protected or otherwise secured website for the specific class or course. In such circumstances, all content available on the recipient's password-protected or otherwise secured website for the specific class or course must comply with the requirements of § 84.84 by the date the term begins for that class or course. New content added throughout the term for the class or course must also comply with the requirements of § 84.84 at the time it is added to the website.

(2) This exception does not apply if the recipient is on notice of the following: a student is pre-registered in an elementary or secondary school's class or course, the student's parent has a disability, and the parent, because of a disability, would be unable to access the content available on the password-protected or otherwise secured website for the specific class or course. In such circumstances, all content available on the recipient's password-protected or otherwise secured website for the specific class or course must comply with the requirements of § 84.84 by the date the term begins for that class or course. New content added throughout the term for the class or course must also comply with the requirements of § 84.84 at the time it is added to the website.

(3) This exception does not apply once a recipient is on notice of the following: a student with a disability is enrolled in an elementary or secondary school's class or course after the term begins and that the student, because of a disability, would be unable to access the content available on the recipient's password-protected or otherwise secured website for the specific class or course. In such circumstances, all content available on the recipient's password-protected or otherwise secured website for the specific class or course must comply with the requirements of § 84.84 within five business days of such notice. New content added throughout the term for the class or course must also comply with the requirements of § 84.84 at the time it is added to the website.

(4) This exception also does not apply once a recipient is on notice of the following: a student is enrolled in an elementary or secondary school's class or course after the term begins, and the student's parent has a disability, and the parent, because of a disability, would be unable to access the content available on the recipient's password-protected or otherwise secured website for the specific class or course. In such circumstances, all content available on the recipient's password-protected or otherwise secured website for the specific class or course must comply with the requirements of § 84.84 within five business days of such notice. New content added throughout the term for the class or course must also comply with the requirements of § 84.84 at the time it is added to the website.

(g) *Individualized, password-protected documents.* Conventional electronic documents that are:

(1) About a specific individual, their property, or their account; and

(2) Password-protected or otherwise secured.

§ 84.86 Conforming alternate versions.

(a) A recipient may use conforming alternate versions of websites and web content, as defined by WCAG 2.1, to comply with § 84.84 only where it is not possible to make websites and web content directly accessible due to technical or legal limitations.

(b) WCAG 2.1 is incorporated by reference into this section with the approval of the Director of the **Federal Register** under 5 U.S.C. 552(a) and 1 CFR part 51. All approved incorporation by reference (IBR) material is available for inspection at HHS and at the National Archives and Records Administration (NARA). Contact HHS, OCR at: Phone line: (202) 545–4884; Email: *504@hhs.gov;* Mail: Office for Civil Rights, U.S. Department of Health and Human Services, 200 Independence Ave. SW, Room 509F, HHH Building, Washington, DC 20201. For information on the availability of this material at NARA, visit *www.archives.gov/federal-register/cfr/ibr-locations.html* or email *fr.inspection@nara.gov.* The material may be obtained from the World Wide Web Consortium (W3C®) Web Accessibility Initiative (''WAI''), 401 Edgewater Place, Suite 600, Wakefield, MA 01880; phone: (339) 273–2711; email: *contact@w3.org;* website: *www.w3.org/WAI/; www.w3.org/TR/2018/REC–WCAG21–20180605/* [*https://perma.cc/UB8A-GG2F*].

§ 84.87 Equivalent facilitation.

Nothing in this subpart prevents the use of designs, methods, or techniques as alternatives to those prescribed, provided that the alternative designs, methods, or techniques result in substantially equivalent or greater accessibility and usability of the web content or mobile app.

§ 84.88 Duties.

Where a recipient can demonstrate that full compliance with the requirements of § 84.84 would result in a fundamental alteration in the nature of a program or activity or undue financial and administrative burdens, compliance with § 84.84 is required to the extent that it does not result in a fundamental alteration or undue financial and administrative burdens. In those circumstances where personnel of the recipient believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, a recipient has the burden of proving that compliance with § 84.84 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of

a recipient or their designee after considering all resources available for use in the funding and operation of the program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a recipient shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the recipient to the maximum extent possible.

§ 84.89 [Reserved]

■ 37. Add subpart J to read as follows:

Subpart J—Accessible Medical Equipment

Sec.
84.90 Application.
84.91 Requirements for medical diagnostic equipment.
84.92 Newly purchased, leased, or otherwise acquired medical diagnostic equipment.
84.93 Existing medical diagnostic equipment.
84.94 Qualified staff.
84.95–84.97 [Reserved]

Subpart J—Accessible Medical Equipment

§ 84.90 Application.

This subpart applies to programs or activities that receive Federal financial assistance from the Department and to recipients that operate, or that receive Federal financial assistance for the operation of, such programs or activities.

§ 84.91 Requirements for medical diagnostic equipment.

No qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of the programs or activities of a recipient offered through or with the use of medical diagnostic equipment (MDE), or otherwise be subjected to discrimination under any program or activity that receives Federal financial assistance because the recipient's MDE is not readily accessible to or usable by persons with disabilities.

§ 84.92 Newly purchased, leased, or otherwise acquired medical diagnostic equipment.

(a) *Requirements for all newly purchased, leased, or otherwise acquired medical diagnostic equipment.* All MDE that recipients purchase, lease, or otherwise acquire more than 60 days after the publication of this part in final form shall, subject to the requirements and limitations set forth in this section, meet the Standards for Accessible MDE, unless and until the recipient satisfies the scoping requirements set forth in paragraph (b) of this section.

(b) *Scoping requirements*—(1) *General requirement for medical diagnostic equipment.* Where a program or activity of a recipient, including physicians' offices, clinics, emergency rooms, hospitals, outpatient facilities, and multi-use facilities, utilizes MDE, at least 10 percent of the total number of units, but no fewer than one unit, of each type of equipment in use must meet the Standards for Accessible MDE.

(2) *Facilities that specialize in treating conditions that affect mobility.* In rehabilitation facilities that specialize in treating conditions that affect mobility, outpatient physical therapy facilities, and other programs or activities that specialize in treating conditions that affect mobility, at least 20 percent, but no fewer than one unit, of each type of equipment in use must meet the Standards for Accessible MDE.

(3) *Facilities with multiple departments.* In any facility or program with multiple departments, clinics, or specialties, where a program or activity uses MDE, the facility shall disperse the accessible MDE required by paragraphs (b)(1) and (2) of this section in a manner that is proportionate by department, clinic, or specialty using MDE.

(c) *Requirements for examination tables and weight scales.* Within 2 years after [EFFECTIVE DATE OF FINAL RULE, recipients shall, subject to the requirements and limitations set forth in this section, purchase, lease, or otherwise acquire the following, unless the recipient already has them in place:

(1) At least one examination table that meets the Standards for Accessible MDE, if the recipient uses at least one examination table; and

(2) At least one weight scale that meets the Standards for Accessible MDE, if the recipient uses at least one weight scale.

(d) *Equivalent facilitation.* Nothing in these requirements prevents the use of designs, products, or technologies as alternatives to those prescribed by the Standards for Accessible MDE, provided they result in substantially equivalent or greater accessibility and usability of the program or activity. The responsibility for demonstrating equivalent facilitation rests with the recipient.

(e) *Fundamental alteration and undue burdens.* This section does not require a recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity, or in undue financial and administrative burdens. In those circumstances where personnel of the recipient believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, a recipient has the burden of proving that compliance with paragraph (a) or (c) of this section would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a recipient or their designee after considering all resources available for use in the funding and operation of the program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a recipient shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the recipient.

(f) *Diagnostically required structural or operational characteristics.* A recipient meets its burden of proving that compliance with paragraph (a) or (c) of this section would result in a fundamental alteration under paragraph (e) of this section if it demonstrates that compliance with paragraph (a) or (c) would alter diagnostically required structural or operational characteristics of the equipment, and prevent the use of the equipment for its intended diagnostic purpose. This paragraph does not excuse compliance with other technical requirements where compliance with those requirements does not prevent the use of the equipment for its diagnostic purpose.

§ 84.93 Existing medical diagnostic equipment.

(a) *Accessibility.* A recipient shall operate each program or activity offered through or with the use of MDE so that the program or activity, in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not—

(1) Necessarily require a recipient to make each of its existing pieces of medical diagnostic equipment accessible to and usable by individuals with disabilities; or

(2) Require a recipient to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity, or in undue financial and administrative burdens. In those circumstances where personnel of the recipient believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, a recipient has the burden of proving that

compliance with this paragraph (a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the recipient or their designee after considering all resources available for use in the funding and operation of the program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the recipient shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the recipient.

(3) A recipient meets its burden of proving that compliance with § 84.92(a) or (c) would result in a fundamental alteration under paragraph (a)(2) of this section if it demonstrates that compliance with § 84.92(a) or (c) would alter diagnostically required structural or operational characteristics of the equipment, and prevent the use of the equipment for its intended diagnostic purpose.

(b) *Methods.* A recipient may comply with the requirements of this section through such means as reassignment of services to alternate accessible locations, home visits, delivery of services at alternate accessible sites, purchase, lease, or other acquisition of accessible MDE, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with disabilities. A recipient is not required to purchase, lease, or otherwise acquire accessible medical diagnostic equipment where other methods are effective in achieving compliance with this section. In choosing among available methods for meeting the requirements of this section, a recipient shall give priority to those methods that offer programs and activities to qualified individuals with disabilities in the most integrated setting appropriate.

§ 84.94 Qualified staff.

Recipients must ensure their staff are able to successfully operate accessible MDE, assist with transfers and positioning of individuals with disabilities, and carry out the program access obligation regarding existing MDE.

§§ 84.95–84.97 [Reserved]

■ 38. Add subpart K, consisting of § 84.98, to read as follows:

Subpart K—Procedures

§ 84.98 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 80.6 through 80.10 and 45 CFR part 81.

Dated: August 31, 2023.

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2023–19149 Filed 9–7–23; 8:45 am]

BILLING CODE P

Reader Aids

Federal Register

Vol. 88, No. 177

Thursday, September 14, 2023

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6050**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.govinfo.gov.**

Federal Register information and research tools, including Public Inspection List and electronic text are located at: **www.federalregister.gov.**

E-mail

FEDREGTOC (Daily Federal Register Table of Contents Electronic Mailing List) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new**, enter your email address, then follow the instructions to join, leave, or manage your subscription.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html and select** *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

FEDERAL REGISTER PAGES AND DATE, SEPTEMBER

60317–60564 1
60565–60866 5
60867–61462 6
61463–61950 7
61951–62284 8
62285–62440 11
62441–62686 12
62687–62992 13
62993–63512 14

CFR PARTS AFFECTED DURING SEPTEMBER

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:
10610 60817
10611 60869
10612 60871
10613 60873
10614 60875
10615 60877
10616 60879
10617 61463
10618 62443
10619 62687
10620 62689
10621 62691
10622 62693
Executive Orders:
14107 62441
Adminstrative Orders:
Notices:
Notice of September 7, 2023 62433
Notice of September 7, 2023 62435
Notice of September 7, 2023 62437
Notice of September 7, 2023 62439

5 CFR

302 60317
317 60317
319 60317
330 60317
731 60317
754 60317
920 60317
2424 62445

7 CFR

760 62285
3550 60883
Proposed Rules:
1207 60599
3560 62475

8 CFR

Proposed Rules:
1001 62242
1003 62242
1239 62242
1240 62242

9 CFR

93 62993
201 62695
202 62695
206 62695

10 CFR

50 62292
52 62292
140 60565
Proposed Rules:
50 ....61986, 61989
51 61986
52 61989
71 61986
431 60746

12 CFR

Proposed Rules:
217 60385

14 CFR

39 ....60566, 60570, 60883, 61467, 63004, 63007, 63009, 63011, 63014
71 ....60886, 62460
95 61951
Proposed Rules:
39 ....60402, 60406, 60603, 60606, 60896, 60899, 60901, 60904, 60908, 61480, 61482, 61485, 61488, 61990, 62709, 63034, 63036
71 ....60910, 62477, 62479

15 CFR

922 60887

17 CFR

240 61850
275 63205
Proposed Rules:
37 61432
38 61432
40 61432

18 CFR

35 61014

19 CFR

12 62696

20 CFR

220 61958
Proposed Rules:
702 62480

21 CFR

Ch. I 60333
Proposed Rules:
161 61492

22 CFR

40 60574
126 63016

27 CFR

Proposed Rules:
478 61993

28 CFR

16 60583

29 CFR
4044 62706
Proposed Rules:
541 62152
1406 60409

31 CFR
548 63017
586 60889
587 61963
Proposed Rules:
1 63039

32 CFR
Proposed Rules:
310 60411

33 CFR
100 ....60336, 60586, 63018
165 ....60586, 60890, 61963, 62461, 62707, 63018
328 61964
Proposed Rules:
140 62491
146 62491
165 63042

36 CFR
1190 61470

37 CFR
2 62463
7 62463
210 60587
Proposed Rules:
202 60413

38 CFR
3 60336
Proposed Rules:
17 60417
51 60417

39 CFR
Proposed Rules:
3050 ....62023, 62024, 63045

40 CFR
2 63020
52 ....60342, 60591, 60893, 61969, 61971, 62293, 63031
63 60344
82 61977
120 61964
180 ....60594, 62464
300 61470
Proposed Rules:
2 63046
51 63046
52 ....60424, 62303
63 ....62711, 63047
180 ....62492, 62499
260 60609
261 60609
262 60609
263 60609
264 60609
265 60609
266 60609
267 60609
268 60609
270 60609
300 61492

42 CFR
405 60346
410 60346
411 60346
412 60346
413 60346
416 60346
419 60346
424 60346
485 60346
489 60346
Proposed Rules:
419 60610
438 61352
442 61352
483 61352

43 CFR
Proposed Rules:
2360 62025
8360 62500

45 CFR
Proposed Rules:
84 63392
1324 62503

46 CFR
175 62295
Proposed Rules:
4 62491
109 62491

47 CFR
54 60347
76 62471
Proposed Rules:
73 ....60611, 60612, 63048

48 CFR
Ch. 34 60540
515 62472
538 62472
552 62472
Proposed Rules:
Ch. 29 60612
3015 61498
3016 61498
3052 61498

49 CFR
172 60356
Proposed Rules:
191 61746
192 61746
198 61746
571 61674
572 61896

50 CFR
20 60375
217 62898
622 ....61475, 61984, 62301
648 ....60597, 61477
679 ....60383, 60598, 61477
Proposed Rules:
17 ....62043, 62725
224 62522
226 62522
229 62748
622 62309
635 62044

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List August 9, 2023

Public Laws Electronic Notification Service (PENS)

PENS is a free email notification service of newly enacted public laws. To subscribe, go to *https://portalguard.gsa.gov/—layouts/PG/register.aspx.*

Note: This service is strictly for email notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.