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Presidential Documents

Title 3—

The President

Proclamation 10644 of October 5, 2023

National Manufacturing Day, 2023

By the President of the United States of America

A Proclamation

On National Manufacturing Day, we celebrate American workers—the best workers in the world, who are leading a new manufacturing boom in our Nation—and we pledge to keep investing in them to make sure the future is Made in America.

Manufacturing is the backbone of our economy, but for the past few decades, we have not always treated it that way. We were told that trickle-down economics was the only way forward—cutting taxes for the wealthy and big corporations; slashing public investment in priorities like education, infrastructure, and health care; and letting American manufacturing jobs be shipped overseas. As a result, economic inequality only grew. And with every manufacturing town that was hollowed out, communities lost not just jobs but also pride and self-worth.

I ran for President to change that—to grow our economy from the middle out and bottom up, not the top down, moving from trickle-down economics to what some in the press are calling ''Bidenomics.'' Our plan is working. We have seen over 13 million new jobs created, including 800,000 manufacturing jobs. Unemployment has been below 4 percent for the longest stretch in over 50 years. And our inflation rate is among the lowest across the world's major economies. It is simple: Bidenomics means we are growing our economy by strengthening the middle class and making things in America again.

As a result, companies are reinvesting in America, building factories that will power our economy for years to come. Since I took office, we have attracted over $500 billion in private investment to American manufacturing and the industries of the future. Real spending on factory construction doubled in the last 2 years, and hit a record high in August, after falling under my predecessor—and so far this year, it has contributed more to gross domestic product growth than any 6 months on record. Instead of exporting American jobs, we are creating American jobs and exporting American products again.

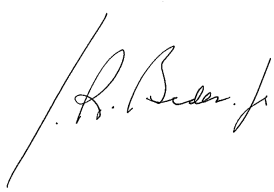
This progress is possible because we are doing what has always worked best in our country—investing in America and in American workers. The Bipartisan Infrastructure Law that I signed puts Americans to work rebuilding our Nation's roads, bridges, ports, and more using American-made materials. We have already announced more than 37,000 new projects across all 50 States. The CHIPS and Science Act is making sure the United States leads the world in innovation by bringing semiconductor manufacturing home so we never again rely on foreign supply chains for the computer chips that power everything in our lives, from cellphones and cars to sophisticated weapons systems. The Inflation Reduction Act is powering a clean energy revolution, increasing our production of essential batteries and clean energy technologies and making sure a sustainable and energy independent future is Made in America. And we are collaborating with employers, unions, community colleges, high schools, and other partners to help more Americans train for the good manufacturing jobs and careers that these investments are creating.

But we are not only making things in America again—we are making sure the Federal Government buys American as well. I started by introducing the most robust updates to the Buy American Act in nearly 70 years, increasing the proportion of American-made content required in federally-acquired goods. I announced new standards requiring that the lumber, glass, fiber optic cables, and other construction materials used in Federal infrastructure projects must be made in America. And I signed an Executive Order requiring Federal research-and-development agencies to prioritize domestic manufacturing when it comes time to bring taxpayer funded inventions to market. When the Federal Government spends taxpayers' money, we are making sure it is on American products made by American workers, creating American jobs.

For too long, too many of us have been told to give up on American manufacturing. I will never do that. We are living through one of the greatest industrial revivals in our Nation's history. There is no one that America cannot outcompete. We used to lead the world in manufacturing, and by investing in America and in our people, we are leading the world in manufacturing growth. Jobs are coming home. Factories are coming home. And we are feeling pride once again in the phrase that is finally a reality and not just a slogan: ''Made in America.''

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim October 6, 2023, as National Manufacturing Day. I encourage all Americans to look for ways to get involved in your community and join me in participating in National Manufacturing Day and, most importantly, buying American.

IN WITNESS WHEREOF, I have hereunto set my hand this fifth day of October, in the year of our Lord two thousand twenty-three, and of the Independence of the United States of America the two hundred and forty-eighth.



[FR Doc. 2023–22581
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Rules and Regulations

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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

Federal Crop Insurance Corporation

7 CFR Part 457

[Docket ID FCIC–23–0004]

RIN 0563–AC83

Actual Production History (APH) and Other Crop Insurance Transparency; Corrections

AGENCY: Federal Crop Insurance Corporation, U.S. Department of Agriculture (USDA).

ACTION: Correcting amendment.

SUMMARY: On August 30, 2023, the Federal Crop Insurance Corporation corrected the Common Crop Insurance Policy (CCIP) Basic Provisions, Arizona-California Citrus Crop Insurance Provisions, California Avocado Crop Insurance Provisions, Macadamia Nut Crop Insurance Provisions, and the Texas Citrus Fruit Crop Insurance Provisions. In reviewing the changes made, FCIC found incorrect crop years in the Crop Provisions. This document makes the corrections.

DATES: Effective October 11, 2023.

FOR FURTHER INFORMATION CONTACT: Francie Tolle; telephone (816) 926–7730; email *francie.tolle@usda.gov.* Persons with disabilities who require alternative means of communication should contact the USDA Target Center at (202) 720–2600 or (844) 433–2774.

SUPPLEMENTARY INFORMATION:

Background

On August 30, 2023, a correction to the ''Actual Production History (APH) and Other Crop Insurance Transparency'' was published at 88 FR 59789 revising several references to subpart G and production reporting requirements for producers to report ''current'' year production rather than ''previous'' year production in various Crop Provisions. That correction inadvertently failed to revise the applicable crop year in the introductory text of the Arizona-California Citrus, California Avocado, Macadamia Nut and Texas Citrus Fruit Crop Provisions. This document makes those corrections.

List of Subjects in 7 CFR Part 457

Acreage allotments, Crop insurance, Reporting and recordkeeping requirements.

Accordingly, 7 CFR part 457 is corrected by making the following amendments:

PART 457—COMMON CROP INSURANCE REGULATIONS

■ 1. The authority citation for part 457 continues to read as follows:

Authority: 7 U.S.C. 1506(l), 1506(o).

§ 457.119 [Amended]

■ 2. Amend § 457.119 in the introductory text by removing the year ''2024'' and adding ''2025'' in its place.

§ 457.121 [Amended]

■ 3. Amend § 457.121 in the introductory text by removing the year ''2024'' and adding ''2025'' in its place.

§ 457.131 [Amended]

■ 4. Amend § 457.131 in the introductory text by removing the year ''2024'' and adding ''2025'' in its place.

§ 457.175 [Amended]

■ 5. Amend § 457.175 in the introductory text by removing the year ''2024'' and adding ''2025'' in its place.

Delores Dean,

Acting Manager, Federal Crop Insurance Corporation.

[FR Doc. 2023–22469 Filed 10–10–23; 8:45 am]

BILLING CODE 3410–08–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 125

RIN 3245–AH28

National Defense Authorization Act of 2020, Credit for Lower Tier Subcontracting and Other Amendments

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: The U.S. Small Business Administration (SBA) is amending its regulations to implement provisions of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020. The final rule will permit a prime contractor with an individual subcontracting plan to apply credit for subcontracts to small businesses at lower tiers toward its subcontracting goals. To do so, the prime contractor would incorporate the lower-tier subcontracting performance into its subcontracting-plan goals.

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

FOR FURTHER INFORMATION CONTACT: Roman Ivey, Program Analyst, Office of Policy Planning and Liaison, Small Business Administration, at *roman.ivey@sba.gov,* (202) 401–1420.

SUPPLEMENTARY INFORMATION:

I. Background Information

The SBA is revising its Small Business Subcontracting Plan regulations in 13 CFR 125.3 in response to changes made in section 870 of the National Defense Authorization Act (NDAA) of 2020, Public Law 116–92. Specifically, section 870 made changes to section 8(d) of the Small Business Act, 15 U.S.C. 637(d), regarding the requirements that apply to a Federal contractor seeking to obtain subcontracting credit on certain types of Federal contracts. SBA published a proposed rule on December 19, 2022, 87 FR 77529, to implement section 870. After receiving comments from the public, SBA finalizes the rule with the changes described below.

Most Federal contracts require the awardee to enter into a subcontracting plan that includes percentage goals for using small businesses and subcategories of small businesses. Subcontracting plans apply to Federal contracts exceeding $750,000 ($1.5 million for construction), unless the awardee is a small business, the contract does not offer subcontracting opportunities, or the contract will be performed entirely outside the United States and its outlying areas. Prior to SBA's final rule published on December 23, 2016, 81 FR 94246, SBA's regulations permitted a prime contractor to count only its first-tier subcontracts toward the goals in its subcontracting plan. The December 2016 Final Rule, however, mandated that prime contractors receive credit for lower-tier

subcontracts under certain criteria. Section 870 changed the criteria for receiving such credit, and this final rule implements those statutory changes.

Section 870 made three changes to subcontracting plan requirements. First, a prime contractor may elect, in some instances, to receive credit toward its subcontracting plan for lower-tier subcontracts to small businesses. Second, agencies are prohibited from setting tier-specific goals for prime contractors that use lower-tier credit. Third, subcontracting plans are required to recite the records that contractors will maintain to substantiate lower-tier credit.

These changes require SBA to change some of the provisions set forth in the December 2016 Final Rule. Most importantly, relying on prior statutory language, the December 2016 Final Rule made it mandatory for contractors with individual subcontracting plans to take credit for lower-tier subcontracts. Section 870, by contrast, removes the mandate and states that prime contractors ''may elect to receive credit'' either for first-tier subcontracts on their own, or for subcontracts at any tier. Accordingly, SBA is changing the prior mandate to an election.

Additionally, the December 2016 Final Rule only allowed for contractors to receive lower-tier subcontracting credit if the contractor had two sets of subcontracting goals. A contractor would have a goal for small-business subcontracting at the first tier, and an additional goal for small business subcontracting at lower tiers. Section 870 prohibits agencies from setting tier-specific goals for prime contractors that use lower-tier credit. To address section 870, SBA is revising the regulations so that all prime contractors will have only one set of subcontracting goals. This rule also implements the requirement from section 870 that contractors include in their subcontracting plans a statement of the types of records they will maintain to substantiate subcontracting credit.

Section 870 further created a new subparagraph 8(d)(16)(B) in the Small Business Act, 15 U.S.C. 637(d)(16)(B), that requires agencies to collect, report, and review data on compliance with subcontracting plans. The new subparagraph duplicates existing statutory language in section 8(d)(7) of the Small Business Act, 15 U.S.C. 637(d)(7), and has already been implemented in SBA's regulations at 13 CFR 125.6(f)(8). Therefore, no regulatory changes are necessary to implement new subparagraph 8(d)(16)(B).

SBA received 10 comments in response to the proposed rule. The following section discusses and responds to the comments.

II. Summary of and Response to Comments

Support for the Rule

Comment: SBA received numerous comments expressing support for the proposed changes that are implemented by this final rule. One commenter specifically highlighted that this rule will increase small business utilization in Federal contracting.

Response: SBA acknowledges the commenters' support. SBA will implement the rule with the changes as noted below.

Outside the Scope of the Rule

Comments: SBA received four comments that were unrelated in any way to the proposed rule or the issue of credit for lower-tier subcontracting.

Response: As these comments do not relate to the rulemaking, SBA will not provide a response to these comments.

Comment: SBA received one comment regarding the applicability of lower-tier subcontracting credit for Small Business Participation Plans.

Response: Small Business Participation Plans are not within the purview of SBA regulations and thus are not impacted by this final rule.

Opposition to the Rule

Comments: SBA received two comments that opposed the proposed changes that are implemented by this final rule. One commenter opposed the rule on the basis that it grants credit to a prime contractor for the subcontracting work done by a first-tier or lower-tier subcontractor. This commenter emphasized that prime contractors would be able to get credit for something that they do not take full responsibility for. Another commenter opposed the rule on the basis that it would increase costs to the government.

Response: SBA is implementing these regulatory changes in line with the statutory mandate from section 870. In addition, SBA does not agree with the concerns of these commenters. Prime contractors will have to take some level of responsibility for lower-tier subcontracting in their subcontracting plan and compliance review. In addition, there is no basis for concluding that this rule will result in an increased cost to the government. Therefore, these comments do not justify SBA failing to implement the NDAA for FY 2020.

Concerns With Implementation in eSRS

Comments: Two commenters expressed concern with how the Electronic Subcontracting Reporting System (eSRS) would be able to handle the new reporting and elections of lower-tier subcontracting under this rule. Specifically, they highlight issues with certifying subcontractor data entries and limitations in Individual Subcontractor Reports (ISRs) as points of concern.

Response: SBA does not believe that this final rule needs to determine exactly how the new lower-tier subcontracting election and reporting will work within eSRS. Prime contractors are not responsible for certifying the data entries input by subcontractors into eSRS. Any potential issues can be resolved by the technical teams that run eSRS.

Applicability of ''Good Faith Effort'' and Liquidated Damages to Lower-Tier Subcontracting

Comments: One commenter sought clarification on the applicability of ''good faith effort'' and liquidated damages to lower-tier subcontracting. Presumably, this commenter was referring to those terms as they are used in the context of subcontracting goals and performance under 13 CFR 125.3. This commenter also sought clarification on the standard of review that a prime contractor is subject to with respect to first-tier and lower-tier subcontractor performance. SBA also presumes this comment refers to Compliance Reviews which are described in 13 CFR 125.3(f).

Response: SBA is not altering any regulatory language other than what is noted below in this final rule. Thus, prime contractors are still subject to the requirement to make good faith efforts to meet subcontracting goals even when a prime contractor elects to receive credit for lower-tier subcontracting. In addition, an agency may impose liquidated damages if a contractor fails to demonstrate good faith effort or fails to provide a corrective action plan after receiving a marginal or unsatisfactory rating following a Compliance Review. 13 CFR 125.3(f)(5)(i).SBA is also declining to adopt a preferential or lenient review standard for Compliance Reviews as that process is described in 13 CFR 125.3(f).

Flow-Down of Federal Acquisition Regulation (FAR) Clauses to All Subcontracting Levels

Comment: One commenter requested that SBA provide regulatory language to direct flow-down of relevant FAR clauses (48 CFR Chapter 1) to all applicable subcontracts so that prime contractors can more easily rely on first-tier and lower-tier subcontractors to

provide data necessary to comply with subcontracting requirements.

Response: Subcontracting flow-down clauses are already mandated under the CFR and FAR regulations. Therefore, including such language in this rule would be duplicative and unnecessary.

Ensuring Subcontractor Compliance

Comment: One commenter requested SBA assistance with holding other-than-small subcontractors accountable for their lower-tier subcontracting plans. This commenter specifically requested that SBA define its role in holding these subcontractors accountable when they fail to meet lower-tier subcontracting goals.

Response: SBA has an interest in seeing all subcontracting plans—at all levels of subcontracting—followed to ensure maximum small business utilization in Federal procurement. To that end, there should be consequences for subcontractors that fail to meet lower-tier subcontracting requirements. Prime contractors can accomplish this by not subcontracting to firms that continuously fail to meet subcontracting requirements. In some cases, it may be appropriate for the government to send a ''show cause'' letter that proposes debarment for subcontractors that repeatedly fail to meet their lower-tier subcontracting goals.

Applicability to Commercial Goods and Services

Comment: One commenter requested that commercial goods and services be omitted from the reporting requirements on prime contractors and subcontractors. This commenter cited a FAR clause that exempts small business reporting requirements for commercial goods and services.

Response: This comment is not related to lower-tier subcontracting credit which is the focus of this rule. This rule does not change any of the reporting requirements for commercial goods and services, it merely allows a prime contractor to elect to receive credit for lower tier subcontracting. The exception to reporting for commercial goods and services found at FAR 52.219–9(j) remains in place. Commercial goods and services could be part of any subcontracting plan so changing the reporting requirements for them would require a much broader rulemaking than the instant one.

Timeline for Incorporating Lower-Tier Subcontracting Plan

Comment: One commenter requested a specific timeline for incorporating lower-tier subcontracting goals of within 90 days of contract award. The commenter noted the difficulty in gathering the required information from first-tier and lower-tier subcontractors in order to prepare a full subcontracting plan especially when relying on input from first-tier and lower-tier subcontractors.

Response: SBA is not adopting this timeline within 13 CFR 125.3(a)(1)(i)(C)(*1*). All prime contractors are required to have a subcontracting plan in place by the time of award in those cases where a subcontracting plan is mandated by 13 CFR 125.3(a).

Remove Restriction on Governmentwide and Multi-Agency Contracts

Comments: One commenter requested that SBA remove the language in the new regulations that would prohibit lower-tier subcontracting credit for governmentwide and multi-agency contracts. This commenter argued that SBA's proposed regulatory change enlarges the restrictions on lower-tier subcontracting as written in section 870. They requested that SBA strike the language referring to governmentwide and multi-agency contracts in proposed 13 CFR 125.3(a)(1)(i)(C)(*5*).

Response: The restriction on governmentwide and multi-agency contracts comes directly from the language of section 870. The categories listed in the second sentence of proposed regulation 13 CFR 125.3(a)(1)(i)(C)(*5*) are all synonymous with ''more than one contract with one or more Federal agencies, or to one contract with more than one Federal agency.'' Thus, SBA is declining to adopt this comment as it is counter to the plain language of section 870.

Clarification on Definition of ''Single Contract With One Federal Agency''

Comment: One commenter requested that SBA define what is meant by a single contract with one Federal agency. Specifically, this commenter wanted to know whether individual branches (Army, Navy, etc.) within the Department of Defense are treated as separate agencies.

Response: The term ''Executive Agency'' is defined in FAR 2.101. In this specific example, Army and Navy would be treated as separate agencies for Federal procurement.

Whether a Firm Can Opt-In to the Lower-Tier Subcontracting Credit During Contract Performance

Comments: One commenter asked whether it is possible to ''opt-in'' to receiving credit for lower-tier subcontracting during the performance of a contract. This commenter highlighted examples where the use of an other-than-small subcontractor may not be known until years into the performance of a contract. In such cases it may be appropriate for the prime contractor to elect to receive credit for lower-tier subcontracting well after contract award.

Response: SBA recognizes that there may be instances when a prime contractor is unaware of subcontracting opportunities for other-than-small firms until after contract award and during performance. However, prime contractors can always request a modification of their subcontracting plan from the contracting officer to account for newly discovered other-than-small subcontractors or other changed circumstances.

Section-by-Section Analysis

Section 125.3(a)

SBA is changing the threshold for a required subcontracting plan to $750,000. This makes the threshold consistent with the FAR subpart 19.7 and with other references to the threshold in § 125.3.

Section 125.3(a)(1)(i)(C)

SBA is revising the language of 13 CFR 125.3(a)(1)(i)(C) to incorporate the two statutory changes from section 870 that differ from SBA's December 2016 rule: creating an election for using lower-tier subcontracting credit and prohibiting more than one set of goals.

First, the revised language makes lower-tier subcontracting credit discretionary in some circumstances. A prime contractor may elect to take credit for lower-tier subcontractors only when the subcontracting plan applies to a single contract with one Federal agency. In other situations—*i.e.,* where the plan applies to more than one contract or to a single contract with more than one agency—section 870 prohibits the prime contractor from receiving credit for lower-tier subcontracting. Commercial plans and comprehensive subcontracting plans therefore are not eligible to use lower-tier subcontracting credit. They must instead rely solely on first-tier subcontracts. Additionally, governmentwide contracts and multi-agency contracts are not permitted to use lower-tier subcontracting credit.

Where a prime contractor elects to include lower-tier subcontracts towards its goal, the prime contractor will be credited with lower-tier subcontracts that are reported under lower-tier subcontracting plans. This rule does not require prime contractors to submit additional reports. Prime contractors will be required to report only their

first-tier awards. Lower-tier subcontracting awards are required to be reported by the prime contractor's lower-tier subcontractors in accordance with their subcontracting plans and SBA's regulations. SBA believes that only having each subcontract at any tier reported once will help prevent duplicative counting of the same awards.

Second, the rule eliminates the prior provision that a prime contractor would have two sets of subcontracting goals—one for the first tier and one for lower tiers. Instead, the prime contractor will incorporate the subcontracting-plan goals of its lower-tier subcontractors into its individual-subcontracting-plan goals.

Section 125.3(c)

SBA is creating a new requirement codified at 13 CFR 125.3(c)(1)(xii) to incorporate the new recordkeeping requirements on contractors with subcontracting plans. Specifically, prime contractors are required to maintain records of the procedures used to substantiate the credit they elect to receive for lower-tier subcontracting under 13 CFR 125.3(a)(1)(i)(C).

III. Compliance With Executive Orders 12866, 12988, 13132, 13175, and 13563, the Congressional Review Act (5 U.S.C. 801–808), the Paperwork Reduction Act (44 U.S.C., Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is not a significant regulatory action for the purposes of Executive Order 12866.

Executive Order 13563

SBA previously solicited comments from the public on a proposal to provide credit for lower-tier subcontracting. 80 FR 60300. Those comments were considered for this rulemaking. Additionally, as part of its ongoing efforts to engage stakeholders in the development of its regulations, SBA has solicited comments and suggestions from procuring agencies on how to best implement section 870. SBA has incorporated those comments and suggestions to the extent feasible.

Executive Order 12988

For purposes of Executive Order 12988, SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of that Executive order, to minimize litigation, eliminate ambiguity, and reduce burden. This rule has no preemptive or retroactive effect.

Executive Order 13175

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.

Executive Order 13132

For the purpose of Executive Order 13132, SBA has determined that this rule 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 layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Ch. 35

This rule updates the requirements for small business subcontracting plans to add a requirement for prime contractors to include in their subcontracting plans a statement of the types of records they will maintain to substantiate subcontracting credit. The FAR rule implementing this requirement will account for this information collection, and clearance for the information collection will be obtained by the FAR Council.

Regulatory Flexibility Act, 5 U.S.C. 601–612

According to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, when an agency issues a rulemaking, it must prepare a regulatory flexibility analysis to address the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. The RFA defines ''small entity'' to include ''small businesses,'' ''small organizations,'' and ''small governmental jurisdictions.''

This rule concerns various aspects of SBA's contracting programs. As such, the rule relates to small business concerns, but would not affect ''small organizations'' or ''small governmental jurisdictions'' because those programs generally apply only to ''business concerns'' as defined by SBA regulations, in other words, to small businesses organized for profit. ''Small organizations'' or ''small governmental jurisdictions'' are non-profits or governmental entities and do not generally qualify as ''business concerns'' within the meaning of SBA's regulations.

There are approximately 350,000 concerns registered as small business concerns in the System for Award Management (SAM) that could potentially be impacted by the implementation of section 870. However, SBA cannot say with any certainty how many will be impacted because we do not know how many of these concerns participate in government contracting as subcontractors. A firm is required to register in SAM in order to participate in Federal contracting as a prime contractor, but not for purposes of subcontracting. Therefore, there are no known compliance or other costs imposed by this rule on small business concerns.

In sum, the regulatory amendments implemented by this rule will not have a disparate impact on small businesses and will increase their opportunities to participate in Federal Government contracting as subcontractors without imposing any additional costs. For the reasons discussed, SBA certifies that this rule will not have a significant economic impact on a substantial number of small business concerns.

Congressional Review Act (5 U.S.C. 801–808)

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

List of Subjects in 13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Small business subcontracting.

For the reasons stated in the preamble, SBA amends 13 CFR part 125 as follows:

PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 1. The authority citation for 13 CFR part 125 is revised to read as follows:

Authority: 15 U.S.C. 632(p), (q), 634(b)(6), 637, 644, 657f, 657q, 657r, and 657s; 38 U.S.C. 501 and 8127.

■ 2. Amend § 125.3 by:
■ a. Removing the number ''$650,000'' in paragraph (a) introductory text and adding in its place the number ''$750,000'';
■ b. Revising paragraph (a)(1)(i)(C);
■ c. Removing the word ''and'' after the semicolon at the end of paragraph (c)(1)(xi);
■ d. Redesignating paragraph (c)(1)(xii) as paragraph (c)(1)(xiii); and
■ e. Adding a new paragraph (c)(1)(xii).

The revision and addition read as follows:

§ 125.3 What types of subcontracting assistance are available to small businesses?

(a) * * *
(1) * * *
(i) * * *

(C) Where the subcontracting goals pertain only to a single contract with one Federal agency, the contractor may elect to receive credit for small business concerns performing as first-tier subcontractors or subcontractors at any tier pursuant to the subcontracting plans required under paragraph (c) of this section in an amount equal to the dollar value of work awarded to such small business concerns. The election must be recorded in the subcontracting plan. If the contractor elects to receive credit for subcontractors at any tier, the following requirements apply:

(*1*) The prime contractor must incorporate the subcontracting-plan goals of their lower-tier subcontractors in its individual-subcontracting-plan goals.

(*2*) To receive credit for their subcontracting, lower-tier subcontractors must have their own individual subcontracting plans.

(*3*) The prime contractor and any subcontractor with a subcontracting plan are responsible for reporting on subcontracting performance under their contracts or subcontracts at their first tier. This reporting method applies to both individual subcontracting reports and summary subcontracting reports.

(*4*) The prime contractor's performance under its individual subcontracting plan will be calculated by aggregating the prime contractor's first-tier subcontracting achievements with the achievements of the prime contractor's lower-tier subcontractors that have flow-down subcontracting plans.

(*5*) If the subcontracting goals pertain to more than one contract with one or more Federal agencies, or to one contract with more than one Federal agency, the prime contractor shall receive credit only for first-tier subcontractors that are small business concerns. This restriction applies to all commercial plans, all comprehensive subcontracting plans with the Department of Defense, governmentwide contracts, and multi-agency contracts.

* * * * *

(c) * * *
(1) * * *

(xii) The prime contractor must provide a written statement of the types of records it will maintain to demonstrate that procedures have been adopted to substantiate the subcontracting credit that the prime contractor elects under paragraph (a)(1)(i)(C) of this section; and

* * * * *

Isabella Casillas Guzman,

Administrator.

[FR Doc. 2023–22466 Filed 10–10–23; 8:45 am]

BILLING CODE 8026–09–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 125

RIN 3245–AH70

Ownership and Control and Contractual Assistance Requirements for the 8(a) Business Development Program; Correction

AGENCY: U.S. Small Business Administration.

ACTION: Correcting amendments.

SUMMARY: The Small Business Administration (SBA) is correcting a final rule that was published in the **Federal Register** on April 27, 2023. The rule implemented several changes to the ownership and control requirements for the 8(a) Business Development program, implemented changes relating to 8(a) contracts, and implemented a statutory amendment in the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2022.

DATES: Effective October 11, 2023.

FOR FURTHER INFORMATION CONTACT: Donna Fudge, U.S. Small Business Administration, Office of Policy, Planning, and Liaison, 409 Third Street SW, Washington, DC 20416; (202) 205–6363; *Donna.fudge@sba.gov*. This phone number may also be reached by individuals who are deaf or hard of hearing, or who have speech disabilities, through the Federal Communications Commission's TTY-Based Telecommunications Relay Service teletype service at 711.

SUPPLEMENTARY INFORMATION: On April 27, 2023, SBA amended its regulation to implement changes to the ownership and control requirements for the 8(a) Business Development program, implement changes related to 8(a) contracts, and implement a statutory amendment from section 863 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2022. This is the second set of corrections. The first set of corrections was published in the **Federal Register** on May 5, 2023. (88 FR 28985). This document augments those corrections.

In the final rule at § 125.8(b)(iv), SBA inadvertently omitted a regulatory change instruction to clarify language stating how the funds remaining in the joint venture bank account at the conclusion of the joint venture contract(s) and/or termination of the joint venture are to be distributed. This paragraph is revised to state that the funds remaining in the joint venture bank account shall be distributed at the termination of the joint venture according to the percentage of ownership.

This document also corrects a citation in 13 CFR 125.4(c)(5).

List of Subjects in 13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Technical assistance.

PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 1. The authority citation for part 125 continues to read as follows:

Authority: 15 U.S.C. 632(p), (q), 634(b)(6), 637, 644, 657r and 657s.

■ 2. Amend § 125.4 by revising (c)(5) to read as follows:

§ 125.4 What is the Government property sales assistance program?

* * * * *

(c) * * *

(5) These provisions are contained in §§ 121.501 through 121.512 of this chapter.

■ 3. Amend § 125.8 by revising (b)(2)(iv) to read as follows:

§ 125.8 What requirements must a joint venture satisfy to submit an offer for a procurement or sale set aside or reserved for small business?

* * * * *

(b) * * *
(2) * * *

(iv) Stating that the small business participant(s) must receive profits from

the joint venture commensurate with the work performed by them, or a percentage agreed to by the parties to the joint venture whereby the small business participant(s) receive profits from the joint venture that exceed the percentage commensurate with the work performed by them, and that at the termination of a joint venture, any funds remaining in the joint venture bank account shall be distributed according to the percentage of ownership;

* * * * *

Larry Stubblefield,

Acting Associate Administrator, Government Contracting and Business Development.

[FR Doc. 2023–22370 Filed 10–10–23; 8:45 am]

BILLING CODE 8026–09–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 21

[Docket No. FAA–2023–0623]

Policy for Type Certification of Very Light Airplanes as a Special Class of Aircraft

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notification of policy.

SUMMARY: The FAA announces the policy for the type certification of Very Light Airplanes (VLA) as a special class of aircraft under the Federal Aviation Regulations.

DATES: This policy is effective October 11, 2023.

FOR FURTHER INFORMATION CONTACT: Hieu Nguyen, Product Policy Management, AIR–62B, Policy and Standards Division, Aircraft Certification Service, Federal Aviation Administration; telephone 816–329–4123; email *hieu.nguyen@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed policy, which published in the **Federal Register** on August 9, 2023 (88 FR 53815). The FAA received comments from two commenters. The comments are available to view in Docket No. FAA–2023–0623 at *www.regulations.gov.*

Discussion of Comments

The FAA received one comment from an individual that was unrelated to the notice and outside the scope of the proposed policy. The other comment was a request from the General Aviation Manufacturers Association asking for a 30-day extension to the comment period. However, the FAA did not extend the comment period. The FAA chose a 30-day comment period because it balances the need to have a final policy available for applicants with the need for interested persons to have time to comment on the proposed policy. The FAA determined that a 30-day comment period provided adequate time for interested persons to submit comments and that it would not be in the public interest to extend the comment period.

Authority Citation

The authority citations for these airworthiness criteria are as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

Policy

The FAA will continue to allow type certification of VLA as a special class of aircraft under 14 CFR 21.17(b) using CS–VLA or JAR–VLA requirements, while also allowing eligibility for certification as a normal category airplane in accordance with part 23 using accepted means of compliance. The FAA accepts CS–VLA and JAR–VLA airworthiness criteria as providing an equivalent level of safety under § 21.17(b) special class type certification of VLA airplanes. The FAA will consider proposals for airplane designs that differ from the VLA limits defined in AC 21.17–3 for type certification as a special class of aircraft under § 21.17(b), provided the VLA were certificated to the JAR–VLA or CS–VLA requirements plus additional airworthiness criteria the FAA finds appropriate and applicable for the proposed design. Additional design requirements may include but are not limited to the airworthiness criteria identified in the following paragraphs. Other additional airworthiness criteria may be required to address specific design proposals.

Advanced Avionic Displays

If the airplane has advanced avionic displays installed, the following requirements from 14 CFR part 23 apply:

- 14 CFR 23.1307 at amendment 23–49, Miscellaneous Equipment.
- 14 CFR 23.1311 at amendment 23–62, Electronic Display Instrument Systems.
- 14 CFR 23.1321 at amendment 23–49, Arrangement and Visibility.
- 14 CFR 23.1359 at amendment 23–49, Electrical System Fire Protection.

Winglets

If the airplane has any outboard fins or winglets installed, the design must comply with JAR 23.445.

Engine Mount to Composite Airframe

VLA.001

The requirements in this section are applicable to airplanes with an engine mounting to composite airframe. Tests must be performed that demonstrate that the interface between the metallic engine mount and the glass fiber reinforced plastic fuselage withstand a fire for 15 minutes while carrying loads under the following conditions:

(a) With one lost engine mount fitting the loads are distributed over the remaining three engine mount fittings. The most critical of these fittings must be chosen for the test.

The loads are:

(1) In Z-direction the mass of the propulsion unit multiplied by a maneuvering load factor resulting from a 30° turn for 15 minutes, superimposed by a maneuvering load of 3 seconds representing the maximum positive limit maneuvering load factor of n=3.8 from JAR–VLA 337(a).

(2) In X-direction the engine propulsion force at maximum continuous power for 5 minutes.

(b) The flame to which the component test arrangement is subjected must provide a temperature of 500 °C within the target area.

(c) The flame must be large enough to maintain the required temperature over the entire test zone, *i.e.,* the fitting on the engine compartment side.

(d) It must be shown that the test equipment, *e.g.,* burner and instrumentation are of sufficient power, size, and precision to yield the test requirements arising from paragraphs (a) through (c) of this section.

Night-VFR Operations

VLA.005

The requirements in sections VLA.005 through VLA.105 are applicable to airplanes with a single engine (spark- or compression-ignition) having not more than two seats, with a maximum certificated takeoff weight of not more than 750 kg and a stalling speed in the landing configuration of not more than 83 km/h (45 knots)(CAS), to be approved for day-VFR [visual flight rules] or for day-and night-VFR.

VLA.010

(a) Any short period oscillation not including combined lateral-directional oscillations occurring between the stalling speed and the maximum allowable speed appropriate to the

configuration of the airplane must be heavily damped with the primary controls—

(1) Free; and

(2) In a fixed position.

(b) Any combined lateral-directional oscillations (''Dutch roll'') occurring between the stalling speed and the maximum allowable speed appropriate to the configuration of the airplane must be damped to 1/10 amplitude in 7 cycles with the primary controls—

(1) Free; and

(2) In a fixed position.

(c) Any long period oscillation of the flight path (phugoid) must not be so unstable as to cause an unacceptable increase in pilot workload or otherwise endanger the airplane. When under the conditions specified in CS–VLA 175, the longitudinal control force required to maintain speeds differing from the trimmed speed by at least plus or minus 15% is suddenly released, the response of the airplane must not exhibit any dangerous characteristics nor be excessive in relation to the magnitude of the control force released.

VLA.015

The pilot compartment must be free from glare and reflections that could interfere with the pilot's vision under all operations for which the certification is requested. The pilot compartment must be designed so that—

(a) The pilot's view is sufficiently extensive, clear, and undistorted, for safe operation;

(b) The pilot is protected from the elements so that moderate rain conditions do not unduly impair the pilot's view of the flight path in normal flight and while landing; and

(c) Internal fogging of the windows covered under paragraph (a) of this section can be easily cleared by the pilot unless means are provided to prevent fogging.

VLA.020

(a) The airplane must be so designed that unimpeded and rapid escape is possible in any normal and crash attitude.

(b) The opening system must be designed for simple and easy operation. It must function rapidly and be designed so that it can be operated by each occupant strapped in their seat, and also from outside the cockpit. Reasonable provisions must be provided to prevent jamming by fuselage deformation.

(c) The exit must be marked for easy location and operation even in darkness.

VLA.025

(a) The engine must meet the specifications of CS–E, amendment 6,[1] or 14 CFR part 33, amendment 33–36, for night-VFR operation.

(b) Restart capability. An altitude and airspeed envelope must be established for the airplane for in-flight engine restarting and the installed engine must have a restart capability within that envelope.

VLA.030

(a) For day-VFR operation, the propeller must meet the specifications of CS–22 Subpart J, amendment 3. For night-VFR operations the propeller and its control system must meet the specifications of CS–P, amendment 2,[2] or 14 CFR part 35, amendment 35–10, except for fixed pitch propellers, for which CS–22 [3] subpart J is sufficient.

(b) Engine power and propeller shaft rotational speed may not exceed the limits for which the propeller is certificated or approved.

VLA.035

If an air filter is used to protect the engine against foreign material particles in the induction air supply—

(a) Each air filter must be capable of withstanding the effects of temperature extremes, rain, fuel, oil, and solvents to which it is expected to be exposed in service and maintenance; and

(b) Each air filter must have a design feature to prevent material separated from the filter media from re-entering the induction system and interfering with proper fuel metering operation.

VLA.040

(a) Each exhaust system must ensure safe disposal of exhaust gases without fire hazard or carbon monoxide contamination in the personnel compartment.

(b) Each exhaust system part with a surface hot enough to ignite flammable fluids or vapours must be located or shielded so that leakage from any system carrying flammable fluids or vapours will not result in a fire caused by impingement of the fluids or vapours on any part of the exhaust system including shields for the exhaust system.

(c) Each exhaust system component must be separated by fireproof shields from adjacent flammable parts of the airplane that are outside the engine compartment.

(d) No exhaust gases may discharge dangerously near any fuel or oil system drain.

(e) Each exhaust system component must be ventilated to prevent points of excessively high temperature.

(f) Each exhaust heat exchanger must incorporate means to prevent blockage of the exhaust port after any internal heat exchanger failure.

(g) No exhaust gases may be discharged where they will cause a glare seriously affecting the pilot's vision at night.

VLA.045

(a) The power or supercharger control must give a positive and immediate responsive means of controlling its engine or supercharger.

(b) If a power control incorporates a fuel shut-off feature, the control must have a means to prevent the inadvertent movement of the control into the shut-off position. The means must—

(1) Have a positive lock or stop at the idle position; and

(2) Require a separate and distinct operation to place the control in the shut-off position.

(c) Each power or thrust control must be designed so that if the control separates at the engine fuel metering device, the airplane is capable of continuing safe flight and landing.

VLA.050

(a) The control must require a separate and distinct operation to move the control toward lean or shut-off position.

(b) Each manual engine mixture control must be designed so that, if the control separates at the engine fuel metering device, the airplane is capable of continuing safe flight and landing.

VLA.055

If warning, caution, or advisory lights are installed in the cockpit, they must be—

(a) Red, for warning lights (lights indicating a hazard which may require immediate corrective action);

(b) Amber, for caution lights (lights indicating the possible need for future corrective action);

(c) Green, for safe operation lights; and

(d) Any other color, including white, for lights not described in paragraphs (a) through (c) of this section, provided the

[1] CS–E amendment 6: Certification Specifications and Acceptable Means of Compliance for Engines can be found in Docket No. FAA–2023–0623 at *https://www.regulations.gov*.

[2] CS–P amendment 2: Certification Specifications and Acceptable Means of Compliance for Propellers can be found in Docket FAA–2023–0623 at *https://www.regulations.gov*.

[3] CS–22 amendment 3: Certification Specifications, Acceptable Means of Compliance and Guidance Material for Sailplanes and Powered Sailplanes can be found in Docket No. FAA–2023–0623 at *https://www.regulations.gov*.

color differs sufficiently from the colors prescribed in paragraphs (a) through (c) of this section to avoid possible confusion.

(e) If warning, caution, or advisory lights are installed in the cockpit, they must be effective under all probable cockpit lighting conditions.

VLA.060

(a) Each instrument provided with static pressure case connections must be so vented that the influence of airplane speed, the opening and closing of windows, moisture, or other foreign matter, will not significantly affect the accuracy of the instruments.

(b) The design and installation of a static pressure system must be such that—

(1) Positive drainage of moisture is provided;

(2) Chafing of the tubing, and excessive distortion or restriction at bends in the tubing, is avoided; and

(3) The materials used are durable, suitable for the purpose intended, and protected against corrosion.

(c) Each static pressure system must be calibrated in flight to determine the system error. The system error, in indicated pressure altitude, at sea-level, with a standard atmosphere, excluding instrument calibration error, may not exceed ±9 m (±30 ft) per 185 km/h (100 knots) speed for the appropriate configuration in the speed range between 1.3 V_{SO} with flaps extended and 1.8 V_{S1} with flaps retracted. However, the error need not be less than ±9 m (±30 ft).

VLA.065

For each airplane—

(a) Each gyroscopic instrument must derive its energy from power sources adequate to maintain its required accuracy at any speed above the best rate-of-climb speed;

(b) Each gyroscopic instrument must be installed so as to prevent malfunction due to rain, oil, and other detrimental elements; and

(c) There must be a means to indicate the adequacy of the power being supplied to the instruments.

(d) For Night VFR operation there must be at least two independent sources of power and a manual or an automatic means to select each power source for each instrument that uses a power source.

VLA.070

(a) Electrical system capacity. Each electrical system must be adequate for the intended use. In addition—

(1) Electric power sources, their transmission cables, and their associated control and protective devices, must be able to furnish the required power at the proper voltage to each load circuit essential for safe operation; and

(2) Compliance with paragraph (a)(l) of this section must be shown by an electrical load analysis, or by electrical measurements, that account for the electrical loads applied to the electrical system in probable combinations and for probable durations.

(b) Functions. For each electrical system, the following apply:

(1) Each system, when installed, must be—

(i) Free from hazards in itself, in its method of operation, and in its effects on other parts of the airplane;

(ii) Protected from fuel, oil, water, other detrimental substances, and mechanical damage; and

(iii) So designed that the risk of electrical shock to occupants and ground personnel is reduced to a minimum.

(2) Electric power sources must function properly when connected in combination or independently.

(3) No failure or malfunction of any electric power source may impair the ability of any remaining source to supply load circuits essential for safe operation.

(4) Each electric power source control must allow the independent operation of each source, except that controls associated with alternators that depend on a battery for initial excitation or for stabilization need not break the connection between the alternator and its battery.

(5) Each generator must have an overvoltage control designed and installed to prevent damage to the electrical system, or to equipment supplied by the electrical system, that could result if that generator were to develop an overvoltage condition.

(d) Instruments. There must be a means to indicate to the pilot that the electrical power supplies are adequate for safe operation. For direct current systems, an ammeter in the battery feeder may be used.

(e) Fire resistance. Electrical equipment must be so designed and installed that in the event of a fire in the engine compartment, during which the surface of the firewall adjacent to the fire is heated to 1,100 °C for 5 minutes or to a lesser temperature substantiated by the applicant, the equipment essential to continued safe operation and located behind the firewall will function satisfactorily and will not create an additional fire hazard. This may be shown by test or analysis.

(f) External power. If provisions are made for connecting external power to the airplane, and that external power can be electrically connected to equipment other than that used for engine starting, means must be provided to ensure that no external power supply having a reverse polarity, or a reverse phase sequence, can supply power to the airplane's electrical system. The location must allow such provisions to be capable of being operated without hazard to the airplane or persons.

VLA.075

(a) Each storage battery must be designed and installed as prescribed in this section.

(b) Safe cell temperatures and pressures must be maintained during any probable charging and discharging condition. No uncontrolled increase in cell temperature may result when the battery is recharged (after previous complete discharge)—

(1) At maximum regulated voltage or power;

(2) During a flight of maximum duration; and

(3) Under the most adverse cooling condition likely to occur in service.

(c) Compliance with paragraph (b) of this section must be shown by tests unless experience with similar batteries and installations has shown that maintaining safe cell temperatures and pressures presents no problem.

(d) No explosive or toxic gases emitted by any battery in normal operation, or as the result of any probable malfunction in the charging system or battery installation, may accumulate in hazardous quantities within the airplane.

(e) No corrosive fluids or gases that may escape from the battery may damage surrounding structures or adjacent essential equipment.

(f) Each nickel cadmium battery installation capable of being used to start an engine or auxiliary power unit must have provisions to prevent any hazardous effect on structure or essential systems that may be caused by the maximum amount of heat the battery can generate during a short circuit of the battery or of its individual cells.

(g) Nickel cadmium battery installations capable of being used to start an engine or auxiliary power unit must have—

(1) A system to control the charging rate of the battery automatically so as to prevent battery overheating;

(2) A battery temperature sensing and over-temperature warning system with a means for disconnecting the battery

from its charging source in the event of an overtemperature condition; or

(3) A battery failure sensing and warning system with a means for disconnecting the battery from its charging source in the event of battery failure.

(h) In the event of a complete loss of the primary electrical power generating system, the battery must be capable of providing 30 minutes of electrical power to those loads that are essential to continued safe flight and landing. The 30-minute time period includes the time needed for the pilot(s) to recognize the loss of generated power and to take appropriate load shedding action.

VLA.080

The instrument lights must—

(a) Make each instrument and control easily readable and discernible;

(b) Be installed so that their direct rays, and rays reflected from the windshield or other surface, are shielded from the pilot's eyes; and

(c) Have enough distance or insulating material between current carrying parts and the housing so that vibration in flight will not cause shorting. (A cabin dome light is not an instrument light.)

VLA.085

Each taxi and landing light must be designed and installed so that—

(a) No dangerous glare is visible to the pilots;

(b) The pilot is not seriously affected by halation;

(c) It provides enough light for night operations; and

(d) It does not cause a fire hazard in any configuration.

VLA.090

(a) Electronic equipment and installations must be free from hazards in themselves, in their method of operation, and in their effects on other components.

(b) For operations for which electronic equipment is required, compliance must be shown with CS–VLA 1309.

VLA.095

(a) A placard meeting the requirements of this section must be installed on or near the magnetic direction indicator.

(b) The placard must show the calibration of the instrument in level flight with the engine operating.

(c) The placard must state whether the calibration was made with radio receivers on or off.

(d) Each calibration reading must be in terms of magnetic headings in not more than 30° increments.

(e) If a magnetic non-stabilized direction indicator can have a deviation of more than 10° caused by the operation of electrical equipment, the placard must state which electrical loads, or combination of loads, would cause a deviation of more than 10° when turned on.

VLA.100

The following placards must be plainly visible to the pilot:

(a) A placard stating the following airspeeds (IAS):

(1) Design maneuvering speed, V_A;

(2) The maximum landing gear operating speed, V_{LO}.

(b) A placard stating the following approved operation:

(1) For day-VFR only operation, a placard stating, ''This airplane is classified as a very light airplane approved for day-VFR only, in non-icing conditions. All aerobatic maneuvers, including intentional spinning, are prohibited. See Flight Manual for other limitations.''

(2) If night-VFR operation is approved, a placard stating, ''This airplane is classified as a very light airplane approved for day- and night-VFR operation, in non-icing conditions. All aerobatic maneuvers, including intentional spinning, are prohibited. See Flight Manual for other limitations.''

VLA.105

(a) Airspeed limitations. The following information must be furnished—

(1) Information necessary for the marking of the airspeed limits on the indicator, as required in CS–VLA 1545, and the significance of the color coding used on the indicator.

(2) The speeds V_A, V_{LO}, V_{LE} (maximum landing gear extended speed) where appropriate.

(b) Weights. The following information must be furnished:

(1) The maximum weight.

(2) Any other weight limits, if necessary.

(c) Center of gravity. The established c.g. limits required by CS–VLA 23 must be furnished.

(d) Maneuvers. Authorized maneuvers established in accordance with CS–VLA 3 must be furnished.

(e) Flight load factors. Maneuvering load factors: the following must be furnished—

(1) The factors corresponding to point A and point C in the figure for CS–VLA 333(b), stated to be applicable at V_A.

(2) The factors corresponding to point D and point E of figure 1 of CS–VLA 333(b) to be applicable at never exceed speed, V_{NE}.

(3) The factor with wing flaps extended as specified in CS–VLA 345.

(f) The kinds of operation (day-VFR or day- and night-VFR, whichever is applicable) in which the airplane may be used, must be stated. The minimum equipment required for the operation must be listed.

(g) Powerplant limitations. The following information must be furnished:

(1) Limitation required by CS–VLA 1521.

(2) Information necessary for marking the instruments required by CS–VLA 1549 through 1551.

(3) Fuel and oil designation.

(4) For two-stroke engines, fuel/oil ratio.

(h) Placards. Placards required by CS–VLA 1555 through 1561 must be presented.

Increased Maximum Certificated Takeoff Weight and Increased Stall Speed

VLA.110

If the maximum certificated takeoff weight is higher than 750 kg, but not more than 850 kg, the requirements in sections VLA.120 through VLA.210 apply.

VLA.115

If the stall speed in landing configuration is higher than 45 knots, but not more than 50 knots (CAS), the requirements in section VLA.120 through VLA.210 apply.

VLA.120

The maximum horizontal distance traveled in still air, in km per 1,000 m (nautical miles per 1,000 ft) of altitude lost in a glide, and the speed necessary to achieve this, must be determined with the engine inoperative and its propeller in the minimum drag position, and landing gear and wing flaps in the most favorable available position.

VLA.125

(a) Each seat is to be equipped with at least a 4-point harness system;

(b) The applicant shall evaluate the head strike path with validated methods, and minimize the risk of injury in case of a head contact with the aircraft structure or interior.

(c) The design shall provide reasonable precautions to minimize the lumbar compression loads experienced by occupants in survivable crash landings;

(d) Each seat/harness system shall be statically tested to an ultimate inertia load factor of 18g forward, considering an occupant's mass of 77 kg. The lapbelt should react 60% of this load, and the

upper torso restraint should react 40% of this load.

VLA.130

(a) The airplane, although it may be damaged in emergency landing conditions, must be designed as prescribed in this section to protect each occupant under those conditions.

(b) The structure must be designed to give each occupant reasonable chances of escaping injury in a minor crash landing when—

(1) Proper use is made of seat belts and shoulder harnesses; and

(2) The occupant experiences the ultimate inertia forces listed below:

(i) Upward 3.0g

(ii) Forward 9.0g

(iii) Sideward 1.5g.

(c) Each item of mass within the cabin that could injure an occupant if it came loose must be designed for the ultimate inertia load factors:

(1) Upward, 3.0g;

(2) Forward, 18.0g; and

(3) Sideward, 4.5g.

Engine mount and supporting structure are included in the above analysis if they are installed behind and above the seating compartment.

(d) The structure must be designed to protect the occupants in a complete turnover, assuming, in the absence of a more rational analysis—

(1) An upward ultimate inertia force of 3g; and

(2) A coefficient of friction of 0.5 at the ground.

(e) Each airplane with retractable landing gear must be designed to protect each occupant in a landing—

(1) With the wheels retracted;

(2) With moderate descent velocity; and

(3) Assuming, in the absence of a more rational analysis;

(i) A downward ultimate inertia force of 3g; and

(ii) A coefficient of friction of 0.5 at the ground.

VLA.135

(a) Each baggage compartment must be designed for its placarded maximum weight of contents and for the critical load distributions at the appropriate maximum load factors corresponding to the flight and ground load conditions for the airplane.

(b) There must be means to prevent the contents of any baggage compartment from becoming a hazard by shifting, and to protect any controls, wiring, lines, equipment, or accessories whose damage of failure would affect safe operations.

(c) Baggage compartments must be constructed of materials which are at least flame resistant.

(d) Designs which provide for baggage to be carried must have means to protect the occupants from injury under the ultimate inertia forces specified in CS–VLA 561(b)(2).

(e) If there is no structure between baggage and occupant compartments, the baggage items located behind the occupants and those which might become a hazard in a crash must be secured for 1.33×18g.

VLA.140

(a) General. For each airplane, the following information must be furnished:

(1) The takeoff distance determined under CS–VLA 51, the airspeed at the 15 m height, the airplane configuration (if pertinent), the kind of surface in the tests, and the pertinent information with respect to cowl flap position, use of flight path control devices, and use of the landing gear retraction system.

(2) The landing distance determined under CS–VLA 75, the airplane configuration (if pertinent), the kind of surface used in the tests, and the pertinent information with respect to flap position and the use of flight path control devices.

(3) The steady rate or gradient of climb determined under CS–VLA 65 and 77, the airspeed, power, and the airplane configuration.

(4) The calculated approximate effect on takeoff distance (paragraph (a)(1) of this section), landing distance (paragraph (a)(2) of this section), and steady rates of climb (paragraph (a)(3) of this section), of variations in altitude and temperature.

(5) The maximum atmospheric temperature at which compliance with the cooling provisions of CS–VLA 1041 through 1047 is shown.

(6) The glide performance determined under VLA.120.

(b) Skiplanes. For skiplanes, a statement of the approximate reduction in climb performance may be used instead of new data for skiplane configuration, if—

(1) The landing gear is fixed in both landplane and skiplane configurations;

(2) The climb requirements are not critical; and

(3) The climb reduction in the skiplane configurations is small (0.15 to 0.25 m/s (30 to 50 feet per minute)).

(c) The following information concerning normal procedures must be furnished:

(1) The demonstrated crosswind velocity and procedures and information pertinent to operation of the airplane in crosswinds, and

(2) The airspeeds, procedures, and information pertinent to the use of the following airspeeds:

(i) The recommended climb speed and any variation with altitude.

(ii) V_X (speed for best angle of climb) and any variation with altitude.

(iii) The approach speeds, including speeds for transition to the balked landing condition.

(d) An indication of the effect on takeoff distance of a grass surface as determined from at least one takeoff measurement on short mown dry grass must be furnished.

VLA.145

(a) The rotation speed V_R, is the speed at which the pilot makes a control input with the intention of lifting the airplane out of contact with the runway.

(b) V_R must not be less than stalling speed, V_{S1}.

(c) The Airplane Flight Manual must provide the rotation speed established above for normal takeoff procedures.

If an Equivalent Level of Safety (ELOS) to CS–VLA 1143(g) and CS–VLA 1147(b) is requested, VLA.150 and VLA.155 are applicable.

VLA.150

Power or supercharger control attachment design must include:

(a) Features which are not likely to separate in flight (*i.e.,* a large load-bearing washer adjacent to the outside face of the power control cable rod end fitting which attaches to the fuel-metering device);

(b) Mandatory inspection intervals;

(c) Inspection procedures;

(d) Component replacement criteria.

VLA.155

Mixture control attachment design must include:

(a) Features which are not likely to separate in flight (*i.e.,* a large load-bearing washer adjacent to the outside face of the power control cable rod end fitting which attaches to the fuel-metering device);

(b) Mandatory inspection intervals;

(c) Inspection procedures;

(d) Component replacement criteria.

VLA.160

(a) For an airplane with independently controlled roll and directional controls, it must be possible to produce and to correct roll by unreversed use of the rolling control and to produce and to correct yaw by unreversed use of the directional control, up to the time the airplane stalls.

(b) For an airplane with interconnected lateral and directional controls (2 controls) and for an airplane with only one of these controls, it must be possible to produce and correct roll

by unreversed use of the rolling control without producing excessive yaw, up to the time the airplane stalls.

(c) The wing level stall characteristics of the airplane must be demonstrated in flight as follows: The airplane speed must be reduced with the elevator control until the speed is slightly above the stalling speed, then the elevator control must be pulled back so that the rate of speed reduction will not exceed 1.9 km/h (one knot) per second until a stall is produced, as shown by an uncontrollable downward pitching motion of the airplane, or until the control reaches the stop. Normal use of the elevator control for recovery is allowed after the control has been held against the stop for not less than two seconds.

(d) Except where made inapplicable by the special features of a particular type of airplane, the following apply to the measurement of loss of altitude during a stall:

(1) The loss of altitude encountered in the stall (power on or power off) is the change in altitude (as observed on the sensitive altimeter testing installation) between the altitude at which the airplane pitches and the altitude at which horizontal flight is regained.

(2) If power or thrust is required during stall recovery, the power or thrust used must be that which would be used under the normal operating procedures selected by the applicant for this maneuver. However, the power used to regain level flight may not be applied until flying control is regained.

(e) During the recovery part of the maneuver, it must be possible to prevent more than 15° of roll or yaw by the normal use of controls.

(f) Compliance with the requirements of this section must be shown under the following conditions:

(1) Wing flaps. Retracted, fully extended and each intermediate normal operating position;

(2) Landing gear. Retracted and extended;

(3) Cowl flaps. Appropriate to configuration;

(4) Power

(i) Power off; and

(ii) 75% maximum continuous power. If the power-to-weight ratio at 75% of maximum continuous power results in extreme nose-up attitudes, the test may be carried out with the power required for level flight in the landing configuration at maximum landing weight and a speed of 1.4 stalling speed, V_{S0}, but the power may not be less than 50% maximum continuous power.

(5) Trim. The airplane trimmed at a speed as near 1.5 V_{S1} as practicable.

(6) Propeller. Full increase rpm position for the power off condition.

VLA.165

Turning flight and accelerated stalls must be demonstrated in tests as follows:

(a) Establish and maintain a coordinated turn in a 30° bank. Reduce speed by steadily and progressively tightening the turn with the elevator until the airplane is stalled or until the elevator has reached its stop. The rate of speed reduction must be constant, and—

(1) For a turning flight stall, may not exceed 1.9 km/h (one knot) per second; and

(2) For an accelerated stall, be 5.6 to 9.3 km/h (3 to 5 knots) per second with steadily increasing normal acceleration.

(b) When the stall has fully developed or the elevator has reached its stop, it must be possible to regain level flight by normal use of controls and without—

(1) Excessive loss of altitude;

(2) Undue pitchup;

(3) Uncontrollable tendency to spin;

(4) Exceeding 60° of roll in either direction from the established 30° bank; and

(5) For accelerated entry stalls, without exceeding the maximum permissible speed or the allowable limit load factor.

(c) Compliance with the requirements of this section must be shown with—

(1) Wing Flaps. Retracted and fully extended for turning flight and accelerated entry stalls, and intermediate, if appropriate, for accelerated entry stalls;

(2) Landing Gear. Retracted and extended;

(3) Cowl Flaps. Appropriate to configuration;

(4) Power. 75% maximum continuous power. If the power-to-weight ratio at 75% of maximum continuous power results in extreme nose-up attitudes, the test may be carried out with the power required for level flight in the landing configuration at maximum landing weight and a speed of 1.4 V_{S0}, but the power may not be less than 50% maximum continuous power.

(5) Trim. 1.5 V_{S1} or minimum trim speed, whichever is higher.

VLA.170

(a) Three-control airplanes. The stability requirements for three-control airplanes are as follows:

(1) The static directional stability, as shown by the tendency to recover from a skid with the rudder free, must be positive for any landing gear and flap position appropriate to the takeoff, climb, cruise, and approach configurations. This must be shown with power up to maximum continuous power, and at speeds from 1.2 V_{S1} up to maximum allowable speed for the condition being investigated. The angle of skid for these tests must be appropriate to the type of airplane. At larger angles of skid up to that at which full rudder is used or a control force limit in CS–VLA 143 is reached, whichever occurs first, and at speeds from 1.2 V_{S1} to V_A, the rudder pedal force must not reverse.

(2) The static lateral stability, as shown by the tendency to raise the low wing in a slip, must not be negative for any landing gear and flap positions. This must be shown with power up to 75% of maximum continuous power at speeds above 1.2 V_{S1}, up to the maximum allowable speed for the configuration being investigated. The static lateral stability may not be negative at 1.2 V_{S1}. The angle of slip for these tests must be appropriate to the type of airplane, but in no case may the slip angle be less than that obtainable with 10° of bank.

(3) In straight, steady slips at 1.2 V_{S1} for any landing gear and flap positions, and for power conditions up to 50% of maximum continuous power, the rudder control movements and forces must increase steadily (but not necessarily linearly) as the angle of slip is increased up to the maximum appropriate to the type of airplane. At larger slip angles up to the angle at which full rudder or aileron control is used or a control force limit contained in CS–VLA 143 is obtained, aileron control movements and forces must not reverse. Enough bank must accompany slipping to hold a constant heading. Rapid entry into, or recovery from, a maximum slip may not result in uncontrollable flight characteristics. The applicant must demonstrate that lateral static stability characteristics do not result in any unsafe handling qualities.

(b) Two-control (or simplified control) airplanes. The stability requirements for two-control airplanes are as follows:

(1) The directional stability of the airplane must be shown by showing that, in each configuration, it can be rapidly rolled from a 45° bank in one direction to a 45° bank in the opposite direction without showing dangerous skid characteristics.

(2) The lateral stability of the airplane must be shown by showing that it will not assume a dangerous attitude or speed when the controls are abandoned for 2 minutes. This must be done in moderately smooth air with the airplane trimmed for straight level flight at 0.9 V_H (maximum speed in level flight with maximum continuous power) or V_C

(design cruising speed), whichever is lower, with flaps and landing gear retracted, and with a rearward center of gravity.

If an ELOS to CS–VLA 161(b)(2)(ii) is requested, VLA.175 through VLA.210 are applicable.

VLA.175

Longitudinal trim. The airplane must maintain longitudinal trim under each of the following conditions:

(a) Approach with landing gear extended and with—

(i) A 3° angle of descent, with flaps retracted and at a speed of 1.4 V_{S1};

(ii) A 3° angle of descent, flaps in the landing position(s) at reference landing approach speed, V_{REF}; and

(iii) An approach gradient equal to the steepest used in the landing distance demonstrations of CS 23.75, flaps in the landing position(s) at V_{REF}.

VLA.180

For normal, utility and aerobatic category reciprocating engine-powered airplanes of 2,722 kg (6,000 lb) or less maximum weight, the reference landing approach speed, V_{REF}, must not be less than the greater of minimum control speed, V_{MC}, determined under CS 23.149(b) with the wing flaps in the most extended takeoff setting, and 1.3 V_{SO}.

VLA.185

(a) A steady approach at not less than V_{REF}, determined in accordance with CS 23.73(a), (b) or (c) as appropriate, must be maintained down to 15 m (50 ft) height and—

(1) The steady approach must be at a gradient of descent not greater than 5.2% (3°) down to the 15 m (50 ft) height.

(b) A constant configuration must be maintained throughout the maneuver.

(c) The landing must be made without excessive vertical acceleration or tendency to bounce, nose-over, ground loop, porpoise, or water loop.

(d) It must be shown that a safe transition to the balked landing conditions of CS 23.77 can be made from the conditions that exist at the 15 m (50 ft) height, at maximum landing weight, or the maximum landing weight for altitude and temperature of CS 23.63(c)(2) or (d)(2), as appropriate.

VLA.190

(a) Each normal, utility, and aerobatic category reciprocating engine-powered airplane of 2,722 kg (6,000 lb) or less maximum weight must be able to maintain a steady gradient of climb at sea-level of at least 3.3% with—

(1) Takeoff power on each engine;

(2) The landing gear extended;

(3) The wing flaps in the landing position, except that if the flaps may safely be retracted in 2 seconds or less without loss of altitude and without sudden changes of angle of attack, they may be retracted; and

(4) A climb speed equal to V_{REF}, as defined in CS 23.73(a).

VLA.195

(a) It must be possible to carry out the following maneuvers without requiring the application of single-handed control forces exceeding those specified in CS 23.143(c), unless otherwise stated. The trimming controls must not be adjusted during the maneuvers:

(1) With power off, landing gear and flaps extended and the airplane as nearly as possible in trim at V_{REF}, obtain and maintain airspeeds between 1.1 V_{S0} and either 1.7 V_{S0} or V_{FE} (maximum flap extended speed), whichever is lower, without requiring the application of two-handed control forces exceeding those specified in CS 23.143(c).

(b) It must be possible, with a pilot control force of not more than 44.5 N (10 lbf), to maintain a speed of not more than V_{REF} during a power-off glide with landing gear and wing flaps extended.

VLA.200

It must be possible, while in the landing configuration, to safely complete a landing without exceeding the one-hand control force limits specified in CS 23.143(c) following an approach to land—

(a) At a speed of V_{REF} 9.3 km/h (5 knots);

(b) With the airplane in trim, or as nearly as possible in trim and without the trimming control being moved throughout the maneuver;

(c) At an approach gradient equal to the steepest used in the landing distance demonstration of CS 23.75;

(d) With only those power changes, if any, which would be made when landing normally from an approach at V_{REF}.

VLA.205

(a) Approach—It must be possible using a favorable combination of controls, to roll the airplane from a steady 30° banked turn through an angle of 60°, so as to reverse the direction of the turn within—

(1) For an airplane of 2,722 kg (6,000 lb) or less maximum weight, 4 seconds from initiation of roll; and

(2) For an airplane of over 2,722 kg (6,000 lb) maximum weight, 1,000/W + 1,300 but not more than 7 seconds, where W is weight in kg. (W + 2800/2200 but not more than 7 seconds where W is weight in lb.).

(b) The requirement of paragraph (a) of this section must be met when rolling the airplane in each direction in the following conditions—

(1) Flaps in the landing position(s);

(2) Landing gear extended;

(3) All engines operating at the power for a 3° approach; and

(4) The airplane trimmed at V_{REF}.

VLA.210

(a) Landing. The stick force curve must have a stable slope at speeds between 1.1 V_{S1} and 1.8 V_{S1} with—

(1) Flaps in the landing position;

(2) Landing gear extended; and

(3) The airplane trimmed at—

(i) V_{REF}, or the minimum trim speed if higher, with power off; and

(ii) V_{REF} with enough power to maintain a 3° angle of descent.

Rechargeable Lithium Ion Battery

VLA.215

The applicant must consider the following safety objectives when showing compliance with regulations applicable to the rechargeable lithium ion battery.

Each rechargeable lithium ion battery installation must:

(a) Be designed to maintain safe cell temperatures and pressures under all foreseeable operating conditions to prevent fire and explosion;

(b) Be designed to prevent the occurrence of self-sustaining, uncontrollable increases in temperature or pressure, and automatically control the charge rate of each cell to protect against adverse operating conditions, such as cell imbalance, back charging, overcharging, and overheating;

(c) Not emit explosive or toxic gases, either in normal operation or as a result of its failure, that may accumulate in hazardous quantities within the airplane;

(d) Meet the requirements of 14 CFR 23.2325(g);

(e) Not damage surrounding structure or adjacent systems, equipment, components, or electrical wiring from corrosive or any other fluids or gases that may escape in such a way as to cause a major or more-severe failure condition;

(f) Have provisions to prevent any hazardous effect on airplane structure or systems caused by the maximum amount of heat it can generate due to any failure of it or its individual cells;

(g) Have a failure sensing and warning system to alert the flightcrew if its failure affects safe operation of the airplane;

(h) Have a monitoring and warning feature that alerts the flightcrew when

its charge state falls below acceptable levels if its function is required for safe operation of the airplane;

(i) Have a means to disconnect from its charging source in the event of an over-temperature condition, cell failure, or battery failure.

Issued in Kansas City, Missouri, on October 5, 2023.

Patrick R. Mullen,

Manager, Technical Policy Branch, Policy and Standards Division, Aircraft Certification Service.

[FR Doc. 2023–22492 Filed 10–10–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2023–1692; Airspace Docket No. 23–AEA–13]

RIN 2120–AA66

Establishment of Class E Airspace; Warrenton, VA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E airspace extending upward from 700 feet above the surface in Warrenton, VA, as new instrument approach procedures have been designed for Fauquier Hospital Emergency Transport Heliport, Warrenton, VA.

DATES: Effective 0901 UTC, November 30, 2023. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order JO 7400.11 and publication of conforming amendments.

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

FOR FURTHER INFORMATION CONTACT: John Goodson, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Avenue, College Park, GA 30337; telephone: (404) 305–5966.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

History

The FAA published a notice of proposed rulemaking for Docket No. FAA 2023–1692 in the **Federal Register** (88 FR 54248; August 10, 2023), proposing to establish Class E airspace for Fauquier Hospital Emergency Transport Heliport, Warrenton, VA. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Incorporation by Reference

Class E airspace is published in paragraph 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, incorporated by reference in 14 CFR 71.1 annually. This document amends the current version of that order, FAA Order JO 7400.11H, dated August 11, 2023, and effective September 15, 2023. FAA Order JO 7400.11H is publicly available as listed in the **ADDRESSES** section of this document. These amendments will be published in the next FAA Order JO 7400.11 update. FAA Order JO 7400.11H lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This action establishes Class E airspace extending upward from 700 feet above the surface within a 6.0-mile radius of Fauquier Hospital Emergency Transport Heliport, Warrenton, VA.

Controlled airspace is necessary for the area's safety and management of instrument flight rules (IFR) operations. This action is necessary to support IFR operations in the area.

Regulatory Notices and Analyses

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

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures,'' paragraph 5–6.5.a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order JO 7400.11H, Airspace Designations and Reporting Points, dated August 11, 2023, and effective September 15, 2023, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AEA VA E5 Warrenton, VA [Established]

Fauquier Hospital Emergency Transport Heliport, VA
(Lat. 38°42′47″ N, long. 77°48′35″ W)

That airspace extending upward from 700 feet above the surface within a 6.0-mile

radius of Fauquier Hospital Emergency Transport Heliport.

* * * * *

Issued in College Park, Georgia, on October 4, 2023.

Andreese C. Davis,

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

[FR Doc. 2023–22440 Filed 10–10–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 744

[Docket No. 231005–0238]

RIN 0694–AJ40

Addition of Entities to the Entity List

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

ACTION: Final rule.

SUMMARY: In this rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) by adding 49 entities under 52 entries to the Entity List. These entries are under the destinations of the People's Republic of China (China) (42), Estonia (1), Finland (1), Germany (1), India (3), Turkey (2), United Arab Emirates (1), and the United Kingdom (1). Some entities may have multiple entries, accounting for the difference in the total number of entities and entries. These 49 entities have been determined by the U.S. Government to be acting contrary to the national security or foreign policy interests of the United States.

DATES: This rule is effective on October 6, 2023.

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

SUPPLEMENTARY INFORMATION:

Background

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

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

Entity List Decisions

Additions to the Entity List

The ERC determined to add the following 49 entities to the Entity List: ACE Electronics (HK) Co., Limited; Alliance Electro Tech Co., Limited; Alpha Trading Investments Limited; Asia Link Shanghai Int'l Logistics Co., Ltd.; Benico Limited; Check IC Solution Limited; Chengdu Jingxin Technology Co. Ltd.; E-Chips Solution Co. Ltd.; Farteco Limited; Glite Electronic Technology Co., Limited; Global Broker Solutions Limited; Grants Promotion Service Limited; Guangdong Munpower Electronic Commerce Co. Ltd.; Huayuanshitong Technology Co. Ltd.; IMAXChip; Insight Electronics; Kingford PCB Electronics Co., Ltd.; Kobi International Company; Most Technology Limited; New Wally Target International Trade Co., Limited; Nuopuxun Electronic Technology Co., Limited; Onstar Electronics Co. Ltd.; Robotronix Semiconductors Limited; Rui En Koo Technology Co. Ltd; Shaanxi Yingsaeir Electronic Technology Co. Ltd.; Shanghai IP3 Information Technology Co. Ltd.; Shenzhen One World International Logistics Co., Limited; Shvabe Opto-Electronics Co. LTD.; Suntop Semiconductor Co., LTD.; Tordan Industry Limited; TYT Electronics Co. Ltd.; UCreate Electronics Group; Wargos Industry Limited; Win Key Limited; Xin Quan Electronics Hong Kong Co. Limited; ZeYuan Technology Limited; Zhejiang Foso Electronics Technology Co. Ltd.; Zixis Limited; and Zone Chips Electronics Hong Kong Co. Limited under the destination of China; C & I Semiconductor Co. Ltd. under the destinations of China and India; China Shengshi International Trade Ltd. under the destinations of China and the United Kingdom; PT Technology Asia Limited under the destinations of China and Finland; Elmec Trade OU under the destination of Estonia; Interquest GmbH under the destination of Germany; Abhar Technologies and Services Private Limited; and Innovio Ventures under the destination of India; LL Chip Elektrik Elektronic Paz; and Scitech Tasimacilik Ticaret Limited under the destination of Turkey; and Hulm al Sahra Elect Devices TR under the destination of the United Arab Emirates.

These entities are added to the Entity List for providing support to Russia's military and/or defense industrial base. Specifically, these entities supplied Russian consignees connected to the Russian defense sector with U.S.-origin integrated circuits after March 1, 2023. These integrated circuits are classified under Harmonized Tariff System (HTS)-6 codes 854231, 854232, 854233, and/or 854239. These HTS–6 codes are identified under supplement no. 4 to part 746 (Russian and Belarusian Industry Sector Sanctions Pursuant to § 746.5(a)(1)(ii)). All U.S.-origin items classified under these HTS–6 codes have been controlled for export and reexport and transfer within Russia since September 15, 2022. Such U.S.-origin items require a license under § 746.5(a)(1)(ii) of the EAR when destined to Russia or Belarus.[1]

Therefore, the documented shipments by these entities to Russia of such U.S.-origin items are contrary to U.S. national security and foreign policy interests under § 744.11(b) of the EAR. All entities added by this rule have a license requirement for all items subject to the EAR, and a license review policy of denial.

For the reasons described above, this final rule adds 49 entities under the following 52 entries, including aliases where appropriate, to the Entity List:

[1] On February 24, 2023 (88 FR 12150), BIS also expanded controls to include certain foreign-made items classified under the same HTS–6 codes destined to Russia, due to their demonstrated use in weapons found on the battlefield in Ukraine. Such foreign-made items are subject to the EAR and the license requirements of § 746.8(a)(2) when a reexport, export from abroad, or transfer (in-country) meets the destination scope of the Russia/Belarus/Temporarily occupied Crimea region of Ukraine FDP rule described in § 734.9(f) of the EAR.

China

- Ace Electronics (HK) Co., Limited;
- Alliance Electro Tech Co., Limited;
- Alpha Trading Investments Limited;
- Asialink Shanghai Int'l Logistics Co., Ltd.;
- Benico Limited;
- C & I Semiconductor Co., Ltd.;
- Check IC Solution Limited;
- Chengdu Jingxin Technology Co. Ltd.;
- China Shengshi International Trade Ltd.;
- E-Chips Solution Co. Ltd.;
- Farteco Limited;
- Glite Electronic Technology Co., Limited;
- Global Broker Solutions Limited;
- Grants Promotion Service Limited;
- Guangdong Munpower Electronic Commerce Co. Ltd.;
- Huayuanshitong Technology Co. Ltd.;
- IMAXChip;
- Insight Electronics;
- Kingford PCB Electronics Co., Ltd.;
- Kobi International Company;
- Most Technology Limited;
- New Wally Target International Trade Co., Limited;
- Nuopuxun Electronic Technology Co., Limited;
- Onstar Electronics Co. Ltd.;
- PT Technology Asia Limited;
- Robotronix Semiconductors Limited;
- Rui En Koo Technology Co. Ltd;
- Shaanxi Yingsaeir Electronic Technology Co. Ltd.;
- Shanghai IP3 Information Technology Co. Ltd.;
- Shenzhen One World International Logistics Co., Limited;
- Shvabe Opto-Electronics Co. LTD.;
- Suntop Semiconductor Co., LTD.;
- Tordan Industry Limited;
- TYT Electronics Co. Ltd.;
- UCreate Electronics Group;
- Wargos Industry Limited;
- Win Key Limited;
- Xin Quan Electronics Hong Kong Co., Limited;
- ZeYuan Technology Limited;
- Zhejiang Foso Electronics Technology Co. Ltd.;
- Zixis Limited; *and*
- Zone Chips Electronics Hong Kong Co., Limited.

Estonia

- Elmec Trade OU.

Finland

- PT Technology Asia Limited.

Germany

- Interquest GmbH.

India

- Abhar Technologies and Services Private Limited;
- C & I Semiconductor Co., Ltd.; *and*
- Innovio Ventures.

Turkey

- LL Chip Elektrik Elektronic Paz; *and*
- Scitech Tasimacilik Ticaret Limited.

UAE

- Hulm al Sahra Elect Devices TR.

United Kingdom

- China Shengshi International Trade Ltd.

Savings Clause

For the changes being made in this final rule, shipments of items removed from eligibility for a License Exception or export, reexport, or transfer (in-country) without a license (NLR) as a result of this regulatory action that were en route aboard a carrier to a port of export, reexport, or transfer (in-country), on October 6, 2023, pursuant to actual orders for export, reexport, or transfer (in-country) to or within a foreign destination, may proceed to that destination under the previous eligibility for a License Exception or export, reexport, or transfer (in-country) without a license (NLR) before November 6, 2023. Any such items not actually exported, reexported or transferred (in-country) before midnight, on October 6, 2023, require a license in accordance with this final rule.

Export Control Reform Act of 2018

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

Rulemaking Requirements

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

2. Notwithstanding any other provision of law, no person is required to respond to or be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves an information collection approved by OMB under control number 0694–0088, Simplified Network Application Processing System. BIS does not anticipate a change to the burden hours associated with this collection as a result of this rule. Information regarding the collection, including all supporting materials, can be accessed at *https://www.reginfo.gov/public/do/PRAMain.*

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

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

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

List of Subjects in 15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

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

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

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

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

■ 2. Supplement no. 4 to part 744 is amended by:

■ a. Under CHINA, PEOPLE'S REPUBLIC OF, adding in alphabetical order, entries for ''Ace Electronics (HK) Co., Limited;'' ''Alliance Electro Tech Co., Limited;'' ''Alpha Trading Investments Limited;'' ''Asialink Shanghai Int'l Logistics Co., Ltd.;'' ''Benico Limited;'' ''C & I Semiconductor Co., Ltd.;'' ''Check IC Solution Limited;'' ''Chengdu Jingxin Technology Co. Ltd.;'' ''China Shengshi International Trade Ltd.;'' ''E-Chips

Solution Co. Ltd.;'' ''Farteco Limited;'' ''Glite Electronic Technology Co., Limited;'' ''Global Broker Solutions Limited;'' ''Grants Promotion Service Limited;'' ''Guangdong Munpower Electronic Commerce Co. Ltd.;'' ''Huayuanshitong Technology Co. Ltd.;'' ''IMAXChip;'' ''Insight Electronics;'' ''Kingford PCB Electronics Co., Ltd.;'' ''Kobi International Company;'' ''Most Technology Limited;'' ''New Wally Target International Trade Co., Limited;'' ''Nuopuxun Electronic Technology Co., Limited;'' ''Onstar Electronics Co. Ltd.;'' ''PT Technology Asia Limited;'' ''Robotronix Semiconductors Limited;'' ''Rui En Koo Technology Co. Ltd;'' ''Shaanxi Yingsaeir Electronic Technology Co. Ltd.;'' ''Shanghai IP3 Information Technology Co. Ltd.;'' ''Shenzhen One World International Logistics Co., Limited;'' ''Shvabe Opto-Electronics Co. LTD.;'' ''Suntop Semiconductor Co., LTD.;'' ''Tordan Industry Limited;'' ''TYT Electronics Co. Ltd.;'' ''UCreate Electronics Group;'' ''Wargos Industry Limited;'' ''Win Key Limited;'' ''Xin Quan Electronics Hong Kong Co., Limited;'' ''ZeYuan Technology Limited;'' ''Zhejiang Foso Electronics Technology Co. Ltd.;'' ''Zixis Limited;'' and ''Zone Chips Electronics Hong Kong Co., Limited.''

■ b. Under ESTONIA, adding, in alphabetical order, an entry for ''Elmec Trade OU.''

■ c. Under FINLAND, adding, in alphabetical order, an entry for ''PT Technology Asia Limited.''

■ d. Under GERMANY, adding, in alphabetical order, an entry for ''Interquest GmbH.''

■ e. Under INDIA, adding, in alphabetical order, entries for ''Abhar Technologies and Services Private Limited;'' ''C & I Semiconductor Co., Ltd.;'' and ''Innovio Ventures.''

■ f. Under TURKEY, adding, in alphabetical order, entries for ''LL Chip Elektrik Elektronic Paz'' and ''Scitech Tasimacilik Ticaret Limited.''

■ g. Under UNITED ARAB EMIRATES, adding, in alphabetical order, an entry for ''Hulm al Sahra Elect Devices TR.''

■ h. Under UNITED KINGDOM, adding, in alphabetical order, an entry for ''China Shengshi International Trade Ltd.''

The additions read as follows:

Supplement No. 4 to Part 744—Entity List

* * * * *

Country	Entity	License requirement	License review policy	**Federal Register** citation
*	* * *	* *	*	*
CHINA, PEOPLE'S REPUBLIC OF.	* *	* *	*	*
	Ace Electronics (HK) Co., Limited, a.k.a., the following two aliases: —ACE (HK) Electronics Technology Co., Ltd; *and* —Ace Electronic (HK) Co., Ltd. 18F Block B, World Trade Plaza, No. 9 Fuhong Road, Futian District, Shenzhen, Guangdong, China; *and* E2 Unit, 22/F Kingsway Industrial Building Phase II, 167–175 Wo Yi Hop Road, Kwai Chung, New Territories, Hong Kong; *and* 9F International Technology Building No. 3007, Shennan Avenue, Futian District, Shenzhen, Guangdong, China; *and* Unit 04 7/F Bright Way Tower, No. 33 Mong Kok Road, Kowloon, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Alliance Electro Tech Co., Limited, 114–118 Lockhart Road, Gaylord Commercial Building, 5th Floor, Room B, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Alpha Trading Investments Limited, a.k.a., the following two aliases: —Alpha Trading Investments; *and* —Alpha Trading Investments Ltd. Unit 617, 6/F Solo Workshops 131–132, Connaught Road West, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Asialink Shanghai Int'l Logistics Co., Ltd., a.k.a., the following two aliases: —Asialink; *and* —Asialink Xi'an Int'l Logistics Co., Ltd. 1128 Tianyueqiao South Road, Building 8, Room 319, Xuhui District, Shanghai, China; *and* 218 West Tian Mu Road, Kerry Everbright City Tower 1 Offices 2508–2510, Jing'an District, Shanghai, 200070, China; *and* 3rd Kong Gang West Road, Xi'an Xianyang International Airport Offices 211–212, Kong Gang New Area, XiXian District, Xi'an, Shaanxi,710000, China; *and* 17 Xinda Road, Building 7, 4th Floor Office 437, Shunyi District, Beijing, 101399, China; *and* 158 Hangzhong Road, East Tower, Room 1607, Zhabei District, Shanghai, 200070, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Benico Limited, Valiant Industrial Center, 10th Floor, Room U, Sha Tin, Hong Kong; *and* 11 On Lai Street, Corporation Park, 6th Floor, Room 617, Sha Tin, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.

Country	Entity	License requirement	License review policy	Federal Register citation
	* *	* *	*	*
	C & I Semiconductor Co., Ltd., a.k.a., the following one alias: —China India Semiconductor Co. Ltd. Ko Fai Road Block A1, 8th Floor, Room A4, Yau Tong Industrial City, Kowloon, Hong Kong. (See alternate address under India).	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Check IC Solution Limited, 2–16 Fa Yuen Street, Ho King Commercial Building, 10th Floor, Room 1005, Mong Kok, Kowloon, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Chengdu Jingxin Technology Co. Ltd., a.k.a., the following one alias: —Chengdu Jingxin Teck Inc. 118 Jitai 5th Road, Building 3, 8th Floor, Room 5, Chengdu High-Tech Zone, China Pilot Free Trade Zone, Chengdu, Sichuan, 610000, China; *and* 5th Street, Jingrong Start-Up Hub, Tianfu, Chengdu, Sichuan, 610000, China; *and* No. 97 Shiren N. Road, Floor 2, Qingyang District, Chengdu, Sichuan, 610014 China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	China Shengshi International Trade Ltd., a.k.a., the following one alias: —Hong Kong Development Group. 21 Jianshe Road, Yufeng Building Room 313B, Xitou Xincun District 3, Longhua District, Shenzhen, Guangdong, China. (See alternate address under United Kingdom).	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	E-Chips Solution Co. Ltd., a.k.a., the following one alias: —Yichuangxin International Ltd. Shen Nan Road Block A, JiaHe HuaQiang Building, Room 3008, Futian District, Shenzhen, Guangdong, 518031, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Farteco Limited, a.k.a., the following one alias: —Farteco Ltd. 501–503 Castle Peak Road, Unit B090, International Industrial Building, Kowloon, Hong Kong; *and* Unit D, 16/F One Capital Place, 18 Luard Rd, Wan Chai, Hong Kong; *and* Unit B909, 9th Floor, International Industrial Building, 501–503 Castle Peak Rd., Kowloon, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Glite Electronic Technology Co., Limited, Xiangmihu Road, Building 1, Room 1002, Shenzhen, Guangdong, China; *and* Fuhong Road, World Trade Plaza, Building A, Room 1106, Funan Community, Futian District, Shenzhen, Guangdong, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	Global Broker Solutions Limited, 11 Shing Yip Street, Wah Shing Center, 9th Floor, Unit 9, Kwun Tong, 518002, Hong Kong; *and* 54–56 Jervois Street, Lower Ground Floor, Room B, Sheung Wan, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	Grants Promotion Service Limited, a.k.a., the following three aliases: —Catalano Limited; —Zhenao Co. Ltd.; *and* —GPSL. 430–436 Nathan Road, Nathan Commercial Building, 8th Floor, Room A, Yau Ma Tei, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	Guangdong Munpower Electronic Commerce Co. Ltd., a.k.a., the following one alias: —Guangzhou Munpower Electronic Technology Co. Ltd. 38 Renzhen Xixing Street, Baiyun District, Guangzhou, Guangdong, China; *and* 82 Langbao West Road, 6th Floor, Rooms 605–610, Chancheng District, Foshan, Guangdong, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Huayuanshitong Technology Co. Ltd., a.k.a., the following two aliases: —Shenzhen Huayuanshitong Technology Limited; *and* —HK Huayuanshitong Technology Limited.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.

Country	Entity	License requirement	License review policy	**Federal Register** citation
	Middle Shennan Road Block B, Jiahe Huaquiang Building, Room 1309, Futian District, Shenzhen, Guangdong, China; *and* Zhenhua Road, Gaokede Electronics Market, Room 62826, Futian District, Shenzhen, Guangdong, China; *and* 1002 Seg Plaza, 32nd Floor, Room 3203, Huaqiao, Shenzhen, Guangdong, China.			
	* *	* *	*	*
	IMAXChip, No. 59 King Yip Street, King Yip Factory Building, 5th Floor, Unit D5, Kwun Tong, Kowloon, Hong Kong; *and* Shennan Middle Road, International Culture Building, Room 2508B, Futian District, Shenzhen, Guangdong, China; *and* Kwun Tong Industrial Center Phase 3, 3rd Floor, Unit L, Kwun Tong, Kowloon, Hong Kong; *and* Nos. 436–446 Kwun Tong Road, 13th Floor, Unit A15, Kowloon, Hong Kong; *and* Shennan Road, Phoenix Building 2, Room 18E, Futian District, Shenzhen, Guangdong, 518000, China; *and* Lianqiu Building, No. 735 Renmin West Road, Wucheng District, Jinhua, Zhejiang, China; *and* Shenfang Building B3109, Futian District, Shenzhen, Guangdong, 518031, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Insight Electronics, No. 195 Keji Road, Room 12A06, Block A, Century Yi Yuan, Yanta District, Xi'an, Shaanxi, China; *and* Nos. 351 & 353 King's Road, Bank Tower, 3rd Floor, Flat 3B, North Point, Hong Kong	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Kingford PCB Electronics Co., Ltd., a.k.a., the following two aliases: —Shenzhen Jingfu Circuit Board Co., Ltd.; *and* —Shenzhen Xinjingfu Technology Co., Ltd. Building 6, Longhui Industrial Park, Fuqiao Third Industrial Zone, Fuyong Town, Bao'an District, Shenzhen, Guangdong, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Kobi International Company, No. 17 Sheung Hei Street, Success Industrial Building, 14th Floor, Room A1, San Po Kong, Kowloon, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Most Technology Limited, Nos. 436–446 Kwun Tong Road, Block 4, 14th Floor, Room A15, Kowloon, Hong Kong; *and* 59 King Yip Street, King Yip Factory Building, 5th Floor, Room D5, Kwun Tong, Hong Kong; No. 75–77 Garden Street, Garden Commercial Building, 7th Floor, Room 705, Mong Kok, Kowloon, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	New Wally Target International Trade Co., Limited, 91–97 Jervois Street, Tung Lee Commercial Building, 19th Floor, Room B3, Sheung Wan, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Nuopuxun Electronic Technology Co., Limited, a.k.a., the following one alias: —Shenzhen Nuopuxun Electronic Technology Co., Ltd. Huishang Center 3809, Futian District, Shenzhen, Guangdong, China; *and* No. 4 Longshan 4th Road, Building F, Floor 2, Third Industrial Zone, Songgang Community, Bao'an District, Shenzhen, Guangdong, 518015, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Onstar Electronics Co. Ltd., No. 45 Hoi Yuen Road, Yau Lee Center, 3rd Floor, Unit 83, Kwun Tong, Kowloon, Hong Kong; *and* Zhonghang Road, Dynamic World Building Room 811, Futian District, Shenzhen, Guangdong, 18031, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	PT Technology Asia Limited, a.k.a., the following one alias: —PT-Technology Asia Limited.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.

Country	Entity	License requirement	License review policy	Federal Register citation
	615–617 Tai Nan West Street, Park Fook Industrial Building, Room 623, Kowloon, Hong Kong; *and* Wah Kit Commercial Building, 11th Floor, Room B, Sheung Wan, Hong Kong. (See alternate address under Finland).			
	* *	* *	*	*
	Robotronix Semiconductors Limited, 89 Lockhart Road, Wan Chai Central Building, 4th Floor, Room 401, Wan Chai, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Rui En Koo Technology Co. Ltd, a.k.a., the following two aliases: —Rui En Koo Technology; *and* —Rui En Ke Technology Co. Ltd. 59 King Yip Street, King Yip Factory Building, 7th Floor, Room B22, Kwun Tong, Kowloon, Hong Kong; *and* Fenghuang Street, Nantaiyun Chuanggu Center Building 4, Room 1202, Guangming District, Shenzhen, Guangdong, 518132, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Shaanxi Yingsaeir Electronic Technology Co. Ltd., a.k.a., the following two aliases: —Shaanxi Yingsaier Electronic Science & Technology Co. Ltd.; *and* —Shaanxi Yingsai'er Commerce and Trade Co. Ltd. No. 28 Xinxi Avenue, Zone B of Shaanxi Xi'an Export Processing Zone, 3A Section 6, Xi'an, 710119, China; *and* No. 10804, Floor 8, Unit 1, Building No. 2, Xibeijiao More Center, Keji 6th Road, Fenghui S. Road, High-Tech Zone, Xi'an, Shaanxi, China; *and* No. 195 Keji Road, Room 12A06, Block A, Century Yiyuan, Yanta District, Xi'an, Shaanxi, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Shanghai IP3 Information Technology Co. Ltd., No. 68, Zhongchuang Road, Building 16, 2nd Floor, Songjiang District, Shanghai, 200001, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Shenzhen One World International Logistics Co., Limited, Shennan East Road, Hongchang Square Building, 30th Floor, Room 3005, Luohu District, Shenzhen, Guangdong, 518002, China; *and* 8 Leung Yip Street, Kar Wah Industrial Building, 7th Floor, Room 18, Yuen Long, Hong Kong; *and* No. 1 Liyumen Street, Room 201, Building A, Zonghe Office, Qianhai Shenzhen-Hong Kong Cooperation Zone Administration, Shenzhen, Guangdong, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Shvabe Opto-Electronics Co. LTD., a.k.a., the following three aliases: —UOMZ (Meizhou) Co., Ltd.; —Shvabe Opto-Electronics Shenzhen Co. Ltd.; *and* —Shvabe Opto-Electronics Meizhou Co. Ltd. 16 A, No. 4044 Pingshan Road, Building 16, Room A, Heping Street, Shenzhen, Guangdong, China; *and* No. 4044 Pingshan Road, Investment Building, Room 1619, Heping Street, Pingshan District, Shenzhen, Guangdong, 518118, China; *and* No. 20 Meilong Road, Bati Dasha 3rd Floor, Room 303, Meizhou City, Guangdong, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Suntop Semiconductor Co., LTD., No. 34–36 Au Pui Wan Street, Block B, Veristrong Industrial Centre, 12th Floor, Room 03, Shatin, New Territory, Hong Kong; *and* No. 116–118 How Ming Street, Manning Industrial Building, 1st Floor, Room B5, Kwun Tong, Kowloon, Hong Kong; *and* Zhonghang Road, Dynamic World Building, Room 811, Futian District, Shenzhen, Guangdong, 518031, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Tordan Industry Limited, a.k.a., the following two aliases: —Tordan Industry; *and* —Tordan Industry Ltd.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.

Country	Entity	License requirement	License review policy	**Federal Register** citation
	Unit 617, 6/F, 131–132 Connaught Road West, Solo Workshops, Hong Kong.			
	* *	* *	*	*
	TYT Electronics Co. Ltd., a.k.a., the following one alias: —Quanzhou Nan'an Teyitong Electronics Co., Ltd. Block 39–1, Optoelectronics-Information Industry Building, Nan'an, Quanzhou, Fujian, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	UCreate Electronics Group, a.k.a., the following one alias: —UCreate PCB Co., Ltd. No. 42 Caiyun Road, Yunhai Enterprise Headquarters Base, Building C, Room 315, Jixiang Community, Longgang District, Shenzhen, Guangdong, China; *and* Room 315, Building C, Yunhai Industrial Park, Longgang District, Shenzhen, Guangdong, China; *and* Xiangshui River Industrial Zone, Daya Bay, No. 11, East District, Industrial Park, Suichuan County, Ji'an, Jiangxi, China; *and* No. 116 Shuiku Road, Yanda Science Park, Baoan District, Shenzhen, Guangdong, China; *and* 45–51 Chatham Road, Chevalier House, Room 803, Tsim Sha Tsui, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Wargos Industry Limited, No. 131–132 Connaught Road West, Solo Workshops, 6th Floor, Room 617, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Win Key Limited, a.k.a., the following two aliases: —Win Key; *and* —Win Key Ltd. Room 1606, 16/F Workingbond Commercial Centre, 162–164 Prince Edward Road West, Mong Kok, Kowloon, Hong Kong; *and* Unit 1008, 10/F, Sun Cheong Industrial Building, 2–4 Cheung Yee Street, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Xin Quan Electronics Hong Kong Co., Limited, a.k.a., the following two aliases: —Xin Quan (HK) Electronics Ltd.; *and* —XQHK. No. 14–24 Au Pui Wan Street Block 1, Kin Ho Industrial Building, 17th Floor, Room 1, Shatin, New Territories, Hong Kong; *and* 75–77 Fa Yuen Street, Fa Yuen Commercial Building, Room 705, Kowloon, Hong Kong; *and* 18 Luard Road, One Capital Place, 16th Floor, Room D, Wan Chai, Hong Kong; *and* 19–21 Shing Yip Street, Shing Yip Building, Room 1302, Kwun Tong, Kowloon, Hong Kong; *and* Room B, Bank Tower, Nos. 351 & 353 King's Road, North Point, Hong Kong; *and* No. 3018, ShenNan Middle Road, Century Place—Duhuixun, Room 2601, Futian, Shenzhen, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	ZeYuan Technology Limited, Shennan Middle Road, Futian Building, Room 510, Funan Community, Futian District, Shenzhen, Guangdong, 518000, China; *and* Room 1007, Funan Community, Futian Street, Futian District, Shenzhen, Guangdong, 518000, China; *and* Room 3009, Funan Community, Futian Street, Futian District, Shenzhen, Guangdong, 518000, China; *and* 45–51 Chatham Road South, Chevalier House Room 803, Tsim Sha Tsui, Kowloon, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Zhejiang Foso Electronics Technology Co. Ltd., No. 8 Haining Avenue, Caohejing Technology Park, Block 13, Haining, Jiaxing, Zhejiang, 314400, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Zixis Limited, 501–503 Castle Peak Road, Unit B090, International Industrial Building, Kowloon, Hong Kong; *and* Unit D, 16/F One Capital Place, 18 Luard Rd, Wan Chai, Hong Kong *and* Unit A22, Block A, 10/F, Prince Industrial Building, 706 Prince Edward Road East, San Po Kong, Kowloon, Hong Kong.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.

Country	Entity	License requirement	License review policy	Federal Register citation
	* *	* *	*	*
	Zone Chips Electronics Hong Kong Co., Limited, a.k.a., the following two aliases: —BomChips; *and* —SQXY Technology (Shenzhen) Co. Room 2811/Building Shijihui, Shennan Avenue 3018, Futian District, Shenzhen, China; *and* Unit 2 D6, 2nd Floor, Mai Wah Industrial Building, Nos. 1/7, Wah Sing Street, Kwai Chung, New Territories, Hong Kong; *and* 22 Huafu Road, Hangdu Building E, Futian District, Shenzhen, Guangdong, 518000 China; *and* Metropolitan Heights at Century Place, Room 3417, Shenzhen, Guangdong, 518000, China.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
ESTONIA	* *	* *	*	*
	Elmec Trade OU, Katusepapi tn 6–502, Lasnamäe linnaosa, Tallinn, Harju maakond, 11412, Estonia; *and* Valukoja tn 8/1, Tallinn, 11415, Estonia.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
FINLAND	* *	* *	*	*
	PT Technology Asia Limited, a.k.a., the following one alias: —PT-Technology Asia Limited. Valtakatu 52, Lappeenranta, 53100, Finland. (See alternate address under China).	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
GERMANY	* *	* *	*	*
	Interquest GmbH, Karolinenstrasse 21C, Berlin, 13507, Germany.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
INDIA	* *	* *	*	*
	Abhar Technologies and Services Private Limited, a.k.a., the following one alias: —Abhartech. RMZ Latitude Building, 10th Floor, Bellary Road, Hebbal, Bangalore, Karnataka, 560024, India; *and* No 6, 80 Feet Road, 4th Block, Koramangala, Bangalore, Karnataka, 560034, India.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	C & I Semiconductor Co., Ltd., a.k.a., the following one alias: —China India Semiconductor Co. Ltd. No. 53 40 Feet Road 3rd Cross, Ground Floor, Raghava Nagar,Bangalore, Karnataka, 560026, India. (See alternate address under China).	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Innovio Ventures, 944 Block C Sushant Lok Phase 1, Gurugram, Haryana, 122001, India; *and* Basai Road, Shop No-141, Gurgaon, Haryana, 122001, India.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
*	* * *	* *	*	*
TURKEY	* *	* *	*	*
	LL Chip Elektrik Elektronic Paz, a.k.a., the following three aliases: —LL Chip Elektrik Elektronik Pazarlama Ic ve Dis Ticaret Limited Sirketi; —LL Chip Ltd.; *and* —LL Chip Electric Electronic Marketing Domestic and Foreign Trade Limited Company. Merkez Mah., Hasat Sokak Kamara, No: 52, Şişli, Istanbul, 34360, Turkey.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
	* *	* *	*	*
	Scitech Tasimacilik Ticaret Limited, a.k.a., the following two aliases: —Scitech Tasimacililk Ticaret, Limited Sirketi; *and* —Scitech Transport Trade Limited Company.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.

Country	Entity	License requirement	License review policy	**Federal Register** citation
	235 SK Kamac, Apt No. 6, Ic Kapi No. 3, Yildiz Mah., Muratpasa, Antalya, 11111, Turkey; *and* 37 Sokak, Cengizhan Apt Block No: 6/102, Kisla Mah., Muratpasa, Antalya, 07040, Turkey.			
	* * * * * * *			
*	* * * * * * *			
UNITED ARAB EMIRATES.	* * * * * * *			
	Hulm al Sahra Elect Devices TR, a.k.a., the following one alias: —Hulm Al Sahra. P.O. Box 62105, Al Dhaid, New Industrial Area Sharjah, Sharjah, United Arab Emirates; *and* Building 38, Industrial Area No.1, Al Dhaid City, Sharjah, United Arab Emirates; *and* Al Khan 2 Street 1, Al Dhaid City, Sharjah, 235545, United Arab Emirates.	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
*	* * * * * * *			
UNITED KINGDOM.	* * * * * * *			
	China Shengshi International Trade Ltd., a.k.a., the following one alias: —Hong Kong Development Group. P.O. Box 957, Offshore Incorporations Center, Road Town, Tortola, British Virgin Islands. (See alternate address under China).	For all items subject to the EAR. (See § 744.11 of the EAR).	Policy of denial	88 FR [INSERT FR PAGE NUMBER; October 11, 2023.
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Thea D. Rozman Kendler,

Assistant Secretary for Export Administration.

[FR Doc. 2023–22536 Filed 10–6–23; 11:15 am]

BILLING CODE 3510–33–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0815]

RIN 1625–AA00

Safety Zone; Southport Swing Bridge, Southport, ME

AGENCY: Coast Guard, DHS.

ACTION: Temporary interim rule and request for comments.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the navigable waters of the Townsend Gut within a 50-yard radius from the center of the Southport Swing Bridge, in Southport, ME. When enforced, this regulation will prohibit waterside entry of vessels or persons into the safety zone unless authorized by Captain of the Port for Sector Northern New England or a designated representative. The safety zone is necessary to protect personnel, vessels, and marine environment from potential hazards created by construction and remediation of the Southport Swing Bridge.

DATES: This rule is effective from October 23, 2023 through May 17, 2024. Comments and related material must be received by the Coast Guard on or before December 11, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2023–0815 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

You may submit comments identified by docket number USCG–2023–0815 using the Federal Decision-Making Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFROMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email MSTC Zachary Wetzel, Sector Northern New England, U.S. Coast Guard; telephone 207–808–9137, email *NNEWaterways@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port Sector Northern New England
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

On August 29, 2023, the Coast Guard was made aware by the Cianbro Companies of the Southport Swing Bridge rehabilitation and construction project in Southport, ME, Maine DOT Project WIN 021751.01. Marine construction actions will consist of coating repairs, replacement of the fender and pier system, full machinery and controls system upgrade, deck replacement and a number of structural repairs. During these construction activities work and crane barges are expected to block the channel and the bridge will be unable to open for vessel traffic. The Captain of the Port Sector Northern New England (COTP) has determined that potential hazards associated with the bridge construction would be a safety concern for anyone within a 50-yard radius of the center point of the bridge. If the project is completed prior to May 17, 2024,

enforcement of the safety zone will be suspended and notice given via Broadcast Notice to Mariners, Local Notice to Mariners, or both. The Coast Guard anticipates that this safety zone period is the first in a several year multi-phase bridge construction and remediation project. The Coast Guard will consider comments in issuing a subsequent temporary interim rule or temporary final rule.

The Coast Guard is issuing this temporary interim 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 doing so would be impracticable and contrary to the public interest. The notice allowing the construction project to proceed and providing updated timelines for the project was only recently finalized and provided to the Coast Guard, which did not give the Coast Guard enough time to publish a NPRM, take public comments, and issue a final rule before the existing regulation expires. Timely action is needed to respond to the potential safety hazards associated with the construction and rehabilitation the Southport Swing Bridge. It would be impracticable and contrary to the public interest to publish a NPRM because we must establish the safety zone as soon as possible to protect the safety of the waterway users, construction crew, and other personnel associated with the bridge project. A delay of the project to accommodate a full notice and comment period would delay necessary operations, result in increased costs, and delay the completion date of the bridge project and subsequent reopening of the Southport Swing Bridge for normal operations.

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**. For reasons stated in the preceding paragraph, delaying the effective date of this rule would be impracticable and contrary to the public interest because timely action is needed to respond to the potential safety hazards associated with the project.

We are soliciting comments on this rulemaking. If the Coast Guard determines that changes to the temporary interim rule are necessary, we will publish a temporary final rule or other appropriate document.

III. Legal Authority and Need for Rule

Coast Guard is issuing this temporary interim rule under authority in 46 U.S.C. 70034. The COTP determined that potential hazards associated with this bridge construction and remediation project will be a safety concern for anyone within the work zone through May 17, 2024. The construction and remediation of the bridge will be extremely complex and present many safety hazards including overhead operations, potential falling debris, and barges positioned along the length of the bridge. In order to mitigate the inherent risks involved with the remediation of a bridge, it is necessary to control vessel movement through the area. The purpose of this temporary interim rule is to ensure the safety of the waterway users, the public, and construction workers for the duration of the bridge construction. In order to minimize such unexpected or uncontrolled movement of water no vessel may stop, moor, anchor, or loiter within the safety zone at any time unless receiving permission from the COTP or a designated representative. This temporary interim rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone during the bridge construction project.

IV. Discussion of the Rule

This temporary interim rule establishes a temporary safety zone from October 23, 2023, through May 17, 2024. This rule will prohibit all persons and vessel traffic from the safety zone unless exceptions are authorized by the COTP or a designated representative.

The Coast Guard will notify the public and local mariners of this safety zone through appropriate means, which may include, but are not limited to, publication in the **Federal Register**, the Local Notice to Mariners, and Broadcast Notice to Mariners via marine Channel 16 (VHF–FM) in advance of any enforcement.

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 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 safety zone. The safety zone is only in effect for navigable water of the Townsend Gut within a 50-yard radius of the center point of the Southport Swing Bridge. This waterway is typically transited by smaller craft on an infrequent basis over the winter months. Vessel traffic is able to safely transit around this safety zone with a slight delay (approximately 30–120 minutes) by transiting around Southport Island to reach any destination on the other side of Townsend Gut. Additionally, the rule allows vessels to seek permission to enter the zone. Moreover, the Coast Guard will notify the public of enforcement of this rule via appropriate means, such as via Local Notice to Mariners and Broadcast Notice to Mariners via marine Channel 16 (VHF–FM).

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 temporary interim 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 temporary interim rule. If this 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. If you believe this rule has implications for federalism or Indian tribes, please contact 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 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 temporary safety zone that will prohibit entry within a 50-yard radius from the center of the Southport Swing Bridge during its construction and rehabilitation. 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.

VI. 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 *http://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2023–0815 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 your material cannot be submitted using *http://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Viewing material in docket. To view documents mentioned in this 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. We review all comments received, but we will only post comments that address the topic of the rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

Personal information. We accept anonymous comments. Comment we post to *http://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 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.T01–0815 to read as follows:

§ 165.T01–0815 Safety Zone; Southport Swing Bridge, Southport, ME.

(a) *Location.* The following area is a safety zone. All navigable waters on Townsend Gut within a 50-yard radius from the center of the Southport Swing Bridge, in Southport, ME, in position 43°50′33.9″ N 69°39′14.4″ W (NAD 83).

(b) *Definitions.* As used in this section:

Designated representative means any Coast Guard commissioned, warrant,

petty officer, or any federal, state, or local law enforcement officer who has been designated by the Captain of the Port Northern New England (COTP), to act on his or her behalf. The designated representative may be on an official patrol vessel or may be on shore and will communicate with vessels via VHF–FM radio or loudhailer. In addition, members of the Coast Guard Auxiliary may be present to inform vessel operators of this regulation. *Official patrol vessels* mean any Coast Guard, Coast Guard Auxiliary, state, or local law enforcement vessels assigned or approved by the COTP to enforce this section.

(c) *Effective and Enforcement Period.* The safety zone in paragraph (a) of this section is in effect from October 23, 2023, through May 17, 2024, and is subject to enforcement 24 hours a day.

(d) *Regulations.* When this safety zone is enforced, the following regulations, along with those contained in 33 CFR 165.23 apply:

(1) No person or vessel may enter or remain the safety zone described in paragraph (a) without the permission of the COTP or the COTP's designated representative. However, any vessel that is granted permission to enter or remain in this zone by the COTP or the COTP's designated representative must proceed through the zone with caution and operate at a speed no faster than that speed necessary to maintain a safe course, unless otherwise required by the Navigation Rules.

(2) Any person or vessel permitted to enter the safety zone shall comply with the directions and orders of the COTP or the COTP's designated representative. Upon being hailed by a U.S. Coast Guard vessel by siren, radio, flashing lights, or other means, the operator of a vessel within the zone shall proceed as directed. Any person or vessel within the safety zone shall exit the zone when directed by the COTP or the COTP's designated representative.

(3) To obtain permission required by this regulation, individuals may reach the COTP or the COTP's designated representative via Channel 16 (VHF–FM) or (207) 741–5465 (Sector Northern New England Command Center).

(e) *Penalties.* Those who violate this section are subject to the penalties set forth in 46 U.S.C. 70036.

Dated: October 2, 2023.

Amy Florentino,

Captain, U.S. Coast Guard, Captain of the Port Northern New England.

[FR Doc. 2023–22340 Filed 10–10–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 402

45 CFR Part 102

[CMS–6061–F]

RIN 0938–AT86

Medicare Program; Medicare Secondary Payer and Certain Civil Money Penalties

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

ACTION: Final rule.

SUMMARY: This final rule will specify how and when CMS must calculate and impose civil money penalties (CMPs) when group health plan (GHP) and non-group health plan (NGHP) responsible reporting entities (RREs) fail to meet their Medicare Secondary Payer (MSP) reporting obligations by failing to register and report as required by MSP reporting requirements. This final rule will also establish CMP amounts and circumstances under which CMPs will and will not be imposed.

DATES:

Effective date: This final rule is effective on December 11, 2023.

Applicability date: The provisions of this rule are applicable on or after October 11, 2024.

FOR FURTHER INFORMATION CONTACT: Brian Broznowicz, (410) 786–3349.

SUPPLEMENTARY INFORMATION:

I. Background

A. Imposition of Civil Money Penalties (CMPs)—Legislative Overview

In 1981, the Congress added section 1128A to the Social Security Act (the Act) (section 2105 of Pub. L. 97–35) to authorize the Secretary of Health and Human Services (the Secretary) to impose civil money penalties (CMPs) and assessments on certain health care facilities, health care practitioners, and other suppliers for noncompliance with rules of the Medicare and Medicaid programs. CMPs and assessments provide an enforcement tool for agencies to use to ensure compliance with statutory and regulatory requirements. These CMPs and assessments may be imposed in addition to potential criminal or civil penalties.

Since 1981, the Congress has increased both the number and the types of circumstances under which the Secretary may impose CMPs. Some CMP authorities address fraud, misrepresentation, or falsification, while others address noncompliance with programmatic or regulatory requirements. The Secretary has delegated the authority for certain provisions to either the Office of Inspector General (OIG) or Centers for Medicare & Medicaid Services (CMS). (See the October 20, 1994, notice, titled ''Office of Inspector General; Health Care Financing Administration; Statement of Organization, Functions, and Delegations of Authority'' (58 FR 52967).) A summary of these CMP changes is discussed in this section of this final rule.

B. Medicare Secondary Payer History

In 1980, the Congress added section 1862(b) of the Act, which defined when Medicare is the secondary payer to certain primary plans. These provisions are known as the Medicare Secondary Payer (MSP) provisions of the Act.

Section 1862(b)(2)(A) of the Act prohibits Medicare from making payment if payment has been made, or can reasonably be expected to be made by any of the following primary plans:

- Group Health Plans (GHPs).
- Workers' compensation plans.
- Liability insurance (including self-insurance).
- No-fault insurance.

Medicare may make conditional payments, subject to Medicare payment rules, in situations where workers' compensation, liability insurance (including self-insurance), or no-fault insurance has not made payment or cannot be expected to make payment promptly. Any conditional payments that Medicare makes are subject to reimbursement from the primary plan. See section 1862(b)(2)(B) of the Act.

C. Legislative Provisions Regarding Mandatory Reporting Requirements

To enhance enforcement of the MSP provisions, section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA) (Pub. L. 110–173) added paragraphs (7) and (8) to section 1862(b) of the Act. These paragraphs established new mandatory reporting requirements regarding Medicare beneficiaries who have coverage under GHP arrangements, as well as when liability insurance (including self-insurance), no-fault insurance, or workers' compensation (collectively referred to as Non-Group Health Plans, or NGHPs) provide settlements, judgments, awards, or assume other payment responsibility for Medicare beneficiaries' care. Sections 1862(b)(7)(A) and (b)(8)(F) of the Act define those parties responsible for this

reporting (collectively referred to as responsible reporting entities, or RREs). Under section 1862(b)(7)(A) of the Act, GHPs or third-party administrators are obligated to report beneficiary coverage; almost 1,000 entities are registered as GHP RREs, with 62 percent estimating between 1,000 and 100,000 individual beneficiaries to be reported annually. Under section 1862(b)(8)(F) of the Act, NGHP applicable plans are obligated to report settlements or when the entity otherwise assumes payment responsibility, and over 21,000 entities are registered as NGHP RREs, with the vast majority (88.29 percent) estimating fewer than 500 individual beneficiaries to report annually at the time of registration.

RREs are currently required to submit coverage information for Medicare beneficiaries including, but not limited to, when coverage begins or ends, or when a judgment, award, settlement, or other payment is made, on a quarterly basis through an electronic file submission process that may vary depending upon the number of beneficiary records being reported or updated. NGHP RREs who submit 500 or less claim reports per year are eligible to utilize the Coordination of Benefits Secure website (COBSW) Direct Data Entry (DDE) reporting option to add, update, or delete claim information. DDE submitters have the same responsibility and accountability as any other RRE. This coverage information primarily consists of enough identifying information to uniquely identify the Medicare beneficiary and confirm their beneficiary status, as well as information about the nature of the coverage (such as GHP or NGHP, coverage effective dates, policy limits, settlement amounts, and so forth). These section 111 of MMSEA reporting provisions did not alter any other existing statutory provisions or regulations. Further, these reporting provisions include authority for CMS to impose CMPs against entities that fail to comply with the section 111 of MMSEA reporting requirements under section 1862(b)(7) or (b)(8) of the Act, as amended by the Medicare IVIG Access and Strengthening Medicare and Repaying Taxpayers Act of 2012 (the SMART Act). These provisions also require that GHPs and NGHPs that fail to comply with these reporting requirements shall be subject to a CMP of $1,000 and up to $1,000, respectively, for each calendar day of noncompliance. Imposition of penalties related to noncompliance with section 111 of MMSEA are required to be promulgated in regulation, which is the purpose of this rule.

In 2013, Congress enacted the SMART Act, which amended section 1862(b)(8)(E) of the Act, which includes the section 111 of MMSEA reporting requirements and describes the enforcement provisions for NGHPs that fail to comply with the reporting requirements. Specifically, the SMART Act revised section 1862(b)(8)(E) of the Act to state that NGHP applicable plans that fail to comply with the reporting requirements *may* be subject to a civil money penalty of *up to* $1,000 for each calendar day of reporting noncompliance required of NGHP applicable plans under section 1862(b)(8)(E) of the Act. The SMART Act also added section 1862(b)(8)(I) of the Act, which specifically required rulemaking actions regarding the enforcement of CMP provisions under section 1862(b)(8)(E) of the Act.

We note that the SMART Act did not amend any CMP provisions for GHP arrangements that have reporting obligations under section 1862(b)(7) of the Act. Such GHP arrangements remain subject to *mandatory* CMPs of $1,000 per calendar day of noncompliance and per individual for whom submission of information was required. In addition, the SMART Act directed rulemaking for NGHP applicable plans regarding the imposition and non-imposition of CMPs.

We further note that the statutory language speaks to ''individuals,'' though there are situations described that are specifically applicable to Medicare beneficiaries; we have attempted to be consistent with the usage of this statutory terminology but use the term ''beneficiary'' where it is more appropriate.

D. Summary of Public Comments Received on the December 11, 2013, Advance Notice of Proposed Rulemaking (ANPRM)

As the mandatory insurer reporting requirements themselves are self-implementing, we were able to gradually implement the reporting process from 2009 through 2011. The implemented reporting process included informal communications to RREs regarding their compliance with reporting requirements, including ''compliance flags'' in response to records that fail to meet specified criteria and even direct outreach to RREs. However, the implementation of civil money penalties for noncompliance requires formal rulemaking. In accordance with the rulemaking directed by the SMART Act, on December 11, 2013 (78 FR 75304), we published an advance notice of proposed rulemaking (ANPRM) titled ''Medicare Secondary Payer and Certain Civil Money Penalties.'' The December 2013 ANPRM solicited public comment on specific practices for which CMPs may or may not be imposed for failure to comply with MSP reporting requirements for certain GHP and NGHP arrangements.

We received 34 timely pieces of correspondence in response to the December 2013 ANPRM. In section I.D. of the February 18, 2020, proposed rule, we provided an analysis of the public comments received by subject area, with a focus on the most common issues raised, and briefly discuss how we proposed to address the issues raised by commenters in response to the 2013 ANPRM. Commenters expressed many of the same concerns and raised most of the same points that were raised in response to the proposed rule, published on February 18, 2020. While the proposed rule addressed these comments, alterations to the rule, as well as an evolving stakeholder landscape, resulted in many comments to the proposed rule being resubmitted in substantially similar form and content. Specifically, many commenters requested clarity around how a CMP would be calculated, the possibility of a sliding scale or tiered approach to levying CMPs, establishing a statute of limitations, and confirming that enforcement of the rule would be prospective only. For more detailed information on our analysis of the public comments on the ANPRM, please see the February 18, 2020, proposed rule (85 FR 8795 through 8797).

II. Provisions of the Proposed Rule and the Analysis of and Responses to Public Comments

In the February 18, 2020, **Federal Register** (85 FR 8793), we published the proposed rule titled ''Medicare Secondary Payer and Certain Civil Money Penalties.'' In drafting the February 2020 proposed rule, we reviewed the public comments in response to our December 11, 2013, ANPRM (78 FR 75304), and other policy considerations. Accordingly, we proposed specific criteria for when CMPs would be imposed and proposed specific criteria for when CMPs would not be imposed, in circumstances when a GHP or an NGHP entity fails to comply (either on its own or through a reporting agent) with MSP reporting requirements specified under section 1862(b)(7) and (b)(8) of the Act. Further, we proposed to amend the amount of these CMPs, as set forth under 45 CFR 102.3 (Penalty adjustment and table).

We received 47 timely pieces of public correspondence on the February 18, 2020, proposed rule. Commenters included various group health plans and private insurance companies (non-group health plan insurers) as well as their representatives, special interest groups, and other interested individuals. Some comments addressed issues or expressed concerns that were outside the scope of this rule and were thus inappropriate to address in this venue. Of the remaining comments, there were many that expressed concern with various aspects of the proposed rule including the possible amount of CMPs, the process by which noncompliance would be discovered, and the proportionality of the possible penalties when compared to the severity of the noncompliance as well as the relative size of the entity against which a penalty was contemplated. In direct response to public comment, as well as substantial internal data analysis, CMS has revised the final rule to be responsive to the concerns of those entities that may be impacted by the rule.

A. CMP Basis and Scope in the Proposed Rule

The existing regulation at 42 CFR 402.1 describes the basis for imposition of CMPs against parties who violate the provisions of the Act. We proposed to add regulatory language under § 402.1(c), which would identify situations in which GHP and NGHP RREs would be subject to CMPs under sections 1862(b)(7) and (b)(8) of the Act. To accomplish this regulatory addition, we proposed the following regulatory revisions in § 402.1:

- Removing paragraph (c)(20), which currently refers to a provision that is no longer applicable regarding the imposition of CMPs for employers that fail to timely, and accurately report an employee's group health insurance coverage.
- Redesignating paragraph (c)(21) as paragraph (c)(20).
- Redesignating paragraphs (c)(22) through (34) as paragraphs (c)(23) through (35).
- Adding new paragraphs (c)(21) and (22), which will incorporate the new text finalized in this rule and all applicable provisions.

The existing regulation at 42 CFR 402.105(b) establishes the amounts of penalties assessed against parties who violate the provisions of the Act. We proposed to amend § 402.105(b) by revising paragraph (b)(2) and adding a new paragraph (b)(3). The proposed regulation at § 402.105(b)(2) would codify the amounts of penalties imposed against GHPs, and the proposed regulation at § 402.105(b)(3) would establish the amounts of penalties imposed against NGHPs.

In addition, we proposed to revise the regulations at 45 CFR 102.3 to establish the updated amounts for all CMPs at issue in these regulations.

Comment: Some commenters expressed concerns about the potential size of the CMPs that would be imposed and recommended developing a ''sliding scale'' or ''tiered'' CMP approach. These suggestions included scaling the amount of the CMP to be imposed based upon the intentions of the noncompliant entity, or upon whether an excess proportion of individual beneficiary records failed to be reported as required (in essence creating a safe harbor for a certain portion of records to not be reported as required), and other similar recommendations to limit the size of the CMP. Some commenters also noted the statutory discrepancy between the penalty amounts for GHP, which are $1,000 per day of noncompliance, and NGHP entities, which are *up to* $1,000 per day of noncompliance.

Response: We begin by noting that CMS does not have the authority to alter penalties for GHPs, as penalty amounts are stated in section 1862(b)(7) of the Act. In the proposed rule, we proposed that penalties for NGHP entities would parallel those for GHP entities. However, because CMS has the authority to adjust CMPs for NGHP entities, we are instead finalizing a tiered approach with respect to such entities, under which we will adjust penalty amounts based on the length of time that a report has been untimely. The full explanation of this approach appears in the next section of this document.

While ultimately the responsibility of the RRE, CMS is not unsympathetic to RREs in regard to those situations where a particular late submission was the result of a rare situation, system glitch, defect, or other problem that was unanticipated or out of the immediate control of the RRE. For this reason, an informal notice process will be implemented so that any RRE that receives notice that a CMP is pending against them will have an opportunity to examine their records and alert CMS to any discrepancies or mistakes that could mitigate or eliminate the potential penalty. This process is described in full detail later in this document.

Comment: Some commenters alleged that the amount of CMPs, in certain circumstances, are too high, excessive, disproportionate to the harm to the program, or unconstitutional.

Response: The amounts of the GHP CMPs are set by statute, in accordance with section 1862(b)(7)(B) of the Act, and CMS must enforce the amount as set by statute. While CMS has discretion to adjust CMPs for NGHPs under section 1862(b)(8)(E) of the Act, the statute does not authorize such discretion with respect to GHPs. In the proposed rule, we proposed that CMPs imposed against NGHPs would be aligned with those for GHP entities. However pursuant to this final rule, penalties for NGHP entities will instead be tiered based on the amount of time that a record has been late, or gone unreported, in accordance with the language of the statute which provides that penalties for NGHPs are *up to* $1,000 per day of noncompliance.

We originally proposed that CMPs may be levied in addition to any MSP reimbursement obligations identified using the reported information, but that CMS would not impose duplicative penalties. For example, failure to timely report the termination of coverage and then submitting the late termination in a manner that exceeds the error tolerance threshold for the fourth time in eight consecutive reporting periods, may meet the criteria for two potential CMPs with the submission of one record. However, we proposed that CMS would only impose a CMP once, and for the lesser of the two potential CMPs. This proposed limitation has been eliminated in the final rule as a result of being rendered unnecessary by the new audit methodology that will be employed.

B. CMP Imposition and Amounts in the Proposed Rule

The proposed regulations at § 402.1(c) identified circumstances where GHP and NGHP entities would be subject to CMPs for violation of sections 1862(b)(7) and (b)(8) of the Act. Following publication of the final rule, we intended to enhance monitoring of recovery process disputes and appeals that contradict reported data, as well as monitoring the reported data and performance over time to identify reporting that exceeded error tolerances. The proposed regulations at § 402.105(b) explained how we would calculate CMP amounts for GHP and NGHP entities that have reporting obligations under sections 1862(b)(7) and (b)(8) of the Act. Furthermore, proposed § 402.1(c) identified situations where GHP and NGHP RREs would not be subject to CMPs for violation of sections 1862(b)(7) and (b)(8) of the Act. The final rule will limit CMPs to only instances of noncompliance based on timely reporting, so as to greatly simplify the process by which CMPs are

levied. The changes to the final rule are largely in response to stakeholder concerns raised in response to the ANPRM and proposed rule that alleged that the proposed process was confusing, punitive, and failed to serve the intended purpose of encouraging compliance and fostering collaboration with CMS. More information on this will be in the following section.

Under section 1862(b)(7) of the Act, a GHP RRE shall be subject to a CMP of $1,000 as adjusted annually under 45 CFR part 102 (currently $1,325 as of June 8, 2023; see 87 FR 15101)) for each calendar day of noncompliance for each individual for which the required information should have been submitted. Under section 1862(b)(8) of the Act, an NGHP RRE may be subject to a CMP of up to $1,000 as adjusted annually under 45 CFR part 102 (currently $1,325 as of June 8, 2023; see 87 FR 15101) for each calendar day of noncompliance with respect to each claimant. These CMPs would be in addition to any other penalties prescribed by law, and in addition to any MSP claim under section 1862(b) of the Act with respect to an individual.

1. Imposition of a CMP

In the proposed rule, CMS indicated that a penalty would be imposed if an RRE fails to report or update any GHP beneficiary record within the required timeframe (no more than 1 calendar year after GHP coverage effective date or the Medicare beneficiary's entitlement date, whichever is later). In the proposed rule, CMS proposed that the penalty be calculated on a daily basis, based on the actual number of individual beneficiaries' records that the entity submitted untimely (that is, beyond the required timeframe after the GHP MSP effective date). CMS proposed that the penalty be $1,000 (as adjusted annually under 45 CFR part 102) for each calendar day of noncompliance for each individual for which the required information should have been submitted, as counted from the day after the last day of the RRE's assigned reporting window where the information should have been submitted through the day that CMS received the information, up to a maximum penalty of $365,000 (as adjusted annually under 45 CFR part 102) per individual per year.

In the proposed rule, CMS also proposed a penalty if an RRE failed to report any NGHP beneficiary record within the required timeframe of no more than 1 year after the date of the settlement, judgment, award, or other payment (also referred to as the Total Payment Obligation to Claimant (TPOC)). CMS proposed that the penalty be calculated on a daily basis, based on the actual number of individual beneficiaries' records that the entity submitted untimely (that is, in excess of the required timeframe after the TPOC date). In the proposed rule, CMS proposed that the penalty be up to $1,000 (as adjusted annually under 45 CFR part 102) for each calendar day of noncompliance for each individual for which the required information should have been submitted, as counted from the day after the last day of the RRE's assigned reporting window where the information should have been submitted through the day that CMS received the information, up to a maximum penalty of $365,000 (as adjusted annually under 45 CFR part 102) per individual per year.

In the proposed rule, CMS also proposed that a CMP be assessed if a GHP's or NGHP's response to CMS recovery efforts contradicted the entity's section 111 of MMSEA reporting. For example, if an RRE reported and repeatedly affirmed ongoing primary payment responsibility for a given beneficiary, then responded to recovery efforts with the assertion that coverage for that beneficiary actually terminated 2 years prior to the issuance of the recovery demand letter. The penalty as proposed would have been calculated based on the number of calendar days that the entity failed to appropriately report updates to beneficiary records, as required for accurate and timely reporting under section 111 of MMSEA. In the proposed rule, for a GHP, CMS proposed that the penalty be $1,000 (as adjusted annually under 45 CFR part 102) for each calendar day of noncompliance for each individual for which the required information should have been submitted. For an NGHP, CMS proposed that the penalty be up to $1,000 (as adjusted annually under 45 CFR part 102) per calendar day of noncompliance for each individual, for a maximum annual penalty of $365,000 (as adjusted annually under 45 CFR part 102) for each individual for which the required information should have been submitted.

In the proposed rule, CMS also proposed that a penalty be assessed if a GHP or NGHP entity had reported and exceeded any error tolerance(s) threshold established by the Secretary in any 4 out of 8 consecutive reporting periods (as defined later in this section). We proposed that the initial and maximum error tolerance threshold would be 20 percent (representing errors that prevent 20 percent or more of the beneficiary records from being processed), with any reduction in that tolerance to be published for notice and comment in advance of implementation. We proposed that this tolerance would be applied as an absolute percentage of the records submitted in a given reporting cycle.

In this final rule, all other proposed avenues for receiving a CMP have been eliminated and the only method of noncompliance that would be ripe for a CMP would be untimely reporting, as fully explained in the following section.

Comment: Many commenters emphasized that this rule should not be aimed at those exhibiting ''good faith efforts'' or those who make an earnest attempt at reporting but may do so occasionally with error but instead be aimed at those who fail to report at all.

Response: It is not our intent to penalize RREs for honest, infrequent mistakes, but instead to only resort to penalty when an RRE fails to report or submits reports in an untimely manner. We acknowledge that the overwhelming majority of RREs report correctly and timely a majority of the time and commend those entities for working with CMS to provide accurate data. It is, therefore, CMS's shared opinion with commenters that the focus shall not be to punish and impose consequences but instead to motivate proper reporting and maintain compliance with existing statute and regulation. To that end, CMS is adopting an audit approach in this final rule whereby we will audit a randomized sample of new beneficiary records received each quarter, rather than undertaking an automated review of all records submitted, as proposed. By using this random auditing approach, CMS will be better able to monitor trends in reporting, via manual review of said records, rather than a mass, computer-based algorithm, which will allow us to discover areas that appear to be more of a challenge for RREs without resorting to penalties that may be disproportionate to the level of noncompliance exhibited or have the effect of penalizing an entity for an honest mistake or system error. RREs will also be able to avail themselves of the informal notice and dispute process to alert CMS to their ''good faith efforts'' to report any records that CMS has identified as being out of compliance.

Comment: Some commenters raised concerns about the imposition of CMPs related to the reporting of Ongoing Responsibility for Medicals, (ORM). Specifically, these commenters cited difficulty with proper and timely reporting and understanding how to report ORM termination correctly.

Response: In the proposed rule, CMS proposed imposing penalties for failing to accurately and timely report ORM

acceptance or termination. In the final rule, based on stakeholder concerns and submitted comments, CMS has chosen to focus its definition of noncompliance solely on those situations where an entity has failed to provide its initial report of primary payment responsibility in a timely manner. That means that untimely termination of ORM coverage records would not be considered eligible for a civil money penalty under this rule. While not a part of this final rule, we also note that CMS strives to engage with stakeholders, including RREs, about the reporting process and continuous process improvement efforts particularly as they relate to ORM, and will continue to do so in the future. We invite any RREs with concerns about ORM or any other aspect of reporting to proactively use the available outreach and education tools to address their questions.

We also wish to convey that time delays caused by CMS or its contractors in the reporting process will not trigger penalties related to timeliness. RREs must adhere to all applicable timelines, but any delay encountered when following CMS's policies and procedures will not be held against the RRE (for example, time delays related to processing by CMS contractors will not trigger any penalty).

Comment: A number of commenters suggested that CMS should develop a formal appeal process to provide entities with reporting obligations a formal structure in which to appeal any notice of a pending or imposed CMP.

Response: We note that CMPs imposed in accordance with this final rule will be subject to the formal appeals process as prescribed by 42 CFR 402.19 and set forth under 42 CFR part 1005. In broad terms, parties subject to CMPs will receive formal written notice at the time penalty is proposed. The recipient will have the right to request a hearing with an Administrative Law Judge (ALJ) within 60 calendar days of receipt. Any party may appeal the initial decision of the ALJ to the Departmental Appeals Board (DAB) within 30 calendar days. The DAB's decision becomes binding 60 calendar days following service of the DAB's decision, absent petition for judicial review.

Comment: Some commenters stressed the possibility of delays and uncertainty regarding their appeals due to backlogs at various stages of the administrative appeals process, and some suggested that CMS utilize a different appeals process.

Response: We affirm that CMS is bound by the appeal process as prescribed in 42 CFR 402.19 and set forth under 42 CFR part 1005.

Comment: Many commenters requested that CMS explain how it will provide notice to entities regarding pending or imposed CMPs and how much information will be included.

Response: We intend to communicate with the entity informally before issuing formal notice regarding a CMP. The informal (that is, prior to formal enforcement actions) written ''pre-notice'' process will allow the RRE the opportunity to present mitigating evidence for CMS review prior to the imposition of a CMP. The RRE will have 30 calendar days to respond with mitigating information before the issuance of a formal written notice in accordance with 42 CFR 402.7.

Common to all such instances where informal notice will be given is the intention to give the RRE an opportunity to clarify, mitigate, or explain any errors that were the result of a technical issue or due to an error or system issue caused by CMS or its contractors. It would be impractical and counter to the spirit of the informal notice process to regulate or enumerate all circumstances in which mitigating information could be provided or what that information should convey. As such, any mitigating factors or circumstances are welcomed, and a dialogue is encouraged in an attempt to find solutions that are short of imposing a CMP. We believe it is in the best interests of all RREs to leave the informal notice process open to any reasonable submission of mitigating factors so that we are free to entertain all such documentation without strict limits on what is, or is not, acceptable.

Once we determine that a CMP will be imposed (after the informal notice period) we will provide formal notice to the entity in writing in accordance with 42 CFR 402.7, which will contain information on the event that has triggered the proposed imposition of a CMP, the amount of the proposed CMP, and next steps for the entity, including a right to a hearing in accordance with 42 CFR 402.19 and part 1005.

Comment: Commenters suggested that CMS should not impose CMPs in situations where required information has already been reported to another agency or entity, such as the Department of Labor, or in situations where multiple entities have obligations to report the same information to CMS and one entity has already reported.

Response: Sections 1862(b)(7) and (b)(8) of the Act imposed certain unique requirements on specific entities to report data to CMS for the purposes of identifying those situations where another party has primary payment responsibility. These reporting requirements were imposed under the Act, regardless of whether another agency or entity requires the same or similar data (and such data must also be reported to CMS in the manner and form specified by the Secretary). The current Office of Management and Budget (OMB) control number assigned to this information collection effort, as required under the Paperwork Reduction Act, is 0938–1074.

Commenters provided examples of data submitted to other agencies that they believe are similar, but the data are not used for a comparable purpose to the data that is reported to CMS. Consequently, this data is neither in the same format that CMS systems require, nor is it the complete set of data that CMS needs for the proper coordination of benefits. Therefore, any attempt to create a data-sharing agreement that would render reporting to CMS truly duplicative would require that other agencies update their data collection efforts to align with CMS, despite the fact that those agencies may have no need for that data. Not only would that impose additional costs to the federal government to accommodate a relatively small number of entities, it would also undermine efforts under this rule to verify the accuracy or timeliness of the reporting. Therefore, it is impractical to attempt to promulgate such data sharing agreements and all RREs must continue to perform reporting as required by the Act.

Comment: Commenters suggested that CMS not impose CMPs when CMS has been able to coordinate benefits correctly or CMS has otherwise been able to recover any conditional payments made due to untimely or inaccurate reporting.

Response: The obligations to report under sections 1862(b)(7) and (b)(8) of the Act are separate and distinct from any other obligation with respect to MSP, including reimbursement. Providing accurate information in response to recovery efforts does not satisfy those obligations and the fact that we may be able to eventually correctly coordinate benefits and retain the right to pursue recovery does not negate the reporting obligations established under sections 1862(b)(7) and (b)(8) of the Act.

Comment: Most commenters requested a statute of limitations on the imposition of CMPs.

Response: We agree and will apply the 5-year statute of limitations as required by 28 U.S.C. 2462. Under 28 U.S.C. 2462, we may only impose a CMP within 5 years from the date when the noncompliance occurred.

Comment: Many commenters suggested that the statute of limitations should be 3 years.

Response: Under 28 U.S.C. 2462, the applicable statute of limitations is 5 years. Although section 1862(b)(2)(B)(iii) of the Act establishes a 3-year statute of limitations for certain actions, that provision applies only to legal actions CMS may utilize for the recovery of MSP debts. While recovery of conditional payments (overpayments) and the imposition of CMPs may appear, on their face, to be similar actions, they are unique and serve separate, distinct purposes and the statute of limitations applicable to the former does not also apply to the latter. An explanation and example of how this 5-year statute of limitations will apply is as follows: For failure to initially report the date of settlement or effective date of coverage timely (where applicable), noncompliance occurs on every day of non-reporting after the required timeframe for reporting has elapsed. For example, if the date of settlement is January 1, 2025, then the RRE will have 1 year from that date to report the coverage before being potentially subject to a CMP (that is, January 1, 2026). If the settlement date was January 1, 2025, but the RRE did not report it to CMS until October 15, 2026, the RRE will be considered noncompliant for the period of January 2, 2026, through October 15, 2026. If CMS does not act until after October 15, 2031, then the statute of limitations has elapsed and no CMP may be imposed.

Comment: Many commenters suggested that the rule should be enforced prospectively only.

Response: We concur and will evaluate compliance based only upon files submitted by the RRE on or after the effective date of the final rule. CMPs will only be imposed on instances of noncompliance based on those settlement dates, coverage effective dates, or other operative dates that occur after the effective date of this regulation and as such, there will be no instances of inadvertent or de facto retroactivity of CMPs. The 1-year period to report the required information before CMPs would potentially be imposed would begin on the latter of the rule effective date or the settlement or coverage effective dates which an RRE is required to report in accordance with sections 1862(b)(7) and (b)(8) of the Act.

Comment: Commenters suggested that CMS refrain from imposing CMPs where NGHPs with reporting obligations under section 1862(b)(8) of the Act make ''good faith efforts'' to obtain required information from individuals who are unwilling or unable to provide it. Some ''good faith efforts'' suggested included the following: (1) CMS could accept documentation signed by the individual stating that he or she is either not a Medicare beneficiary, or will not provide the NGHP entity with his or her Social Security Number (SSN) (full SSN or last 5 digits); and (2) CMS could accept a judicial order establishing that the individual is not required to provide his or her Medicare Beneficiary Identifier (MBI) or SSN to the NGHP entity.

Response: We note that concerns about ''good faith efforts'' were received from the NGHP industry and not the GHP industry during both rounds of comments, which we believe is reflective of the fundamental differences between the two industries and the relationships between those plans and the individuals in question. Our understanding is that NGHP applicable plans may at times be in an adversarial relationship with the reportable individual, whereas the reportable individual is typically the client of a GHP. To this end we understand the concern regarding privacy law or consumer protection statute violations, as were mentioned by some commenters.

In response to these comments, we stress that CMPs will not be imposed against NGHP entities where those entities have made good faith efforts, as outlined in this final rule, to obtain necessary reporting information. NGHP entities must document their efforts to obtain this reporting information and retain this documentation, as we retain the right to audit such documentation. In response to comments, we are finalizing a revised version of our proposal regarding how NGHPs may avoid being subject to CMPs where they have made sufficient efforts to obtain the necessary information. The revisions we are finalizing address commenter concerns regarding the type and number of communication attempts an RRE must perform, as well as documentation of express refusal by an individual or their attorney or representative to provide the requested information as a way to satisfy the obligation to attempt to collect that information.

Comment: Many commenters continued to suggest that CMS should specify a series of ''safe harbors'' that would preclude the assessment of a CMP.

Response: In this section, we outline two such safe harbors but acknowledge that other situations may exist where it is inappropriate to penalize an entity for noncompliance. We welcome RREs to use the informal or formal appeal process if there are other situations that the RRE believes makes it inappropriate to receive a CMP.

First, any untimely reporting that is the result of a technical or system issue outside of the control of the RRE, or that is the result of an error caused by CMS or one of its contractors would not be considered noncompliance for purposes of this rule. See a more thorough explanation in ''Amount of CMPs''.

Second, any untimely reporting by an NGHP that is the result of a failure to acquire all necessary reporting information due to a lack of cooperation by the beneficiary will not lead to a CMP provided that certain standards are met. This situation is addressed in greater detail in section III.D. of this final rule and § 402.1(c)(22)(ii)(A) as finalized.

Comment: Commenters suggested that CMS consider suspending the imposition of CMPs where changes to mandatory reporting procedures require RREs to make significant revisions to the systems used to prepare the data for reporting.

Response: We will continue to provide a minimum of 6 months' (180 calendar days) notice prior to any changes in procedure, including systems alterations or changes to the required data elements, associated with section 111 of MMSEA required reporting to allow reporting entities adequate time to react. We will not assess any CMPs associated with a specific change for a minimum of 2 reporting periods following the implementation (effective date) of that policy or procedural change. As provided in § 402.1(c)(21)(ii)(A) and (c)(22)(ii)(C) as finalized, in the event we are unable to provide a minimum of 6 months' notice prior to implementing any reporting process changes (such as the addition of a new required data element), we will not impose any CMPs associated with that specific reporting process change for a minimum of 1 year after that change becomes effective. CMPs associated with any unchanged aspects of reporting may still be imposed during this time.

2. Overall Response to Comments

We solicited comments on our proposed approaches to imposing and not imposing CMPs, including our proposed methods of calculating CMP amounts. Our proposed approach to imposing CMPs was developed with the intention of giving entities meaningful opportunities to resolve most reporting issues, without the immediate risk that a CMP would be imposed. After consideration of the public comments we received, we have made a number of important revisions in this final rule.

As described in the proposed rule and earlier in this final rule, the amount of CMPs for GHPs is established in section 1862(b)(7)(B) of the Act, and, except for those situations and criteria described in this final rule, CMS does not have the authority to adjust the amount of the CMP levied on a GHP entity. In the case of NGHPs, where CMS is permitted discretion in the amount of the CMP, we are finalizing a tiered approach based upon the length of time for which a submission was untimely to better align the penalty to the severity of the noncompliance. In the case of GHPs, the statutory language at section 1862(b)(7)(B) of the Act does not allow this level of discretion, and CMS is therefore unable to adjust the amount of GHP-related CMPs.

The submission of information or documentation that serves to mitigate the noncompliance, or explain a technical error, will be considered on a case-by-case basis in an effort to prevent the imposition of a CMP at all.

Based on the comments we received, we have determined that we will only impose penalties where the initial report was not received in a timely manner. Penalties will not be imposed on any other basis, such as in relation to the quality of reporting. Timeliness is determined by comparing the date a record is submitted and accepted against the date CMS should have received the record. The date CMS should receive a record is determined by the effective date of coverage or the date of settlement (or settlement funding date if the funding of the settlement is delayed) plus 1 year (365 days). For every day a record is submitted that is past the date that CMS should have received the information, a penalty of up to $1,000 per day for NGHP RREs or $1,000 per day, in the case of GHP RREs, will be imposed.

No CMP will be imposed until at least 1 year (365 days) after the later of: (1) the applicability date of this final rule; or (2) the coverage effective date, or settlement date, an RRE is required to report. This is a minor change from the proposed rule which seeks to clarify that RREs will have at least 1 year from the rule applicability date before any CMP is contemplated. The date that information was submitted by the RRE will determine timeliness. Any delay that is the result of technical or administrative issues on the part of CMS or its contractors will not be held against the RRE for purposes of calculating whether reporting was timely.

In the proposed rule, we proposed that we would not impose a CMP in the following situations, where all of the applicable conditions are met:

- If an RRE reports any GHP beneficiary record that is reported on a quarterly submission timeframe within the required timeframe (not to exceed 1 year after the GHP effective date), or any NGHP beneficiary record that is submitted within the required timeframe (not to exceed 1 year after the settlement date or ORM effective date).
- If an RRE complies with any settlement reporting thresholds or any other reporting exclusions published in CMS's MMSEA Section 111 User Guides or otherwise established by CMS. Note that these thresholds are not defined in the regulatory text as they include operational thresholds that are currently subject to change on an annual basis per section 1862(b)(9)(B) of the Act as well as other operational thresholds for reporting that CMS elects to impose, such as the current $5,000 threshold for Health Reimbursement Arrangements, which are communicated to RREs through the MMSEA Section 111 User Guides. Our ability to implement such thresholds and operational exclusions, whether as statutorily mandated or to be responsive to stakeholder or litigation needs, is not altered by this regulation.
- If an NGHP entity fails to report timely because the NGHP entity was unable to obtain information necessary for reporting from the reportable individual, including an individual's last name, first name, date of birth, gender, MBI, or SSN (or the last 5 digits of the SSN), and the responsible applicable plan has made and maintained records of its good faith effort to obtain this information by taking *all* of the following steps:

++ The NGHP has communicated the need for this information to the individual and his or her attorney or other representative (if applicable) and requested the information from the individual and his or her attorney or other representative at least twice by mail and at least once by phone or other means of contact such as electronic mail in the absence of a response to the mailings.

++ The NGHP certifies that it has not received a response, or has received a response in writing that the individual will not provide his or her MBI or SSN (or last 5 digits of his or her SSN).

++ The NGHP has documented its efforts to obtain the missing information, such as the MBI or SSN (or the last 5 digits of the SSN) and the reason for the failure to collect this information.

The NGHP entity should maintain records of these good faith efforts (such as dates and types of communications with the individual) in order to be produced as mitigating evidence should CMS contemplate the imposition of a CMP. Such records must be maintained for a period of 5 years. The current OMB control number assigned to this information collection effort, as required under the Paperwork Reduction Act, is 0938–1074.

III. Provisions of the Final Regulations

The final rule incorporates some of the provisions of the proposed rule and also revises some of the provisions as proposed. Additionally, the final rule clarifies how the identification of noncompliance will occur, which was not discussed in the proposed rule. Those provisions of this final rule that differ from the proposed rule are as follows:

A. Removal of Any Basis Other Than Timeliness as a Reason for Imposing a CMP

The only basis for the imposition of a CMP will be untimely reporting of required information. The final rule removes all references in the proposed rule to ''contradictory reporting'' or ''exceeding error tolerance'' as a reason to impose a CMP. Specifically, any references to an applicable plan providing contradictory reporting, and any CMPs imposed as a result, that were proposed in 42 CFR 402.1(c)(21) and (c)(22), 402.105(b)(2) and (b)(3), or elsewhere, are removed and are not being finalized. As such, the following sections of the proposed regulations text have been removed and are not being finalized:

- Sections 402.1(c)(21)(ii) and (iii).
- Sections 402.1 (c)(22)(ii) and (iii).
- Sections 402.105(b)(2)(ii) and (iii).
- Sections 402.105(b)(3)(ii) and (iii).

B. Audit Methodology for Analyzing Records

To identify potential instances of noncompliance, rather than imposing CMPs based upon automated monitoring of all RRE submissions as contemplated in the proposed rule, we will utilize the following process to audit a randomized sample of recently added beneficiary records:

- CMS has determined that, given the time and resources necessary to accurately and thoroughly evaluate the accuracy of any submitted record, it would be possible to audit a total of 1,000 records per calendar year across all RRE submissions, divided evenly among each calendar quarter (250 individual beneficiary records per quarter).
- CMS will evaluate a proportionate number of GHP and NGHP records

based on the pro-rata count of recently added records for both types of coverage over the calendar quarter under evaluation. For example, if over the calendar quarter being evaluated, CMS received 600,000 GHP records and 400,000 NGHP records for a total of 1,000,000 recently added beneficiary records, then 60 percent of the 250 records audited for that quarter would be GHP records, and 40 percent would be NGHP records.

- At the end of each calendar quarter, CMS will randomly select the indicated number of records and analyze each selected record to determine if it is in compliance with the reporting requirements as required by statute and defined herein.
- Noncompliance is defined as any time CMS identifies a new beneficiary record that was not reported to CMS timely. Timeliness is defined as reporting to CMS within 1 year of the date GHP coverage became effective, the date a settlement, judgment, award, or other payment determination was made (or the funding of a settlement, judgment, award, or other payment, if delayed), or the date when an entity's Ongoing Responsibility for Medicals (ORM) became effective. Failure to report timely prevents CMS from promptly and accurately determining the proper primary payer and taking the appropriate actions.
- For GHP entities, for any selected record that is more than 1 year (365 calendar days) late, a penalty of $1,000 per day (as adjusted) of noncompliance will be imposed as indicated herein.
- For NGHP entities, for any selected record determined to be noncompliant, a tiered approach to penalties will be implemented as described in detail in section III.C. of this final rule.
- To calculate the penalty imposed against an RRE, CMS will multiply the number of audited records found to be noncompliant by the number of days that each record was late (in excess of 365 days). The product will then be multiplied by the appropriate penalty amount, as described previously and below.

C. Tiered Approach for NGHP RREs

Because we have the statutory authority to adjust the amounts of penalties imposed on NGHP RREs, a tiered approach and cap on the total amount of penalties applicable to such RREs are being finalized in this rule. As explained previously, the statute does not permit us to extend this approach to GHP RREs. For any record selected via the random audit process described above where the NGHP RRE submitted the information more than 1 year after the date of settlement, judgment, award, or other payment (including the effective date of the assumption of ongoing payment responsibility for medical care); the daily penalty will be—

- $250, as adjusted annually under 45 CFR part 102, for each calendar day of noncompliance, where the record was reported 1 year or more, but less than 2 years after, the required reporting date;
- $500, as adjusted annually under 45 CFR part 102, for each calendar day of noncompliance, where the record was reported 2 years or more, but less than 3 years after, the required reporting date; or
- $1,000, as adjusted annually under 45 CFR part 102, for each calendar day of noncompliance, where the record was reported 3 years or more after the required reporting date.

Additionally, the total penalty for any one instance of noncompliance by an NGHP RRE for a given record identified by CMS will be no greater than $365,000 (as adjusted annually under 45 CFR part 102).

While we emphasize that all RREs are obligated to comply with their reporting obligations, CMS's approach to enforcement, where a randomized sample of records will be reviewed closely (as opposed to an automated review of all records), means that smaller entities are inherently much less likely to have their records audited for compliance. We also encourage entities that are smaller and less experienced with Medicare's coordination of benefits processes to take advantage of the resources and support available to ensure compliance.

D. Clarification of Good Faith Efforts To Obtain Identifying Information

A key change for the final rule is the expansion of the circumstances under which an NGHP entity may avoid CMPs for noncompliance caused by failure to obtain identifying information from an individual despite a good faith effort to do so.

In the proposed rule, we proposed providing NGHPs with the ability to document ''good faith'' efforts to obtain identifying information of reportable individuals. In the final rule, we are expanding this exemption. Specifically, as proposed in the proposed rule, NGHPs must make a total of three attempts to obtain the required information. At least two attempts to obtain the required information from the individual and his or her attorney must be by mail or electronic mail, but the final rule permits that the third attempt may be via telephone, electronic mail, or some other reasonable method.

Further, the final rule permits that, should an individual or their attorney or representative clearly and unambiguously decline to provide the information requested, no further attempts by the RRE to obtain the required information would be required. This documented refusal to provide the required information must be maintained for a minimum of 5 years, in accordance with the other requirements of this section of the rule.

We understand that NGHP RREs are concerned that attempts to obtain beneficiary information, particularly when in an adversarial relationship with the beneficiary, may be construed as running afoul of certain state and local privacy and anti-harassment laws. If the intent and purpose of the RRE's communications with beneficiaries was solely to comply with federal requirements, we believe any privacy or anti-harassment law would be preempted by the reporting requirements set forth in the Act.

All other parameters related to obtaining identifying information, including records retention requirements, are being finalized as proposed.

IV. Collection of Information Requirements

This document does not impose any new information collection requirements, that is, reporting, recordkeeping, or third-party disclosure requirements. The associated information collection requirements imposed under mandatory insurer reporting are already approved under OMB control number 0938–1074. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). We did not receive comments on the previous statement and therefore are finalizing the language without modification.

V. Regulatory Impact Statement

We have examined the impact of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993) and Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011) as amended by the Executive Order on Modernizing Regulatory Review on April 6, 2023), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–

4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (CRA) (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563, as amended by the Executive Order on Modernizing Regulatory Review on April 6, 2023, direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A Regulatory Impact Analysis (RIA) must be prepared for major rules with economically significant effects ($200 million or more in any 1 year). Modelling of potential penalties likely to be imposed under this rule demonstrates that this rule does not reach the economic threshold and thus is not considered a major rule.

Based on CMS workload and resource availability, the sampling methodology explained herein would result in a fixed number of submitted records to be audited each calendar quarter to determine compliance and potential penalty. At present, and absent a notice-and-comment period to alter such limit, CMS will audit up to 1,000 records each year, or up to 250 each calendar quarter. CMS has utilized the methodology as described in previous sections, in conjunction with utilizing data from the preceding calendar year regarding RRE reporting habits and volume, to determine the anticipated penalties that would be levied if no other changes in behavior were observed. Although we note that CMS believes that publication of the rule will have the intended effect of incentivizing increased compliance with reporting requirements in an effort to avoid a CMP, we have analyzed the existing data with no adjustments for subjective analysis. Assuming the rule had been in effect and CMPs could have been imposed based upon reporting behavior for calendar year 2022, the maximum penalties imposed would have been $86.4 million for GHP entities and $42.4 million for NGHP entities, for a total annual CMP amount of $128.8 million, which is below the $200 million threshold to be considered an economically significant rule. We also note that reporting behavior in this period may be skewed towards more untimely reporting, potentially reflecting efforts to come into compliance in advance of this rule becoming effective. Consequently, we believe this is a worst-case scenario and do not expect to collect CMPs totaling $200 million or more in any given year, nor do we expect this rule to have any other economic effects that meet or exceed that threshold.

The RFA requires agencies to analyze options for regulatory relief of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $7.0 million to $35.5 million in any 1 year. Individuals and States are not included in the definition of a small entity. We consider a rule to have a significant impact on a substantial number of small entities if it has at least a 3 percent impact of revenue on at least 5 percent of small entities. Affected entities with reporting responsibilities have been required to comply with sections 1862(b)(7) and (b)(8) of the Act since these provisions were added to the Act in 2007. This rule is intended to define how CMPs would be imposed as a consequence of noncompliance with these statutory obligations, and thus does not present any additional burden beyond the review of the rule. As discussed later in this section, the total cost impact of reviewing this rule by all 20,855 actively reporting RREs, regardless of size, is estimated to be $7,699,249, or $369.18 per entity. As the provisions and regulations, the violation of which will result in a CMP under this regulation, are already in place, no additional costs to comply with this regulation should be realized by any RRE. This regulation merely enumerates when and how CMPs will be levied but does not impose any additional rules or requirements on any RRE that does not already, at present, exist. This falls below the standard definition of ''significance'' of 3 or more of small entity revenue. As a result, we have determined, and the Secretary certifies, that this rule would not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare an RIA if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 for the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area for Medicare payment regulations and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because we have determined, and the Secretary certifies, that this rule would not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2023, the threshold is approximately $177 million. This rule will have no consequential effect on state, local, or tribal governments or on the private sector. Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has Federalism implications. Since this final rule does not impose any costs on state or local governments, the requirements of Executive Order 13132 are not applicable.

We used the current number of actively reporting GHP RREs (1,039) and NGHP RREs (19,816) to determine the total number of impacted entities (20,855). We recognize that this is a slight overestimate, as a single corporate parent may have multiple associated RREs. We welcome any comments on the approach in estimating the number of entities which will review this rule.

Using the May 2022 wage information from the U.S. Department of Labor Bureau of Labor Statistics for medical and health service managers (Code 11–9111), we estimate that the cost of reviewing this rule is $123.06 per hour, based on doubling the mean hourly wage of $61.53 to include overhead and fringe benefits (see *https://www.bls.gov/oes/current/oes119111.htm*). We assume that one individual associated with each of the 20,855 impacted entities will read the rule. Assuming an average reading speed, we estimate that it would take approximately 3 hours for the staff to review this rule. For each entity that reviews the rule, the estimated cost is $369.18 (3 hours × $123.06). Therefore, we estimate that the total cost of reviewing this rule is $7,699,249 ($369.18 × 20,855).

We did not receive additional comments on the regulatory impact statement section through the public comment period.

In accordance with the provisions of Executive Order 12866, this rule was reviewed by the Office of Management and Budget.

Chiquita Brooks-LaSure, Administrator of the Centers for Medicare & Medicaid Services, approved this document on September 28, 2023.

List of Subjects

42 CFR Part 402

Assessments, Civil money penalties, Exclusions.

45 CFR Part 102

Administrative practice and procedure, Penalties.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV as set forth below:

PART 402—CIVIL MONEY PENALTIES, ASSESSMENTS, AND EXCLUSIONS

■ 1. The authority citation for part 402 is revised to read as follows:

Authority: 42 U.S.C. 1302 and 1395hh.

■ 2. Section 402.1 is amended—
■ a. In paragraph (c) introductory text by removing the reference ''(c)(34) of this section'' and adding in its place the reference ''(c)(35) of this section'';
■ b. By removing paragraph (c)(20);
■ c. By redesignating paragraph (c)(21) as paragraph (c)(20);
■ d. By redesignating paragraphs (c)(22) through (34) as paragraphs (c)(23) through (35); and
■ e. Adding new paragraphs (c)(21) and (22).

The additions read as follows:

§ 402.1 Basis and scope.

* * * * *

(c) * * *

(21) Section 1862(b)(7)(B)—Except for the situation described in paragraphs (c)(21)(ii)(A) and (B) of this section, any entity that has a reporting obligation under section 1862(b)(7) of the Act (''reporting entity'') that—

(i) Fails to report any beneficiary record within 1 year of the last acceptable reporting date, defined as 365 days from the GHP coverage effective date or the Medicare beneficiary's entitlement date, whichever is later.

(ii) A civil money penalty (CMP) is not imposed if—

(A) The incident of noncompliance is associated with a specific reporting policy or procedural change on the part of CMS that has been effective for less than 6 months following the implementation of that policy or procedural change (or for 1 year, should CMS be unable to provide a minimum of 6 months' notice prior to implementing such changes).

(B) The entity complies with any reporting thresholds or any other reporting exclusions.

(22) Section 1862(b)(8)(E)—Except for the situations described in paragraph (c)(22)(ii)(A), (B) and (C) of this section, any applicable plan that has a reporting obligation under section 1862(b)(8) of the Act (''applicable plan''), that—

(i) Fails to report any beneficiary record within 1 year from the date of the settlement, judgment, award, or other payment, or the effective date where ongoing payment responsibility for medical care has been assumed by the entity.

(ii) A CMP is not imposed in the following situations:

(A) An NGHP applicable plan fails to report required information as a result of the applicable plan's inability to obtain an individual's last name, first name, date of birth, gender, Medicare Beneficiary Identifier (MBI), Social Security Number (SSN), or the last 5 digits of the SSN, and the applicable plan has made a good faith effort to obtain this information by meeting the following:

(*1*) Has communicated the need for this information to the individual and his or her attorney, or other representative, if applicable, or both.

(*2*) Has requested the information from the individual and his or her attorney, or other representative (if applicable), at least three times—

(*i*) Once in writing (including electronic mail);

(*ii*) Then at least once more by mail; and

(*iii*) At least once more by phone or other means of contact in the absence of a response to the mailings.

(*3*) Has not received a response or has received a written response clearly indicating that the individual refuses to provide the needed information. Should the applicable plan receive a written response from the individual or their attorney or representative that clearly and unambiguously declines or refuses to provide any portion of the information specified herein, no additional communications with the individual or their attorney or other representative are required.

(*4*) Has documented its efforts to obtain the MBI or SSN (or the last 5 digits of the SSN). This documentation, including any written rejection correspondence, must be retained for a minimum of 5 years.

(B) An NGHP applicable plan complies with any reporting thresholds or any other reporting exclusions.

(C) The incident of noncompliance is associated with a specific reporting policy or procedural change on the part of CMS that has been effective for less than 6 months following the implementation of that policy or procedural change (or for 12 months, should CMS be unable to provide a minimum of 6 months' notice prior to implementing such changes).

* * * * *

■ 3. Section 402.105 is amended by revising paragraph (b)(2) and adding paragraph (b)(3) to read as follows:

§ 402.105 Amount of penalty.

* * * * *

(b) * * * *

(2) For entities with reporting obligations under section 1862(b)(7) of the Act (''reporting entity''), if a reporting entity fails to report any beneficiary record within the specified period from the latter of the GHP coverage effective date or the Medicare beneficiary's entitlement date. The penalty is—

(i) Calculated on a daily basis, based on the number of recently added beneficiary records reviewed where CMS identifies that the entity submitted the required information more than 1 year after the GHP coverage effective date for the individual; and

(ii) $1,000 as adjusted annually under 45 CFR part 102 for each calendar day starting the day after 1 year (365 days) from the first instance of noncompliance, as defined in paragraph (b)(2)(i) of this section.

(3) For entities with reporting obligations under section 1862(b)(8) of the Act (''applicable plan'') as follows:

(i) If an applicable plan fails to report any NGHP beneficiary record within the specified period from the date of the settlement, judgment, award, or other payment (including the effective date of the assumption of ongoing payment responsibility for medical care). The penalty is—

(A) Calculated on a daily basis, based on the number of recently added beneficiary records reviewed where CMS identifies that the entity submitted the required information more than 1 year after the date of settlement, judgment, award, or other payment (including the effective date of the assumption of ongoing payment responsibility for medical care);

(B) $250 (as adjusted annually under 45 CFR part 102) for each calendar day of noncompliance as defined in paragraph (b)(3)(i)(A) of this section for each individual for which the required information should have been submitted, but was reported more than 1 year but less than 2 years after the required reporting date;

(C) $500 (as adjusted annually under 45 CFR part 102) for each calendar day of noncompliance as defined in paragraph (b)(3)(i)(A) of this section for each individual for which the required information should have been

submitted, but was reported 2 years or more, but less than 3 years, after the required reporting date; and

(D) $1,000 (as adjusted annually under 45 CFR part 102), for each calendar day of noncompliance as defined in paragraph (b)(3)(i)(A) of this section for each individual for which the required information should have been submitted, but was reported 3 years or more after the required reporting date.

(ii) The maximum penalty that may be imposed for noncompliance associated with any one individual for which the required information should have been submitted is $365,000 (as adjusted annually under 45 CFR part 102).

* * * * *

For the reasons specified in the preamble, the Department of Health and Human Services amends 45 CFR part 102 as specified below:

PART 102—ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION

■ 4. The authority for part 102 continues to read as follows:

Authority: Pub. L. 101–410, Sec. 701 of Pub. L. 114–74, 31 U.S.C. 3801–3812.

■ 5. Section 102.3 is amended in table 1 by adding references for U.S.C. 1395y(b)(6)(B), 1395y(b)(7)(B)(i), and 1395y(b)(8)(E)(i) in numerical order to read as follows:

§ 102.3 Penalty adjustment and table.

* * * * *

TABLE 1 TO § 102.3—CIVIL MONETARY PENALTY AUTHORITIES ADMINISTERED BY HHS AGENCIES AND PENALTY AMOUNTS

U.S.C. sections	CFR [1]	HHS agency	Description [2]	Date of last statutorily established penalty figure [3]	2021 maximum adjusted penalty ($)	2022 maximum adjusted penalty [4] ($)
*	*	*	*	*	*	
42 U.S.C.:						
*	*	*	*	*	*	
1395y(b)(6)(B)	42 CFR 402.1(c)(20), 402.105(a).	CMS	Penalty for any entity that knowingly, willfully, and repeatedly fails to complete a claim form relating to the availability of other health benefits in accordance with statute or provides inaccurate information relating to such on the claim form.	2021	3,484	3,701
1395y(b)(7)(B)(i)	42 CFR 402.1(c)(21), 402.105(a).	CMS	Penalty for any entity serving as insurer, third party administrator, or fiduciary for a group health plan that fails to provide information that identifies situations where the group health plan is or was a primary plan to Medicare to the HHS Secretary.	2021	1,247	1,325
*	*	*	*	*	*	
1395y(b)(8)(E)(i)	42 CFR 402.1(c)(22), 402.105(a)(E).	CMS	Penalty for any entity serving as insurer, third party administrator, or fiduciary for a non-group health plan that fails to provide information that identifies situations where the group health plan is or was a primary plan to Medicare to the HHS Secretary.	2021	1,247	1,325
*	*	*	*	*	*	

[1] Some HHS components have not promulgated regulations regarding their civil monetary penalty-specific statutory authorities.

[2] The description is not intended to be a comprehensive explanation of the underlying violation; the statute and corresponding regulation, if applicable, should be consulted.

[3] Statutory or Inflation Act Adjustment.

[4] The cost of living multiplier for 2018, based on the CPI–U for the month of October 2017, not seasonally adjusted, is 1.02041, as indicated in OMB Memorandum M–18–03, ''Implementation of Penalty Inflation Adjustments for 2018, Pursuant to the Federal Civil Penalties Adjustment Act Improvements Act of 2015'' (December 15, 2017).

[5] The cost of living multiplier for 2020, based on the Consumer Price Index for all Urban Consumers (CPI–U) for the month of October 2019, not seasonally adjusted, is 1.01764, as indicated in OMB Memorandum M–20–05, ''Implementation of Penalty Inflation Adjustments for 2019, Pursuant to the Federal Civil Penalties Adjustment Act Improvements Act of 2015'' (December 16, 2019).

Dated: October 3, 2023.

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2023–22282 Filed 10–10–23; 8:45 am]

BILLING CODE 4120–01–P

Proposed Rules

Federal Register
Vol. 88, No. 195
Wednesday, October 11, 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.

FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Part 2412

Privacy

AGENCY: Federal Labor Relations Authority.

ACTION: Proposed rule.

SUMMARY: This rulemaking proposes revisions to the regulations that the Federal Labor Relations Authority (FLRA) follows in processing records under the Privacy Act. The FLRA is revising these regulations to update procedures for requesting information from the FLRA and procedures that the FLRA follows in responding to requests from the public, in order to reflect changes in the law and the FLRA's organization since the regulations were last updated.

DATES: Written comments must be received on or before November 13, 2023.

ADDRESSES: You may send comments, which must include the caption ''Privacy Act Regulations,'' by one of the following methods:

Email: SolMail@flra.gov. Include ''Privacy Act Regulations'' in the subject line of the message.

Mail: Thomas Tso, Senior Agency Official for Privacy, Federal Labor Relations Authority, 1400 K Street NW, Washington, DC 20424–0001.

Instructions: Do not mail written comments if they have been submitted via email. Interested persons who mail written comments must submit an original and 4 copies of each written comment, with any enclosures, on 8½ x 11 inch paper. Do not deliver comments by hand.

FOR FURTHER INFORMATION CONTACT: If you have any questions, please contact Thomas Tso, Solicitor, Senior Agency Official for Privacy, at (771) 444–5779.

SUPPLEMENTARY INFORMATION: The proposed revisions to the FLRA's Privacy Act (5 U.S.C. 552a) regulations update these regulations to account for issues that have arisen since the regulations were last updated. For example, these changes are proposed to reflect modifications that clarify the FLRA's obligations under the Act and align with the authority vested in the FLRA's Office of the Solicitor to process Privacy Act requests. Modifications include the addition of language to reflect the amendment of the Privacy Act by the Debt Collection Act of 1982 (which stated the circumstances under which Federal agencies could disclose individual records to consumer reporting agencies). By consolidating responsibility with the Solicitor, the designated Senior Agency Official for Privacy, the proposed regulations ensure compliance with the Senior Agency Official for Privacy's oversight requirements in OMB M–16–24, ''Role and Designation of Senior Agency Officials for Privacy'' in accordance with E.O. 13719, Establishment of the Federal Privacy Council.'' [81 FR 7685, February 12, 2016]. The proposed regulations also ensure the independence of the FLRA's Office of the Inspector General (OIG or IG) by assigning all responsibilities to the IG for deciding Privacy Act requests for records held by the IG. In addition to some minor non-substantive changes to correct typographical errors, small stylistic adjustments for clarification, and streamlined language of some procedural provisions, the FLRA is proposing the following changes:

- Section 2412.1 is revised to clarify that these regulations are coordinated with regulations under the Freedom of Information Act (FOIA) and these regulations do not concern personnel records of FLRA employees.
- Section 2412.2 is revised to add definitions for four terms used in the regulations: request for access, request for amendment or correction, request for an accounting, and requester.
- Section 2412.4 is revised to streamline the procedure for existence-of-records requests by directing all requests to the FLRA's Solicitor, or the IG, as appropriate, and to include procedures for verifying identity and filing an existence-of-records request as a parent or guardian of an individual.
- Section 2412.5 is revised to streamline the procedure for individual access requests by directing all requests to the FLRA's Solicitor, or the IG, as appropriate, and to include procedures for verifying identity and for filing an individual access request as a parent or guardian of an individual.
- Section 2412.6 is removed and redesignated as § 2412.7 and is revised to streamline the procedure for responding to access requests by providing that the FLRA's Solicitor, or the IG, as appropriate will issue all initial decisions on access requests. Revisions also clarify that records will not be provided if they have been compiled in reasonable anticipation of civil or criminal action or other proceedings.
- Section 2412.7 is removed and integrated into newly redesignated § 2412.6 in order to consolidate all request provisions.
- Section 2412.8 is removed and redesignated as § 2412.6 and is revised to contain the limitations on disclosure and to streamline the process for responding to third-party requests for records by directing all such requests to the FLRA's Solicitor or the IG. The revision also adds language to reflect the amendment of the Privacy Act by the Debt Collection Act of 1982, which stated the circumstances under which Federal agencies could disclose individual records to consumer reporting agencies.
- Section 2412.9 is removed and redesignated as § 2412.8 and is revised to include a procedure for requesting accountings of record disclosures, for the FLRA's Solicitor or IG to respond to such requests, and for an individual to appeal the Solicitor or IG's decision. Revisions also identify certain types of records that are not subject to accounting or disclosure of an accounting.
- Section 2412.10 is removed and redesignated as § 2412.9 and is revised to streamline the procedure for requesting amendment or correction of records by directing all such requests to the FLRA's Solicitor or the IG and to list certain types of records that are not subject to amendment or correction.
- Section 2412.11 is removed and redesignated as § 2412.10 and is revised to streamline the procedure for responding to requests for correction or amendment by providing that the FLRA's Solicitor or IG will issue all initial decisions on access requests.
- Section 2412.12 is removed and redesignated as § 2412.11 and is revised to streamline the procedure for

correction or amendment of previously disclosed records by providing that the FLRA's Solicitor or IG will give notice of correction or amendment, or notice of a written statement of disagreement, to all persons to whom such records or copies have been disclosed.

- Section 2412.13 is removed and redesignated as § 2412.12 and is revised to streamline the procedure for an individual to appeal the initial decision of the FLRA's Solicitor or IG on a request for information regarding, or access to, a system of records, for amendment or correction of records, or for an accounting of disclosure from records by providing that the individual may submit the appeal by mail or by email to *privacy@flra.gov*.
- Section 2412.14 is removed and redesignated as § 2412.13 and is revised to provide that an individual's Privacy Act request for access to records will be considered an agreement to pay all applicable fees charged under paragraph (b) of this section, up to $25.00, unless the request specifies otherwise. It is further amended to provide that the cost for paper-copy duplication of records is twenty-five (25) cents per page, consistent with the duplication fees charged by the FLRA under its FOIA regulations.
- Section 2412.15 is removed and redesignated as § 2412.14.
- Section 2412.16 is removed and redesignated as § 2412.15.

This proposed rule is internal and procedural rather than substantive. It does not create a right to obtain FLRA records, nor does it create any additional right or privilege not already available to the public under the Privacy Act.

Regulatory Flexibility Act Certification

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the FLRA has determined that this regulation, as amended, will not have a significant impact on a substantial number of small entities. The Privacy Act primarily affects individuals and not entities and the proposed rule would impose no duties or obligations on small entities.

Unfunded Mandates Reform Act of 1995

This proposed rule change will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one 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.

Small Business Regulatory Enforcement Fairness Act of 1996

This action is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This proposed rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act of 1995

The amended regulations contain no additional information collection or record-keeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*

List of Subjects in 5 CFR Part 2412

Privacy Act.

For the reasons stated in the preamble, the Authority proposes to revise 5 CFR part 2412 to read as follows:

PART 2412—PRIVACY

Sec.

Authority: 5 U.S.C. 552a.

§ 2412.1 Purpose and scope.

This part contains the regulations that the Federal Labor Relations Authority (FLRA), including the Authority component (Authority), the General Counsel of the FLRA (General Counsel), the Inspector General (IG), and the Federal Service Impasses Panel (Panel), follow under the Privacy Act of 1974, as amended, 5 U.S.C. 552a. These regulations should be read together with the Privacy Act, which provides additional information about records maintained on individuals. The regulations apply to all records maintained by the Authority, the General Counsel, the IG, and the Panel that are contained in a system of records, as defined at § 2412.2(d), and that are retrieved by an individual's name or personal identifier. They describe the procedures by which individuals may request access to records about themselves, request amendment or correction of those records, and request an accounting of disclosures of those records. In addition, the regulations limit the access of other persons to those records. The Authority, the General Counsel, the IG, and the Panel also process all Privacy Act requests for access to records under the Freedom of Information Act, 5 U.S.C. 552, giving requesters the benefit of both statutes. These regulations do not relate to those personnel records of Federal Government employees, which are under the Office of Personnel Management's (OPM) jurisdiction, to the extent such records are subject to OPM regulations.

§ 2412.2 Definitions.

For the purposes of this part—

Individual means a citizen of the United States or an alien lawfully admitted for permanent residence.

Maintain includes maintain, collect, use, or disseminate.

Record means any item, collection, or grouping of information about an individual that is maintained by the Authority, the General Counsel, the IG, or the Panel including, but not limited to, information regarding the individual's education, financial transactions, medical history, and criminal or employment history, that contains the individual's name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

Request for access to a record means a request made under the Privacy Act, 5 U.S.C. 552a(d)(1).

Request for amendment or correction of a record means a request made under the Privacy Act, 5 U.S.C. 552a(d)(2).

Request for an accounting means a request made under the Privacy Act, 5 U.S.C. 552a(c)(3).

Requester means an individual who makes an existence-of-records request, a request for access, a request for amendment or correction, or a request for an accounting under the Privacy Act.

System of records means a group of any records under the control of the Authority, the General Counsel, the IG, or the Panel from which information is

retrieved by the name of the individual or by some identifying particular assigned to the individual.

Routine use means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

§ 2412.3 Notice and publication.

The Authority, the General Counsel, the IG, and the Panel will publish in the **Federal Register** such notices describing systems of records as are required by law.

§ 2412.4 Existence-of-records requests.

(a) If you want to know whether a system of records maintained by the Authority, the General Counsel, the IG, or the Panel contains a record pertaining to you, you may submit a written existence-of-records request by mail to the FLRA's Solicitor or IG, as appropriate, at the Authority's offices in Washington, DC, or by email to *privacy@flra.gov*.

(b) You should clearly and prominently identify your request as a Privacy Act request. If you submit the request by mail, it should bear the mark ''Privacy Act Request'' on the envelope or other cover, as well as your return address. If you submit the request by email, the subject line of the email should include the phrase ''Privacy Act Request.'' If you do not comply with the provisions of this paragraph, your request will not be deemed received until the time it is actually received by the FLRA's Solicitor or IG.

(c) An existence-of-records request must include your name and address and must reasonably describe the system of records in question. Whenever possible, the request should also describe the time periods in which you believe the records were compiled and the name or identifying number of each system of records in which you believe the records are kept. The Authority, the General Counsel, the IG, and the Panel have published descriptions of the systems of records they maintain in the **Federal Register**.

(d) When you make an existence-of-records request regarding records about yourself, you must verify your identity. You must state your full name, current address, and date and place of birth. You must sign your request and your signature must either be notarized or submitted by you under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. In order to help the identification and location of requested records, you may also, at your option, include your social security number.

(e) When making an existence-of-records request as the parent or guardian of a minor or as the guardian of someone determined by a court to be incompetent, you must establish:

(1) The identity of the individual who is the subject of the record, by stating the name, current address, date and place of birth, and, at your option, the social security number of the individual;

(2) Your own identity, following the requirements of paragraph (d) of this section;

(3) That you are the parent or guardian of that individual, which you may prove by providing a copy of the individual's birth certificate showing your parentage or by providing a court order establishing your guardianship; and

(4) That you are acting on behalf of that individual in making the request.

(f) The Solicitor or IG, as appropriate, will advise you in writing within ten (10) working days from receipt of your request whether the system of records you identified contains a record pertaining to you or to the individual for whom you are a parent or guardian and, if so, the office in which that record is located. If the Solicitor or IG is prohibited from, or there is otherwise an exemption that prevents, disclosing whether a system of records contains a record pertaining to you or to the individual for whom you are a parent or guardian, you will be notified in writing of the reasons of that determination, and of your right to appeal that determination under the provisions § 2412.12.

§ 2412.5 Individual access requests.

(a) You may make a request for access to a record about yourself that is contained in a system of records maintained by the Authority, the General Counsel, the IG, or the Panel by submitting a written request reasonably identifying the records sought to be inspected or copied by mail to the FLRA's Solicitor or the IG at the Authority's offices in Washington, DC, or by email to *privacy@flra.gov*. You must describe the records that you want in enough detail to enable Authority, General Counsel, IG, or Panel personnel to locate the system of records containing them with a reasonable amount of effort. Whenever possible, your request should describe the time periods in which you believe the records were compiled and the name or identifying number of each system of records in which you believe the records are kept. The Authority, the General Counsel, the IG, and the Panel have published descriptions of the systems of records they maintain in the **Federal Register**.

(b) Your written request should be clearly and prominently identified as a Privacy Act request. If you submit the request by mail, it should bear the mark ''Privacy Act Request'' on the envelope or other cover, as well as your return address. If you submit the request by email, the subject line of the email should include the phrase ''Privacy Act Request.'' If your request does not comply with the provisions of this paragraph, it will not be deemed received until the time it is actually received by the FLRA's Solicitor or IG.

(c) If you desire, you may be accompanied by another person during your review of the records. If you desire to be accompanied by another person during the inspection, you must notify the Solicitor or IG at least twenty-four hours in advance of the agreed-upon inspection date. Additionally, you must sign a statement and provide it to the representative of the Authority, the General Counsel, the IG, or the Panel, as appropriate, at the time of the inspection, authorizing that person to accompany you. The agency may require a written statement from you authorizing discussion of your record in the accompanying person's presence.

(d) When you make a request for access to records about yourself, you must verify your identity. You must state your full name, current address, and date and place of birth. You must sign your request and your signature must either be notarized or submitted by you under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. In order to help the identification and location of requested records, you may also, at your option, include your social security number.

(e) When making a request as the parent or guardian of a minor or as the guardian of someone determined by a court to be incompetent, for access to records about that individual, you must establish:

(1) The identity of the individual who is the subject of the record, by stating the name, current address, date and place of birth, and, at your option, the social security number of the individual;

(2) Your own identity, following the requirements of paragraph (d) of this section;

(3) That you are the parent or guardian of that individual, which you may prove by providing a copy of the individual's birth certificate showing your parentage or by providing a court

order establishing your guardianship; and

(4) That you are acting on behalf of that individual in making the request.

§ 2412.6 Records about other individuals, medical records, and limitations on disclosures.

(a) Requests for records about an individual made by person other than that individual shall also be directed to the FLRA's Solicitor or IG, as appropriate, at the Authority's offices in Washington, DC, or by email to *privacy@flra.gov*. You must describe the records that you want in enough detail to enable Authority, General Counsel, IG, or Panel personnel to locate the system of records containing them with a reasonable amount of effort. Whenever possible, your request should describe the time periods in which you believe the records were compiled and the name or identifying number of each system of records in which you believe the records are kept. The Authority, the General Counsel, the IG, and the Panel have published descriptions of the systems of records they maintain in the **Federal Register**.

(b) Such records shall only be made available to persons other than that individual in the following circumstances:

(1) To any person with the prior written consent of the individual about whom the records are maintained;

(2) To officers and employees of the Authority, the General Counsel, the IG, and the Panel who have a need for the records in the performance of their official duties;

(3) For a routine use compatible with the purpose for which it was collected, as defined in 5 U.S.C. 552a(a)(7) and as described under 5 U.S.C. 552a(e)(4)(D);

(4) To any person to whom disclosure is required by the Freedom of Information Act, as amended, 5 U.S.C. 552;

(5) To the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to title 13 of the United States Code;

(6) In a form not individually identifiable to a recipient who has provided the Solicitor or IG with advance adequate written assurance that the record will be used solely as a statistical research or reporting record;

(7) To the National Archives and Records Administration or other appropriate entity as a record which has sufficient historical or other value warranting its preservation, or for evaluation by the Archivist of the United States or the designee of such official to determine whether the record has such value;

(8) To another agency or to an instrumentality of any governmental jurisdiction within or under control of the United States for a civil or criminal law enforcement activity that is authorized by law if the head of the agency or instrumentality has made a written request for the record to the Solicitor or IG, in accordance with part 2417 of this chapter, specifying the particular portion desired and the law enforcement activity for which the record is sought;

(9) To a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual, provided that notification of such a disclosure shall be immediately mailed to the last known address of the individual;

(10) To either House of Congress or to any committee thereof with appropriate jurisdiction;

(11) To the Comptroller General, or any of Comptroller General's authorized representatives, in the performance of the official duties of the General Accountability Office;

(12) Pursuant to the order of a court of competent jurisdiction; or

(13) To a consumer reporting agency in accordance with 31 U.S.C. 3711(e).

(c) The request shall be in writing and should be clearly and prominently identified as a Privacy Act request and, if submitted by mail or otherwise submitted in an envelope or other cover, should bear the mark ''Privacy Act Request'' on the envelope or other cover. If a request does not comply with the provisions of this paragraph, it shall not be deemed received until the time it is actually received by the Solicitor or the IG.

(d) If medical records are requested for inspection which, in the opinion of the Solicitor or the IG, as appropriate, may be harmful to the requester if personally inspected by such person, such records will be furnished only to a licensed physician designated to receive such records by the requester. Prior to such disclosure, the requester must furnish a signed written authorization to make such disclosure and the physician must furnish a written request for the physician's receipt of such records to the Solicitor or the IG, as appropriate.

(1) If such authorization is not executed within the presence of an Authority, General Counsel, or Panel representative, the authorization must be accompanied by a notarized statement verifying the identification of the requester.

(2) [Reserved]

§ 2412.7 Initial decision on access requests.

(a) Within ten (10) working days of the receipt of a request pursuant to § 2412.5, the FLRA's Solicitor or IG will make an initial decision regarding whether the requested records exist and whether they will be made available to the requester. The Solicitor or IG will promptly communicate that initial decision to you in writing or other appropriate form.

(b) When the initial decision is to provide access to the requested records, the writing or other appropriate communication notifying you of the decision will:

(1) Briefly describe the records to be made available;

(2) State whether any records maintained about you in the system of records in question are not being made available;

(3) State whether any further verification of your identity is necessary; and

(4) Notify you of any fee charged under § 2412.13.

(5) The Solicitor or IG will promptly disclose the requested records to you upon payment of any applicable fee under § 2412.13.

(c) When the initial decision is not to provide access to requested records and accountings, the Solicitor or IG will, by writing or other appropriate communication, explain the reason for that decision. The Solicitor or IG will only refuse to provide you access when:

(1) Your verification of identity is inadequate under § 2412.5(d);

(2) No such records are maintained or an exemption applies;

(3) Your information is contained in, and inseparable from, another individual's record;

(4) The requested records have been compiled in reasonable anticipation of civil or criminal action or other proceedings.

§ 2412.8 Accountings of disclosures and requests for accountings.

(a) The FLRA's Solicitor or IG, as appropriate, will maintain a record (''accounting'') of every instance in which records about an individual are made available, pursuant to this part, to any person other than:

(1) Officers or employees of the Authority, the General Counsel, the IG, or the Panel in the performance of their duties; or

(2) Any person pursuant to the Freedom of Information Act, as amended, 5 U.S.C. 552.

(b) The accounting which shall be retained for at least five (5) years or the life of the record, whichever is longer, shall contain the following information:

(1) A brief description of records disclosed;

(2) The date, nature and, where known, the purpose of the disclosure; and

(3) The name and address of the person or agency to whom the disclosure is made.

(c) Except when accountings of disclosures are not required to be kept (as stated in paragraph (a) of this section) or are withheld accounting of disclosures that were made pursuant to 5 U.S.C. 552a(b)(7), you may make a request for an accounting of any disclosure that has been made by the Solicitor or IG, to another person, organization, or agency of any record about you. This accounting contains the date, nature, and purpose of each disclosure, as well as the name and address of the person, organization, or agency to which the disclosure was made. Your request for an accounting should identify each particular record in question and should be made by writing to the FLRA's Solicitor or IG, as appropriate, following the procedures in § 2412.5.

(d) The FLRA's Solicitor or IG, as appropriate, will respond to your request for access to an accounting following the procedures in § 2412.7. You may appeal the Solicitor or IG's decision on your request under the procedures in § 2412.12.

§ 2412.9 Requests for amendment or correction of records.

(a) Unless the record is not subject to amendment or correction as stated in paragraph (b) of this section, you may make a request for amendment or correction of an Authority, General Counsel, IG, or Panel record about yourself or about an individual for whom you are a parent or guardian by submitting a written request to the FLRA's Solicitor or IG, as appropriate, following the procedures in § 2412.5. Your request should identify each particular record in question, state the amendment or correction that you want, and state why you believe that the record is not accurate, relevant, timely, or complete. Please note that a requester bears the burden of proving by the preponderance of the evidence that information is not accurate, relevant, timely, or complete. You may submit any documentation that you think would be helpful. If you believe that the same record is in more than one system of records, your request should state that.

(b) The following records are not subject to amendment or correction:

(1) Transcripts of testimony given under oath or written statements made under oath;

(2) Transcripts of grand jury proceedings, judicial proceedings, or quasi-judicial proceedings, which are the official record of those proceedings;

(3) Records in systems of records that have been exempted from amendment and correction under the Privacy Act, 5 U.S.C. 552a(j) or (k), by notice published in the **Federal Register**; and

(4) Records compiled in reasonable anticipation of a civil action or proceeding.

§ 2412.10 Initial decision on amendment or correction.

(a) Within ten (10) working days after receiving your request for amendment or correction, the FLRA's Solicitor or IG, as appropriate, will acknowledge receipt of the request and, under normal circumstances, the Solicitor or IG will notify you, by mail or other appropriate means, of the decision regarding the request not later than thirty (30) working days after receiving of the request.

(b) The notice of decision will include:

(1) A statement of whether the Solicitor or IG has granted or denied your request, in whole or in part;

(2) A quotation or description of any amendment or correction made to any records; and

(3) When a request is denied in whole or in part, an explanation of the reason for that denial and of your right to appeal the decision to the Chairman of the Authority, pursuant to § 2412.12.

§ 2412.11 Amendment or correction of previously disclosed records.

When a record is amended or corrected pursuant to § 2412.10, or a written statement of disagreement filed, pursuant to § 2412.12, the FLRA's Solicitor or IG, as appropriate, will give notice of that correction, amendment, or written statement of disagreement to all persons to whom such records or copies have been disclosed, as recorded in the accounting kept pursuant to § 2412.8.

§ 2412.12 Agency review of refusal to inform, to provide access to, or to amend or correct records.

(a) If your request for information regarding whether a system of records contains information about you or an individual for whom you are a parent or guardian, or your request for access to, or amendment or correction of, records of the Authority, the General Counsel, the IG, or the Panel, or an accounting of disclosure from such records, has been denied in whole or in part by an initial decision, you may, within thirty (30) working days after your receipt of notice of the initial decision, appeal that decision by filing a written request by mail to the Chairman of the Authority at the Authority's offices in Washington, DC, or by email to *privacy@flra.gov.*

(b) The appeal must describe:

(1) The request you initially made for information regarding, access to, or the amendment or correction of, records;

(2) The initial decision of the FLRA's Solicitor or IG on the request; and

(3) The reasons why that initial decision should be modified by the Chairman of the Authority.

(c) Not later than thirty (30) working days after receipt of a request for review (unless such period is extended by the Chairman of the Authority or the Chairman's designee for good cause shown), the Chairman of the Authority or the Chairman's designee will notify you of their decision on your request. If the Chairman of the Authority or the Chairman's designee upholds the initial decision not to inform the individual of whether requested records exist, or not to provide access to requested records or accountings, or not to amend or correct the records as requested, then the Chairman of the Authority or the Chairman's designee will notify you of your right:

(1) To judicial review of the Chairman of the Authority or the Chairman's designee's decision pursuant to 5 U.S.C. 552a(g)(1); and

(2) To file with the FLRA's Solicitor or IG, as appropriate, a concise written statement of disagreement with the determination. That written statement of disagreement will be made a part of the record and will accompany that record in any use or disclosure of the record.

§ 2412.13 Fees.

(a) Your Privacy Act request for access to records will be considered an agreement to pay all applicable fees charged under paragraph (b) of this section, up to $25.00. When making a request, you may specify a willingness to pay a greater or lesser amount.

(b) There will be a charge of twenty-five cents per page for paper-copy duplication of records disclosed under this part. For copies of records produced on tapes, disks, or other media, the Solicitor or IG will charge the actual cost of production, including operator time.

(c) The FLRA's Solicitor or IG may waive or reduce any charges under this section whenever it is in the public interest to do so.

§ 2412.14 Penalties.

Any person who knowingly and willfully requests or obtains any record

concerning an individual from the Authority, the General Counsel, the IG, or the Panel under false pretenses will be subject to criminal prosecution under 5 U.S.C. 552a(i)(3), which provides that such person shall be guilty of a misdemeanor and fined not more than $5,000.

§ 2412.15 Exemptions.

(a) *Files of FLRA's Office of Inspector General (OIG) compiled for the purpose of a criminal investigation and for related purposes.* Pursuant to 5 U.S.C. 552a(j)(2), the FLRA hereby exempts the system of records entitled ''FLRA/OIG–1, Office of Inspector General Investigative Files,'' insofar as it consists of information compiled for the purposes of a criminal investigation or for other purposes within the scope of 5 U.S.C. 552a(j)(2), from the application of 5 U.S.C. 552a, except for 5 U.S.C. 552a(b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), (11) and (i).

(b) *OIG files compiled for other law enforcement purposes.* Pursuant to 5 U.S.C. 552a(k)(2), the FLRA hereby exempts the system of records entitled ''FLRA/OIG–1, Office of Inspector General Investigative Files,'' insofar as it consists of information compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2), from the application of 5 U.S.C. 552a, (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f).

Dated: October 4, 2023.

Thomas Tso,

Solicitor.

[FR Doc. 2023–22439 Filed 10–10–23; 8:45 am]

BILLING CODE 7627–01–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 51

[Doc. No. AMS–SC–21–0039]

U.S. Grade Standards for Pecans in the Shell and Shelled Pecans

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

ACTION: Proposed rule.

SUMMARY: The Agricultural Marketing Service (AMS) is proposing to revise the U.S. Standards for Grades of Pecans in the Shell and the U.S. Standards for Grades of Shelled Pecans by replacing the current grades with U.S. Extra Fancy, U.S. Fancy, U.S. Choice, and U.S. Standard grades. The proposal also includes updating terminology, definitions, and defect scoring guides.

DATES: Comments must be submitted on or before December 11, 2023.

ADDRESSES: Interested persons are invited to submit comments to the Standardization Branch, Specialty Crops Inspection Division, Specialty Crops Program, Agricultural Marketing Service, U.S. Department of Agriculture, National Training and Development Center; 100 Riverside Parkway, Suite 101; Fredericksburg, Virginia 22406; fax: (540) 361–1199, or via the internet at: *https://www.regulations.gov.* Comments should reference the date and page numbers of this issue of the **Federal Register**. All comments submitted in response to this proposed rule will become a part of the public record and be made available to the public including any personal information provided at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Olivia L. Banks at the address above, or by phone (540) 361–1120; fax (540) 361–1199; or email *SCIStandards@usda.gov.* Copies of the proposed U.S. Standards for Grades of Pecans in the Shell and U.S. Standards for Grades of Shelled Pecans are available on the internet at *https://www.regulations.gov.* Copies of the current U.S. Standards for Grades of Pecans in the Shell and U.S. Standards of Grades of Shelled Pecans are available at *https://www.ams.usda.gov/grades-standards/nuts.*

SUPPLEMENTARY INFORMATION: This proposed action, pursuant to 5 U.S.C. 553, would amend regulations at 7 CFR part 51 issued under the Agricultural Marketing Act of 1946 (7 U.S.C. 1621–1627), as amended. These revisions do not affect the Federal marketing order, 7 CFR part 986, (Marketing Order 986) issued under the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601–674) or applicable imports.

Executive Orders 12866, 13563, and 14094

The Department of Agriculture (USDA) is issuing this proposed rule in conformance with Executive Orders 12866, 13563, and 14094. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 reaffirms, supplements, and updates Executive Order 12866 and further directs agencies to solicit and consider input from a wide range of affected and interested parties through a variety of means. This proposed action falls within a category of regulatory actions that the Office of Management and Budget (OMB) has exempted from review under Executive Order 12866.

Executive Order 13175

This proposed rule has been reviewed under Executive Order 13175—Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions would have tribal implications.

AMS has determined that this proposed rule is unlikely to have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988—Civil Justice Reform. This proposed action is not intended to have retroactive effect. There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this rule.

Background

AMS continually reviews fruit and vegetable grade standards to ensure their usefulness to the industry and to modernize language.

On June 12, 2020, the American Pecan Council (APC) petitioned AMS to revise the U.S. Standards for Grades of Pecans in the Shell and the U.S. Standards for Grades of Shelled Pecans (standards). The APC was established by, and is regulated under, the Federal marketing order for the pecan industry, Marketing Order 986, and represents all 15 major U.S. pecan-growing states.

The APC noted that the pecan standards have not been substantially updated since 1969 and the terminology of the standards no longer reflects current industry descriptions and practices. The National Pecan Shellers Association (NPSA) directed the initiative to update the standards for the APC. The APC voted unanimously to submit their proposed revisions to the USDA. AMS and the APC have since collaborated to refine the proposed revisions.

The changes to the standards would replace current grades with new ones, revise scoring guides for defects, create new sizes, and revise definitions. The

two current grades for pecans in the shell are U.S. No. 1 and U.S. No. 2. The six current grades for shelled pecans are U.S. No. 1 Halves, U.S. No. 1 Halves and Pieces, U.S. No. 1 Pieces, U.S. Commercial Halves, U.S. Commercial Halves and Pieces, and U.S. Commercial Pieces. AMS proposes to revise both standards by replacing the current grades with U.S. Extra Fancy, U.S. Fancy, U.S. Choice, and U.S. Standard grades. These proposed changes represent current industry descriptions and practices.

The proposed revisions would not affect Marketing Order 986 or applicable imports since there are no grade, size, or quality standards currently applied under the marketing order.

The first proposed rule was published in the **Federal Register** of June 1, 2022 (87 FR 33064), inviting comments on proposed revisions to the U.S. Standards for Grades of Pecans in the Shell and the U.S. Standards for Grades of Shelled Pecans. The public was invited to review and comment on the proposed rule, which was to be accompanied by copies of the proposed standards, on *https://www.regulations.gov.* On June 28, 2022, AMS noted that the proposed U.S. Standards for Grades of Pecans in the Shell and the U.S. Standards for Grades of Shelled Pecans failed to upload to *https://www.regulations.gov,* and the supporting documents were uploaded to *https://www.regulations.gov* on that date. To provide all interested persons a full 60-day comment period to view copies of the proposed standards and facilitate review of the proposed rule, AMS extended the public comment period by 30 days (87 FR 48091) to September 7, 2022. In an effort to pursue clarification, and based on the feedback USDA received during the comment period, Specialty Crop Inspection Division (SCI) invited interested parties to meet on February 28, 2023, and May 2, 2023, to provide an opportunity to clarify language and discuss specific sections of the proposed standards to ensure there are no misinterpretations on how any proposed language would be applied before moving forward with this rulemaking.

This proposed rule also includes additional changes to align with updated Code of Federal Regulations formatting requirements and to correct errors that were made in the printing of the previous proposed rule in the **Federal Register**.

Regulatory Flexibility Analysis

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

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions so that small businesses will not be unduly or disproportionately burdened.

The Small Business Administration (SBA) defines small growers engaging in tree nut farming [1] as those having annual receipts of no more than $3.75 million (13 CFR 121.201).[2] Handlers, which can be defined as those engaging in postharvest crop activities (except cotton-ginning),[3] have a small business size standard of annual receipts not exceeding $34 million, per the SBA (13 CFR 121.201).[2]

In the 2017 Census of Agriculture, the most recent to date, the National Agricultural Statistics Service (NASS) reports that of the 19,008 pecan farms counted nationwide, 440 of them had annual sales valued at $1 million or more. This means that 18,568 pecan farms, or 98 percent of the census, had annual receipts of less than $1 million. As the threshold for meeting the definition of a small business, per the SBA, is $3.75 million, nearly four times the $1 million maximum reported by NASS, the portion of pecan farms that may be considered small by the SBA standard is likely even higher than 98 percent.

According to the Census Bureau, there were 910 firms classified as those engaging in postharvest crop activities (except cotton-ginning) in 2017. Total sales for all 910 firms was valued at more than $6.4 billion. The Census Bureau survey [4] which yielded these results for 2017 is the most recent to date. The APC estimates that there are 115 handlers subject to regulation under Marketing Order 986. Of these, the APC estimates that 9 handlers have annual sales exceeding $34 million, thus surpassing the threshold of a small business as defined by the SBA. This means that 106 handlers, or 92 percent of the total, had annual receipts not exceeding $34 million and would, therefore, be designated as small per the SBA definition.

Food grading standards provide important quality information to buyers and sellers that contribute to the efficient marketing of agricultural commodities. Because the proposed revisions of the standards represent current industry grading practices, these changes will not require any significant changes in grower or handler business operations nor any significant industry educational effort. As the standards are voluntary, handlers are not required to use the new terms or make any changes. Neither large nor small handlers will incur additional costs. No small businesses will be unduly or disproportionately burdened.

Comments

The first proposed rule was published in the **Federal Register** of June 1, 2022 (87 FR 33064), inviting comments on proposed revisions to the U.S. Standards for Grades of Pecans in the Shell and the U.S. Standards for Grades of Shelled Pecans. The public was invited to review the two proposed standards in their entirety online and comment on the proposed rule. Due to AMS technical issues, the drafts of both standards were not immediately uploaded through the **Federal Register** automated document management system for public viewing, resulting in some commenters misinterpreting that the two standards were being combined into a single standard, which was not AMS's intent. On August 8, 2022, AMS extended the public comment period by 30 days (87 FR 48091) to allow additional time for commenters to review both standards. The 60-day comment period for the proposed rule, lengthened by the 30-day extension period, ended September 7, 2022.

AMS received comments on the proposed changes to the U.S. Standards for Grades of Pecans in the Shell and the U.S. Standards for Grades of Shelled Pecans from 34 respondents.

Comment: Numerous comments stated that the two standards should not be combined.

Response: Due to the technical issues described above, some commenters misinterpreted that the two standards were being combined into one standard, which was not AMS's intent. AMS extended the public comment period by 30 days to allow the public additional time to review and comment on the two separate standards once they were made available.

Comment: Several comments stated there was no need for the standards, that no changes should be made to the current standards, that things should be kept simple, or that there is no need for inshell standards.

Response: AMS acknowledges these comments. AMS pursued these revisions in response to the APC petition to revise the U.S. Standards for

[1] North American Industry Classification System (NAICS) Code 111335.

[2] Version December 2022 size standards.

[3] NAICS Code 115114.

[4] Economic Surveys Annual Business Survey: Statistics for Employer Firms by Industry, Sex, Ethnicity, Race, and Veteran Status for the U.S., State, Metro Areas, Counties, and Places: 2017.

Grades of Pecans in the Shell and the U.S. Standards for Grades of Shelled Pecans. As mentioned earlier, the APC represents all 15 major U.S. pecan-growing states.

The APC noted that the pecan standards have not been substantially updated since 1969 and the terminology of the standards no longer reflects current industry descriptions and practices. The APC voted unanimously to submit their recommended revisions to the USDA. Based on industry input, AMS has determined that the standards continue to play an important role in U.S. pecan marketing and that they should be preserved. The APC has provided evidence of broad-based industry support from growers and handlers for the changes to the standards in the petition submitted. The recommended changes will modernize the standards to reflect current industry practices. Accordingly, AMS made no changes to this proposed rule based on this comment.

Comment: Several comments stated that the ''application of tolerances'' language in § 51.1407 was not part of the industry's original proposal. However, USDA currently uses a 100-count sample for certification of pecans for export. Based on the existing sampling procedures, the commenters acknowledged that the 100-count sample size would be acceptable in the inshell standard.

Response: AMS acknowledges this was not in the original petition. AMS retained the current 100-count sample size used in the inshell standard. The 100-count sample size is not limited to export as noted by the commenter. Accordingly, AMS made no changes to this proposed rule based on this comment.

Comment: One commenter asked about sampling rates and tools used to select samples. In addition, they did not agree with the process currently used to determine the 10 smallest nuts out of 100 nuts and suggested that the sample size should be one or two one-pound samples without requiring the inspector to pick out the 10 smallest nuts.

Response: The petitioner did not recommend changes to § 51.1402—Size classification of the current inshell standards or to the sampling procedures. The commenter has not provided supporting background or sufficient data to justify changes to the sample size. Current requirements for any one of the classifications in Table 1 of § 51.1404—Size classification state the lot must conform to both the specified number of nuts per pound and the weight of the 10 smallest nuts per 100-nut sample. Sampling guidelines and tools are described in inspection manuals which are available at *https://www.ams.usda.gov/grades-standards/nuts.* Accordingly, AMS made no changes to this proposed rule based on this comment.

Comment: One commenter expressed concern with § 51.1406—Tolerances of the June 2022 proposed inshell standards, stating that a processor could sell product with 12 percent of the kernels having serious damage and 6 percent of the product being rancid, moldy, decayed, or injured by insects. On a 30-pound case, the standard size case used in commerce, that would mean that 3.6 pounds could be sold with serious defects, including rancid, moldy product.

Response: AMS disagrees. The percentages referenced in this proposed section for inshell pecans are based on sample size by count, not container size by weight. These tolerances would apply to U.S. Extra Fancy, U.S. Fancy, and U.S. Choice grades, and would allow for 12 percent total defects for kernels, including not more than 7 percent for kernels which are seriously damaged, provided that not more than 6 percent are rancid, moldy, decayed, or injured by insects. This proposed restrictive tolerance limits the percent of rancid, moldy, or decayed pecans to 6 percent. Accordingly, AMS made no changes to this proposed rule based on this comment.

Comment: One commenter stated that they did not support the proposed revisions to the inshell pecan standards, stating that a small number of shellers control the market. Further, they stated that the revision would automatically put almost the entirety of the U.S. pecan crop in the bottom half of the quality grades. They additionally stated that it is rare that any one-pound sample of inshell pecans would ever be completely ''free from damage by any cause,'' and they are concerned that the proposed revisions will negatively impact U.S. pecan growers.

Response: AMS is revising these voluntary standards based on a petition from the APC. AMS reviewed this request and determined it had merit. AMS finds that the proposed revisions should improve the marketing of pecans in the United States and internationally by modernizing language to more accurately reflect product currently available, including the addition of higher quality options to meet customer preferences. Regarding the concerns surrounding the ''free from damage by any cause'' language, this does not mean free from defects, or that any amount of blemishes would fail the lot. The term ''damage'' is defined in the proposed inshell standards in § 51.1416. This section provides a listing of defects, including the severity and scoring criteria. The tolerances provided in § 51.1406—Tolerances apply to U.S. Extra Fancy, U.S. Fancy, U.S. Choice, and U.S. Standard grades; are based on a composite sample by count, not by weight; and allow for percentage totals for defects based on the grade being applied. Accordingly, AMS made no changes to this proposed rule based on this comment.

Comment: Several commenters indicated that the text in the June 2022 proposed shelled standards at § 51.1433(a)(3) read ''No requirement for uniformity of kernel,'' while it should have read ''No requirement for uniformity of color.''

Response: AMS recognizes this typographical error in the June 2022 proposed standards and has included the corrected text in this proposed rule.

Comment: Several comments indicated that the term ''sixteenths'' in the size classification for pieces should be removed from the June 2022 proposed shelled standards at § 51.1436(a) as all size classifications should be described in ''sixty-fourths'' of an inch.

Response: AMS agrees with the removal of the ''sixteenths'' measurement as it was a carryover from the current standard. Accordingly, AMS has made this change in this proposed rule.

Comment: Several comments noted the omission of language in the June 2022 proposed shelled standards at § 51.1437—Tolerances for defects concerning the restrictive tolerance for color of kernels.

Response: AMS recognizes this typographical error in the June 2022 proposed standards and has included the missing text in the ''Extra Fancy'' grade section of § 51.1437—Tolerances for defects of this proposed rule.

Comment: One commenter stated that they did not agree with the proposed definitions for ''half-kernel,'' that the definitions as proposed would allow for all product to have a portion missing and still meet the requirements, and that there should be a limit to the allowable amount of kernels (5 percent for Extra Fancy and 15 percent for all other grades) with portions missing.

Response: AMS disagrees with this comment, as the proposed definitions reflect current industry practices and have been in the standard since 1969. However, the terms have been updated in the new proposed standards to include definitions for both ''premiere half-kernels'' and ''half-kernels'' to differentiate between § 51.1439(a) and

(b) of the June 2022 proposed standard. For kernels failing to meet the definition, the tolerances in proposed § 51.1437—Tolerances for defects would be applied. Based on clarifying conversation items 8 and 9, discussed later in this document, there has not been broad-based support from industry for adding further limitations to these definitions and tolerances. Accordingly, AMS has made the above-mentioned changes to this proposed rule.

Comment: One commenter asked who would be performing the inspections.

Response: The standards are voluntary, and inspections would continue to be performed by federal or federal-state inspectors, at the request of the applicant.

Comment: One commenter asked if processors/shellers will be reimbursed for changes to boxes, literature, etc., to reflect the new regulations' sizes and names of sizes, arguing that the cost for changing labels would be a hinderance to processors, especially small ones.

Response: The standards are voluntary, provide common language to facilitate trade, and contain no marking requirements. While AMS understands that there may be a cost associated with labeling changes, industry use of grade and size terms is not mandated by USDA. Accordingly, AMS made no changes to this proposed rule based on this comment.

Comment: One commenter shared pecan size classifications used by the pecan industry in South Africa.

Response: AMS acknowledges this comment and appreciates the information provided.

Comment: One commenter, in order to fully understand the impact of the proposed changes regarding new nomenclature and specifications, asked what percentage of crop over the last five years would have been downgraded under the proposed regs, and what percentage would have been upgraded.

Response: Due to the voluntary nature of the U.S. standards, AMS does not collect this data and is unable to provide this information.

Comment: One commenter stated that they did not support the proposed revisions to the standards and did not agree with having inshell standards at all. They stated further that creating a quality standard for inshell product would mean that the farmer would be penalized for minor exterior issues when the actual product was the kernel and not the shell.

Response: The U.S. Standards for Grade of Pecans in the Shell were originally published in 1930. This proposed revision does not create a new U.S. Standards for Grade of Pecans in the Shell but revises the terminology of the standards to correctly reflect current industry practices and modernizes language to more accurately reflect product currently available. Regarding the concerns surrounding being penalized for minor exterior defects, the standards provide a listing of defects, including the severity and scoring criteria, which does not mean the product must be free from defects, or that any amount of blemishes would fail the lot. Accordingly, AMS made no changes to this proposed rule based on this comment.

Comment: One commenter stated that the standards should include only three grades instead of four. They suggested the first two grades be combined, as they are very similar. The commenter requested that the grading process be kept simple.

Response: The proposed revisions are based on a petition from APC to modernize the standards and are intended to improve the marketing of pecans. AMS finds that the proposed additional grade levels should improve the marketing of pecans in the United States and internationally by allowing for the variation in grade level and including the addition of higher quality options to meet customer preferences. Accordingly, AMS made no changes to this proposed rule based on this comment.

Comments and Issues Addressed During Clarifying Conversations

After the comment period closed, AMS reviewed the comments received and, based on the complexity of the proposed revisions, contacted the petitioner, APC, for clarifying conversations. AMS held these conversations with the APC, NPSA, National Pecan Federation, Georgia Pecan Growers Association, Oklahoma Pecan Growers Association, Texas Pecan Growers Association, Western Pecan Growers Association, members of the industry, and other interested parties on February 28, 2023, and May 2, 2023. Select comments received on the proposed rule were discussed, and issues were clarified and incorporated into the draft standards associated with this proposed rule. Changes based on these conversations are outlined below.

1. Inshell—Loose Extraneous or Foreign Material

In the June 2022 proposed rule, AMS proposed to retain—in proposed §§ 51.1400(a), 51.1401(a), 51.1402(a), and 51.1403(a)—the current requirement for all grades of inshell pecans that they be free of loose extraneous or foreign material. The proposed rule also retained current tolerances for such material for each grade (0.5 percent (one-half of 1 percent) by weight for all grades), as well as the current definition for the term *loose extraneous or foreign material,* which means loose hulls, empty broken shells, or any substance other than pecans in the shell or pecan kernels.

Due to confusion about which standard the proposed requirements applied to, numerous commenters stated that tolerances for loose extraneous or foreign material did not belong in the inshell standards. On the other hand, one comment stated that limits for loose extraneous or foreign material should be included in the inshell standards so that large amounts of such material are not included in loads of inshell pecans.

While not included in the original recommended language from the APC, ''Free from loose extraneous or foreign material'' is a basic requirement of each grade and is included in the current standards to prevent large amounts of loose extraneous or foreign material from entering commerce. There are restrictive tolerances set in place to allow for a certain percentage of loose extraneous or foreign material in each sampled load. APC originally recommended adding rocks, wood, glass, and plastic to the definition of *loose extraneous or foreign material.*

After discussions with the industry, AMS retained ''Free from loose extraneous or foreign material'' in the proposed requirements for each grade; retained the proposed tolerances for such material in inshell pecans; and included the recommended additional defects in the definition of *loose extraneous or foreign material* in this proposed rule.

2. Inshell—Damage and Serious Damage

In the June 2022 proposed rule, AMS proposed requirements pertaining to shell or kernel ''damage by any cause'' for the U.S. Extra Fancy and U.S. Fancy grades in §§ 51.1400 and 51.1401 and to shell or kernel ''serious damage by any cause'' for the U.S. Choice grade in § 51.1402. No requirements pertaining to ''damage'' or ''serious damage'' defects were specified for shells or kernels for the U.S. Standard grade in proposed § 51.1403. The proposed rule further specified in § 51.1406 related tolerances for those defects in all four grades. Finally, in proposed §§ 51.1416 and 51.1417, AMS proposed definitions for the defects *Damage* and *Serious damage.*

AMS later determined that the requirements for the U.S. Choice grade

needed to align with those for U.S. Extra Fancy and U.S. Fancy grades, as they are grouped together, and all have the same ''damage'' and ''serious damage'' defect tolerances in § 51.1406. AMS further determined that it was necessary to revise the proposed language for the U.S. Standard grade in § 51.1403(h) references to the ''Tolerances'' section, proposed § 51.1406, to clarify that there are not increased tolerances for the U.S. Standard grade.

APC's original petition included the language ''free from damage or serious damage by any cause,'' while the June 2022 proposed standards only specified ''free from damage by any cause'' for U.S. Extra Fancy and U.S. Fancy and ''free from serious damage by any cause'' for U.S. Choice. In discussions with AMS, the industry agreed that ''free from damage by any cause'' is appropriate for the requirements of both the U.S. Choice and U.S. Standard grades in §§ 51.1402 and 51.1403, and that the restrictive tolerance for serious damage should be included in the ''Tolerances'' in § 51.1406(a) for U.S. Extra Fancy, U.S. Fancy, and U.S. Choice grades, and (b) for U.S. Standard grade. Accordingly, AMS has made these changes in this proposed rule.

3. Inshell—Moisture Content

Section 51.1416 (d) of the current inshell standards provides that kernel moisture content is not a requirement, but can be determined upon request by the applicant. In the June 2022 proposed rule, AMS proposed to add a new § 51.1420—Kernel moisture content, to specify that inshell pecans should have a moisture content of no more than 6 percent, unless otherwise specified.

APC originally recommended two different moisture content limits, one for domestic shipments (no more than 6 percent) and one for international (import/export) shipments (no more than 4.5 percent). AMS coordinated with APC prior to publishing the June 2022 proposed standards and presented options for moisture content, as there cannot be a more restrictive requirement for imported product. APC agreed that ''not more than 6 percent, unless otherwise specified'' would be acceptable for all shipments.

Numerous comments stated that 6 percent moisture was too high. AMS discussed with the industry at the February and May 2023 meetings whether moisture content limits should be a requirement of grade, and what that moisture content limit should be. The industry recommended making moisture content limits a requirement for grade, and keeping the language as AMS proposed. Including the language ''unless otherwise specified'' as part of the moisture requirement allows parties to stipulate varying moisture content limits based on intended use and contract specifications. This additional language resolves any concern about 6 percent moisture being too high.

Accordingly, AMS is removing proposed § 51.1420—Kernel moisture content as a standalone section, and is now proposing to add kernel moisture content of no more than 6 percent, unless otherwise specified, as a basic requirement for each grade of inshell pecans in §§ 51.1400(c), 51.1401(c), 51.1402(c), and 51.1403(c).

4. Shelled—Damage and Serious Damage

In the June 2022 proposed rule, AMS proposed requirements pertaining to kernel ''damage by any cause'' for the U.S. Extra Fancy and U.S. Fancy grades in §§ 51.1430 and 51.1431, to kernel ''serious damage by any cause'' for the U.S. Choice grade in § 51.1432, and no requirements pertaining to damage or serious damage for the U.S. Standard grade in § 51.1433. The June 2022 proposed rule further specified in § 51.1437 related tolerances for those defects in the four grades. Finally, in §§ 51.1452 and 51.1453, AMS proposed definitions for the defects ''Damage'' and ''Serious damage.''

AMS later determined that the requirements for U.S. Choice grade, in § 51.1432(a)(6) needed to be revised to specify ''Free from damage by any cause.'' Further, AMS determined the U.S. Standard grade required the addition of ''Free from damage by any cause'' to § 51.1433(a)(6). Additionally, AMS needed to revise § 51.1433(a)(7) references to the ''Tolerances for defects'' (§ 51.1437), to clarify that there are not increased tolerances for the U.S. Standard grade.

In discussions with AMS, the industry agreed that the language ''free from damage by any cause'' would be appropriate for the U.S. Choice and U.S. Standard grade requirements, and that § 51.1433(a)(7) needed to be updated. Accordingly, AMS added ''free from damage by any cause'' to the U.S. Choice and U.S. Standard grades within this proposed rule. Additionally, AMS revised § 51.1433(a)(7) references to the ''Tolerances for defects'' (§ 51.1437).

5. Shelled—Pecan Weevil Larvae

APC originally recommended that the presence of pecan weevil larvae be determined on a 30-pound sample (the typical size for a case of shelled pecans), with no larvae allowed in U.S. Extra Fancy, no more than 2 larvae in U.S. Fancy, no more than 5 larvae in U.S. Choice, and no limit on the number of larvae in U.S. Standard. AMS's June 2022 proposed rule contained the language as recommended by APC, but upon further review, AMS noted an additional sampling procedure would need to be established in order to determine compliance with this requirement. In discussions with AMS, industry agreed that the determination of pecan weevil larvae should be part of the current sampling process for pecan inspections and not based on an additional 30-pound sample, specifically for the presence of pecan weevil larvae. The industry also agreed that § 51.1437—Tolerances for defects for the U.S. Extra Fancy grade should remain as proposed in the June 2022 proposed rule. Therefore, any amount of pecan weevil larvae found would fail a lot; U.S. Fancy tolerance would allow not more than 2 pecan weevil larvae per lot, provided that the tolerance for serious damage is not exceeded; and U.S. Choice tolerance would allow not more than 5 pecan weevil larvae per lot, provided that the tolerance for serious damage is not exceeded. Additionally, the number of pecan weevil larvae found in U.S. Fancy and U.S. Choice lots would be included in the tolerance for serious damage, not in addition to the serious damage tolerance. The grade U.S. Standard will not specify a limit for pecan weevil larvae, as in this case the lack of a specified limit does not create an exemption from meeting the ''serious damage'' tolerance, under which the defect ''pecan weevil larvae'' is scored. Accordingly, AMS has included these changes in this proposed rule.

6. Shelled—Moisture Content

The standards currently require that all grades of shelled pecan halves and pieces must be well dried, but no limits to moisture content are specified in the definition of *well dried* in § 51.1444. In the June 2022 proposed rule, AMS proposed to require that all four grades of shelled pecans be well dried.

APC originally recommended including the moisture content limit as part of the definition of *well dried,* and AMS's proposed standards included a moisture content limit as part of the definition but upon further review, AMS noted that in order to make moisture content limit a requirement, it needed to be listed in the grade requirements. Separation of these two requirements allows moisture requirements to be applied to the lot as a whole, and kernels not meeting the definition of well dried can be scored on an individual basis. Industry agreed to make moisture content limit a requirement, and that moisture should

be separated from the definition of *well dried.* Additionally, industry agreed to keep the proposed moisture content limit as published at not more than 4.5 percent, unless otherwise specified. Under this proposed rule, moisture content limit would be added as a basic requirement of each grade (§ 51.1430 through § 51.1433). Accordingly, AMS has included these changes in this proposed rule.

7. Shelled—Insects as Foreign Material

In the June 2022 proposed rule, AMS proposed to include ''insects'' in the definition of *foreign material* in § 51.1450 of the shelled pecan standards, as APC originally recommended. However, upon further review, AMS determined that ''insects'' should be removed from the definition of *foreign material* because it would create conflicting requirements by allowing no insects as foreign material on one hand, and specifying a tolerance for serious damage, which includes insects, on the other. In discussions with AMS, industry agreed that ''insects'' should be removed from the definition of *foreign material* in § 51.1451 of the new proposed standards because insects would be covered under the tolerance for serious damage. Accordingly, AMS has included this change in this proposed rule.

8. Shelled—Half-Kernel

In the June 2022 proposed rule, AMS proposed two definitions for the size term *Half-kernel*—one that would apply to U.S. Extra Fancy grade, and one that would apply to all other grades. This coincided with APC's original recommendation. However, upon further review, AMS determined that a term can only have one meaning. AMS determined further that the proposed definition of *Half-kernel* for all other grades conflicted with the proposed definition of *Piece.*

In discussions with the industry, AMS suggested—and the industry agreed with— adding the size term Premier half-kernel (Premiere halves), which could be used only with the U.S. Extra Fancy grade, and with updating the size definition of *Piece.* Accordingly, *Premier half-kernel (Premier halves)* is defined in § 51.1439 of this proposed rule, with tolerances provided in the newly proposed Table 2 to § 51.1435. The term *Half-kernel (Halves)* is defined in § 51.1440 of this proposed rule. AMS also proposes a revised size definition of *Piece* in § 51.1441 so that there would be no conflict with the proposed definition of *Half-kernel (Halves).* Accordingly, AMS has included these changes in this proposed rule.

9. Shelled—Size Tolerances for Pieces, Meal, and Flour

APC originally recommended having two definitions for the term *half-kernel* (as discussed in item 8 of clarifying conversations). With the addition of the new term *premier halves,* AMS changed the paragraph style format in § 51.1435(d) (of the June 2022 proposed standards) into table style format (Table 2 to § 51.1435) for clarity. Having two distinct size terms for premiere halves and halves allows for each size to be applied to the U.S. Extra Fancy grade, which allows for greater flexibility within the standard. Tolerances for U.S. Extra Fancy Premier Halves, U.S. Extra Fancy Halves, U.S. Fancy Halves, U.S. Choice Halves, and U.S. Standard Halves are shown in Table 2 to § 51.1435 of this proposed rule. Additionally, the industry requested that the originally proposed tolerances of 5 percent for U.S. Extra Fancy Premier Halves (Less than 7/8 half-kernel) and U.S. Extra Fancy Halves (Less than 3/4 half-kernel) in Table 2 to § 51.1435 be increased to 10 percent. Accordingly, AMS has included this change in this proposed rule.

10. Shelled—Size Tolerances for Pieces

APC originally recommended having the range for ''topping pieces'' be 12/64 inch to 8/64 inch and the range for ''granules'' be 8/64 inch to 4/64 inch. The June 2022 proposed standards included this language; however, upon further review, AMS determined that additional clarifying language needed to be added to the restrictive tolerances for pieces in § 51.1436(b)(1)–(3) to exclude topping pieces and granules. The industry agreed with these changes. Accordingly, AMS has included these changes in this proposed rule.

11. Shelled—Color

APC originally recommended including a color requirement and tolerances for each grade. The June 2022 proposed standards were published with APC's recommended language. Upon further review, AMS determined that the proposed tolerances for kernels darker than a specified color did not align with the minimum color for U.S. Extra Fancy, U.S. Fancy, and U.S. Standard grades. To correct this issue, AMS proposed to update color terms in the ''Tolerances for defects'' section for U.S. Extra Fancy (§ 51.1437(a)(4)–(5)), which was changed from ''dark amber'' to ''light amber;'' and for U.S. Fancy (§ 51.1437(b)(4)–(5)), from ''dark amber'' to ''amber.'' AMS further proposed to remove ''dark amber or darker'' from the ''Tolerances for defects'' section for U.S. Standard (§ 51.1437(d)(3)). When discussing the issue with the industry, there was some confusion about the application of the USDA kernel color standards, PEC–MC–1, and whether it was a requirement of the grade. PEC–MC–1 illustrates the color intensities implied by the terms outlined in the ''Color classifications.'' The industry agreed with AMS's clarification that color is indeed a requirement of the grade and PEC–MC–1 is needed to meet the terminology in the ''Color classifications'' section of the standards. AMS further clarified to the industry that PEC–MC–1 is not used as a direct comparative to gauge pecan color of the individual kernel; rather, it is used to gauge the percentage of the varying colors of a kernel to meet the defined color terminology within § 51.1434—Color classifications of the standards. Accordingly, AMS has included these changes in this proposed rule.

12. Inshell and Shelled—Development

The APC petition recommended a range from minimum to maximum development of pecan kernels in U.S. Fancy and U.S. Choice grades. The June 2022 proposed standards included the proper method for listing minimum kernel development requirements. AMS received comments opposing the language that was included in the June 2022 proposed standards. AMS clarified that the language as published meets the industry's intent for minimum kernel development in each grade, as there are unintended consequences when including a range in the requirements for the grade. The industry agreed that a range from minimum to maximum kernel development within U.S. Fancy and U.S. Choice grades would result in unintentional classification of kernels as defects. Accordingly, AMS will retain descriptive language from the June 2022 proposed rule, which lists the minimum kernel development requirements of the grade for development.

13. Inshell and Shelled—Rancidity

APC's petition explained that ''rancidity'' refers to the tendency of the oil in a pecan kernel to become tainted as a result of oxidation or hydrolysis. While there is no definitive measure to determine rancidity, the tendency of the kernel to become rancid can be evaluated by testing the kernel's peroxide and free fatty acid values. Peroxide values should be less than 5 mEq/kg, and free fatty acid should be less than 1 percent.

The information above was included as standalone definitions in the June

2022 proposed standards. However, upon further review by AMS, it was determined that the information would cause confusion and contradict the scoring criteria under ''rancidity'' in § 51.1417(i)—Serious damage for inshell standards, and § 51.1453(h)—Serious damage for shelled standards. AMS suggested adding this information as a footnote to those paragraphs instead to clarify that the analysis would not be a requirement of grade, and that no analysis for rancidity would be performed in determination of grade. The industry agreed to removing the rancidity definition from the June 2022 proposed standards at § 51.1419 and § 51.1453, and to adding a footnote to ''rancidity'' as a serious defect, indicating industry methods of determination. This method would allow AMS to provide the informative language desired by the industry without causing any confusion on how rancidity is scored. Accordingly, AMS is retaining the defect ''rancidity,'' which shows how rancidity is scored when pecans are distinctly rancid to taste in paragraph (i) of proposed § 51.1417—Serious damage in the standards for inshell pecans, and in paragraph (h) of proposed § 51.1453—Serious damage in the standards for shelled pecans; removing industry's methods of determination for rancidity as a standalone section in the June 2022 proposed rule; and adding a footnote to ''rancidity'' as a serious damage defect, to indicate industry's methods of determination within this proposed rule.

14. Inshell and Shelled—Undeveloped

APC originally recommended a definition for the term *undeveloped* in the standards for inshell pecans to clarify that undeveloped kernels have practically no food value, or are blank (complete shell containing no kernel). AMS included this description as a serious damage defect in § 51.1417(j) of the proposed rule. ''Undeveloped kernel'' was also listed as a serious damage defect in the standards for shelled pecans in proposed § 51.1452, but included no further description.

Upon further review, AMS determined that the inclusion of ''undeveloped kernels'' as a serious damage defect for shelled pecans created a conflict with the proposed definition of *poorly developed* (where the kernel is full-meated in less than 25 percent of its width and length) and asked for industry input on the definition of *undeveloped kernels* for the inshell standard.

The industry determined that there was no need for the term ''undeveloped'' in the shelled pecan standard, and further stated that the definition needed to be modified for the inshell standards to mean undeveloped kernels which are blank (complete shell containing no kernel).

AMS agrees that these revisions would provide greater clarity and accordingly has revised the proposed definition of *undeveloped kernel* in the list of serious damage defects for inshell pecans in § 51.1417(j) to mean undeveloped kernels which are blank (complete shell containing no kernel). Under this proposed rule, undeveloped kernels would be scored as serious damage in all grades of inshelled pecans. For shelled pecans, the term ''undeveloped kernel'' is not included in the ''serious damage'' defect listing. Kernel development would only be scored as damage in all grades of shelled pecans.

15. Inshell and Shelled—Housekeeping

Upon further review of the standards, it was determined that additional minor housekeeping edits were needed for both standards. The additional proposed edits are in line with edits that have been made to other recently revised standards, and the industry agreed that the edits are acceptable. Those edits are as follows:

Inshell pecan standards: Removal of metric conversions throughout the standard. These conversions were not accurate and are rarely utilized.

Shelled pecan standards: Removal of metric conversion table. This standard did not contain any metric conversions; therefore, the table is unnecessary.

Accordingly, AMS has included these changes in this proposed rule.

USDA has determined that this rule is consistent with and would effectuate the purpose of the Agricultural Marketing Act of 1946. Therefore, this rule proposes to revise the voluntary U.S. Standards for Grades of Pecans in the Shell and the U.S. Standards for Grades of Shelled Pecans issued under the Agricultural Marketing Act of 1946.

List of Subjects in 7 CFR Part 51

Food grades and standards, Fruits, Nuts, Reporting and recordkeeping requirements, Vegetables.

For reasons set forth in the preamble, the Agricultural Marketing Service proposes to amend 7 CFR part 51 as follows:

PART 51—FRESH FRUITS, VEGETABLES, AND OTHER PRODUCTS (INSPECTION, CERTIFICATION, AND STANDARDS

■ 1. The authority citation for part 51 continues to read as follows:

Authority: 7 U.S.C. 1621–1627.

■ 2. Revise Subpart M—United States Standards for Grades of Pecans in the Shell to read as follows:

Subpart M—United States Standards for Grades of Pecans in the Shell

Sec.

Subpart M—United States Standards for Grades of Pecans in the Shell

Grades

§ 51.1400 U.S. Extra Fancy.

''U.S. Extra Fancy'' consists of pecans in the shell which meet the following requirements:

(a) Free from loose extraneous or foreign material.

(b) Shells are:

(1) Uniform in color; and

(2) Free from damage by any cause.

(c) Kernels are:

(1) Well developed;

(2) Well cured;

(3) Moisture content shall be not more than 6 percent, unless otherwise specified;

(4) Uniform in color and not darker than ''light;'' and

(5) Free from damage by any cause.

(d) For tolerances see § 51.1406.

§ 51.1401 U.S. Fancy.

''U.S. Fancy'' consists of pecans in the shell which meet the following requirements:

(a) Free from loose extraneous or foreign material.

(b) Shells are:

(1) Uniform in color; and

(2) Free from damage by any cause.

(c) Kernels are:

(1) Fairly well developed;

(2) Well cured;

(3) Moisture content shall be not more than 6 percent, unless otherwise specified;

(4) Uniform in color;

(5) Not darker than ''light amber,'' unless specified to a lighter color classification; and

(6) Free from damage by any cause.

(d) For tolerances see § 51.1406.

§ 51.1402 U.S. Choice.

''U.S. Choice'' consists of pecans in the shell which meet the following requirements:

(a) Free from loose extraneous or foreign material.

(b) Shells are:

(1) Fairly uniform in color; and

(2) Free from damage by any cause.

(c) Kernels are:

(1) Not poorly developed;

(2) Well cured;

(3) Moisture content shall be not more than 6 percent, unless otherwise specified;

(4) Fairly uniform in color;

(5) Not darker than ''amber,'' unless specified to a lighter color classification; and

(6) Free from damage by any cause.

(d) For tolerances see § 51.1406.

§ 51.1403 U.S. Standard.

''U.S. Standard'' consists of pecans in the shell which meet the following requirements:

(a) Free from loose extraneous or foreign material;

(b) Kernels well cured;

(c) Moisture content shall be not more than 6 percent, unless otherwise specified;

(d) No requirement for fullness of kernel;

(e) No requirement for uniformity of color of shells or kernels;

(f) May contain kernels that are ''dark amber'' or darker, unless specified to a lighter color classification; and

(g) Shells and kernels are free from damage by any cause.

(h) For tolerances see § 51.1406.

Size Classification

§ 51.1404 Size classification.

Size of pecans may be specified in connection with the grade in accordance with one of the following classifications. To meet the requirements for any one of the classifications in Table 1 to this section, the lot must conform to both the specified number of nuts per pound and the weight of the 10 smallest nuts per 100-nut sample.

TABLE 1 TO § 51.1404

Size classification	Number of nuts per pound	Minimum weight of the 10 smallest nuts per 100-nut sample
Jumbo	55 or less	In each classification, the 10 smallest nuts per 100 must weigh at least 7% of the total weight of the 100-nut sample.
Extra Large	56 to 63.	
Large	64 to 77.	
Medium	78 to 100.	
Small	101 or more.	

Kernel Color Classification

§ 51.1405 Kernel color classification.

(a) The skin color of the pecan kernels are described in terms of the color classifications provided in this section. When specified to a lighter color classification, that color may be used to describe the lot in connection with the grade.

(1) Light means that the kernel is mostly golden color or lighter, with not more than 25 percent of the surface darker than golden, and none of the surface darker than light brown.

(2) Light amber means that more than 25 percent of the kernel is light brown, with not more than 25 percent of the surface darker than light brown, none of which is darker than medium brown.

(3) Amber means that more than 25 percent of the kernel is medium brown, with not more than 25 percent of the surface darker than medium brown, none of which is darker than dark brown (very dark brown or blackish-brown discoloration).

(4) Dark amber means that more than 25 percent of the kernel is dark brown, with not more than 25 percent of the surface darker than dark brown (very dark brown or blackish-brown discoloration).

(b) U.S. Department of Agriculture kernel color standards, PEC–MC–1, illustrate the color intensities implied by the terms ''golden,'' ''light brown,'' ''medium brown,'' and ''dark brown'' referred to in paragraph (a) of this section. The color standards are available at *https://www.ams.usda.gov/grades-standards.*

Tolerances

§ 51.1406 Tolerances.

In order to allow for variations incident to proper grading and handling in each of the foregoing grades, the following tolerances are provided as specified:

(a) *U.S. Extra Fancy, U.S. Fancy, and U.S. Choice grades:*

(1) *For shell defects, by count:* 5 percent for pecans with damaged shells, including therein not more than 2 percent for shells which are seriously damaged.

(2) *For kernel defects, by count:* 12 percent for pecans with kernels which fail to meet the requirements for the grade or any specified color classification, including therein not more than 7 percent for kernels which are seriously damaged: *Provided,* That not more than 6 percent shall be allowed for kernels which are rancid, moldy, decayed, or injured by insects: *Provided further,* That included in this 6 percent tolerance not more than 0.5 percent (one-half of 1 percent) shall be allowed for pecans with live insects inside the shell.

(3) *For loose extraneous or foreign material, by weight:* 0.5 percent (one-half of 1 percent).

(b) *U.S. Standard grade:*

(1) *For shell defects, by count:* 10 percent for pecans with damaged shells, including therein not more than 3 percent for shells which are seriously damaged.

(2) *For kernel defects, by count:* 30 percent for pecans with kernels which fail to meet the requirements for the grade or any specified color classification, including therein not

more than 10 percent for kernels which are seriously damaged: *Provided,* That not more than 7 percent shall be allowed for kernels which are rancid, moldy, decayed, or injured by insects: *Provided further,* That included in this 7 percent tolerance not more than 0.5 percent (one-half of 1 percent) shall be allowed for pecans with live insects inside the shell.

(3) *For loose extraneous or foreign material, by weight:* 0.5 percent (one-half of 1 percent).

Application of Tolerances

§ 51.1407 Application of tolerances.

Individual 100-count samples shall have not more than one and one-half times a specified tolerance of 5 percent or more and not more than double a tolerance of less than 5 percent, except that at least one pecan which is seriously damaged by live insects inside the shell is permitted: *Provided,* That the averages for the entire lot are within the tolerances specified for the grade.

Sample for Grade or Size Determination

§ 51.1408 Sample for grade or size determination.

Each sample shall consist of 100 pecans. The individual sample shall be drawn at random from a sufficient number of packages to form a 100-count composite sample. The number of such individual 100-count samples drawn for grade or size determination will vary with the size of the lot. When practicable, at point of packaging the sample may be obtained from the grading belt after sorting has been completed.

Definitions

§ 51.1409 Loose extraneous or foreign material.

Loose extraneous or foreign material means loose hulls, empty broken shells, rocks, wood, glass, plastic, or any substance other than pecans in the shell or pecan kernels.

§ 51.1410 Well cured.

Well cured means the kernel separates freely from the shell, breaks cleanly when bent without splintering, shattering, or loosening the skin; and the kernel appears to be in good shipping or storage condition as to moisture content.

§ 51.1411 Well developed.

Well developed means that the kernel is full-meated throughout its width and length.

§ 51.1412 Fairly well developed.

Fairly well developed means that the kernel is full-meated in over 50 percent of its width and length.

§ 51.1413 Poorly developed.

Poorly developed means that the kernel is full-meated in less than 25 percent of its width and length.

§ 51.1414 Uniform in color.

Uniform in color means that the shells do not show sufficient variation in color to detract from the general appearance of the lot and that 95 percent or more of the kernels in the lot have skin color within the range of one or two color classifications.

§ 51.1415 Fairly uniform in color.

Fairly uniform in color means that the shells do not show sufficient variation in color to materially detract from the general appearance of the lot and that 85 percent or more of the kernels in the lot have skin color within the range of one or two color classifications.

§ 51.1416 Damage.

Damage means any specific defect described in this section; or an equally objectionable variation of any one of these defects, or any other defect, or any combination of defects, which materially detracts from the appearance or the edible or marketing quality of the individual pecan or the general appearance of the pecans in the lot. The following defects shall be considered as damage:

(a) Adhering hull material or dark stains affecting an aggregate of more than 5 percent of the surface of the individual shell;

(b) Adhering material from inside the shell when firmly attached to more than one-third of the outer surface of the kernel and contrasting in color with the skin of the kernel;

(c) Broken shells when any portion of the shell is missing;

(d) Internal flesh discoloration of a medium shade of gray or brown extending more than one-fourth inch lengthwise beneath the center ridge, or any equally objectionable amount in other portions of the kernel; or lesser areas of dark discoloration affecting the appearance to an equal or greater extent;

(e) Kernels which are dark amber in color;

(f) Kernels which are not well cured;

(g) Kernel spots when more than one dark spot is present on either half of the kernel, or when any such spot is more than one-eighth inch in greatest dimension;

(h) Poorly developed kernels;

(i) Shriveling when the surface of the kernel is very conspicuously wrinkled; and

(j) Split or cracked shells when the shell is spread apart or will spread upon application of slight pressure.

§ 51.1417 Serious damage.

Serious damage means any specific defect described in this section; or an equally objectionable variation of any one of these defects, or any other defect, or any combination of defects, which seriously detracts from the appearance or the edible or marketing quality of the individual pecan. The following defects shall be considered as serious damage:

(a) Adhering hull material or dark stains affecting an aggregate of more than 20 percent of the individual shell;

(b) Broken shells when the missing portion of shell is greater in area than a circle one-fourth inch in diameter;

(c) Dark discoloration of the skin which is darker than dark amber over more than 25 percent of the surface of the kernel;

(d) Decay affecting any portion of the kernel;

(e) Insects, web, frass, or the kernel shows distinct evidence of insect feeding on the kernel;

(f) Internal flesh discoloration of a dark shade extending more than one-third the length of the kernel beneath the ridge, or an equally objectionable amount of dark discoloration in other portions of the kernel;

(g) Kernel spots when more than three dark spots on either half of the kernel, or when any spot or the aggregate of two or more spots on one of the halves of the kernel affects more than 10 percent of the surface;

(h) Mold, on the surface or inside the kernel, which is plainly visible without magnification;

(i) Rancidity [1] when the kernel is distinctly rancid to the taste. Staleness of flavor shall not be classed as rancidity;

(j) Undeveloped kernels which are blank (complete shell containing no kernel); and

(k) Worm holes when penetrating the shell.

Note to § 51.1417(i):

[1] Refers to the tendency of the oil in a pecan kernel to become tainted as a result of oxidation or hydrolysis. Industry measures to determine the tendency of a kernel to become rancid include testing the kernel's peroxide and free fatty acid values. Peroxide values should be less than 5 mEq/kg and free fatty acids acid value should be less than 1 percent. These analyses are not performed in determination of grade.

§ 51.1418 Inedible kernels.

Inedible kernels means that the kernel or pieces of kernels are rancid, moldy,

decayed, injured by insects or otherwise unsuitable for human consumption.

■ 3. Revise Subpart N—United States Standards for Grades of Shelled Pecans to read as follows:

Subpart N—United States Standards for Grades of Shelled Pecans

Sec.

Subpart N—United States Standards for Grades of Shelled Pecans

Grades

§ 51.1430 U.S. Extra Fancy.

''U.S. Extra Fancy'' consists of pecan kernels which meet the following requirements:

(a) For quality:

(1) Well dried;

(2) Moisture content shall not be more than 4.5 percent, unless otherwise specified;

(3) Well developed;

(4) Uniform in color;

(5) Not darker than ''light;''

(6) Free from damage by any cause; and

(7) Comply with tolerances for defects (see § 51.1437).

(b) For size:

(1) Uniform in size; and

(2) Conform to size classification or count specified.

§ 51.1431 U.S. Fancy.

''U.S. Fancy'' consists of pecan kernels which meet the following requirements:

(a) For quality:

(1) Well dried;

(2) Moisture content shall not be more than 4.5 percent, unless otherwise specified;

(3) Fairly well developed;

(4) Uniform in color;

(5) Not darker than ''light amber,'' unless specified to a lighter color classification;

(6) Free from damage by any cause; and

(7) Comply with tolerances for defects (see § 51.1437).

(b) For size:

(1) Uniform in size; and

(2) Conform to size classification or count specified.

§ 51.1432 U.S. Choice.

''U.S. Choice'' consists of pecan kernels which meet the following requirements:

(a) For quality:

(1) Well dried;

(2) Moisture content shall not be more than 4.5 percent, unless otherwise specified;

(3) Not poorly developed;

(4) Fairly uniform in color;

(5) Not darker than ''amber,'' unless specified to a lighter color classification;

(6) Free from damage by any cause; and

(7) Comply with tolerances for defects (see § 51.1437).

(b) For size:

(1) Fairly uniform in size; and

(2) Conform to size classification or count specified.

§ 51.1433 U.S. Standard.

''U.S. Standard'' consists of pecan kernels which meet the following requirements:

(a) For quality:

(1) Well dried;

(2) Moisture content shall not be more than 4.5 percent, unless otherwise specified;

(3) No requirement for fullness of kernel;

(4) No requirement for uniformity of color;

(5) May contain kernels ''dark amber'' or darker, unless specified to a lighter color classification;

(6) Free from damage by any cause; and

(7) Comply with tolerances for defects (see § 51.1437).

(b) For size:

(1) No uniformity in size; and

(2) Conform to size classification or count specified.

Color Classifications

§ 51.1434 Color classifications.

(a) The skin color of pecan kernels are described in terms of the color classifications provided in this section. When specified to a lighter color classification, that color may be used to describe the lot in connection with the grade.

(1) Light means that the kernel is mostly golden color or lighter, with not more than 25 percent of the surface darker than golden, and none of the surface darker than light brown.

(2) Light amber means that the kernel has more than 25 percent of the surface light brown, but not more than 25 percent of surface darker than light brown, and none of the surface darker than medium brown.

(3) Amber means that the kernel has more than 25 percent of the surface medium brown, but not more than 25 percent of surface darker than medium brown, and none of the surface darker than dark brown (very dark brown or blackish-brown discoloration).

(4) Dark amber means that the kernel has more than 25 percent of the surface dark brown, but not more than 25 percent of surface darker than dark brown (very dark brown or blackish-brown discoloration).

(b) U.S. Department of Agriculture kernel color standards, PEC–MC–1, illustrate the color intensities implied by the terms ''golden,'' ''light brown,'' ''medium brown,'' and ''dark brown'' referred to in paragraph (a) of this section. The color standards are available at: *https://www.ams.usda.gov/grades-standards.*

Size Classifications

§ 51.1435 Size classifications for halves.

The size of pecan halves in a lot may be specified in accordance with one of the size classifications shown in Table 1 to this section.

TABLE 1 TO § 51.1435

Size classification for halves	Number of halves per pound
Mammoth	250 or less.
Junior Mammoth.	251–350.
Jumbo	351–450.
Large	451–550.
Medium	551–650.
Topper	651–750.
King Topper ...	751 or more.

In lieu of the size classifications in this table, the size of pecan halves in a lot may be specified in terms of the number of halves or a range of number of halves per pound. For example, ''400'' or ''600–700.''

(a) Halves per pound.

The number of halves per pound shall be based upon the weight of half-kernels after all pieces, meal and flour, shell, center wall, and foreign material have been removed.

(b) Tolerance for count per pound.

In order to allow for variations incident to proper sizing, a tolerance shall be permitted as follows:

(1) When an exact number of halves per pound is specified, the actual count per pound may vary not more than 5 percent from the specified number, and

(2) When any size classification shown in Table 1 to this section or a range in count per pound is specified, no tolerance shall be allowed for counts outside of the specified range.

(c) Tolerances for pieces, meal, and flour.

In order to allow for variations incident to proper sizing and handling, tolerances are provided for pieces, meal, and flour in any lot of halves. The tolerances, by weight, are as shown in Table 2 to this section.

TABLE 2 TO § 51.1435

	U.S. extra fancy premier halves (%)	U.S. extra fancy halves (%)	U.S. fancy halves (%)	U.S. choice halves (%)	U.S. standard halves (%)
Tolerances for Pieces, Meal, and Flour:					
A. Less than 7/8 half-kernel	10	.....	.....	.....	.....
B. Less than 3/4 half-kernel	.....	10	15	20	20
C. Less than 1/2 half-kernel (included in A.—U.S. Extra Fancy Premier Halves) (included in B.—U.S. Extra Fancy Halves, U.S. Fancy Halves, U.S. Choice Halves, and U.S. Standard Halves)	3	3	5	5	5
D. Less than 4/64" (included in C.)	1	1	1	1	1

§ 51.1436 Size classifications for pieces.

The size of pecan pieces in a lot may be specified in accordance with one of the size classifications shown in Table 1 to this section. Sizes are measured using a round-hole screen.

TABLE 1 TO § 51.1436

Size classification	Maximum diameter (will pass through round opening of the following diameter)	Minimum diameter (will not pass through round opening of the following diameter)
Extra-Large Pieces	No limitation	32/64 inch.
Large Pieces	32/64 inch	24/64 inch.
Halves and Pieces	No limitation	20/64 inch.
Medium Pieces	24/64 inch	16/64 inch.
Small Pieces	16/64 inch	12/64 inch.
Topping Pieces	12/64 inch	8/64 inch.
Granules	8/64 inch	4/64 inch.

In lieu of the size classifications in this table, the size of pieces in a lot may be specified in terms of minimum diameter, or as a range described in terms of minimum and maximum diameters expressed in sixty-fourths of an inch.

(a) Tolerances for size of pieces.

In order to allow for variations incident to proper sizing, tolerances are provided for pieces in a lot which fail to meet the requirements of any size specified. The tolerances, by weight, are as follows:

(1) U.S. Extra Fancy pieces and U.S. Fancy pieces:

Not more than 15 percent of the lot may fall outside of the size range in Table 1 to this section. Further, not more than 1 percent of the pieces, excluding Topping Pieces and Granules, may pass through an eight sixty-fourths of an inch round hole screen.

(2) U.S. Choice pieces:

Not more than 20 percent of the lot may fall outside of the size range in Table 1 to this section. Further, not more than 2 percent of the pieces, excluding Topping Pieces and Granules, may pass through an eight sixty-fourths of an inch round hole screen.

(3) U.S. Standard pieces:

Not more than 25 percent of the lot may fall outside of the size range in Table 1 to this section. Further, not more than 2 percent of the pieces, excluding Topping Pieces and Granules, may pass through an eight sixty-fourths of an inch round hole screen.

Tolerances for Defects

§ 51.1437 Tolerances for defects.

In order to allow for variations incident to proper grading and handling in each of the foregoing grades, the following tolerances, by weight, are as follows:

(a) U.S. Extra Fancy grade:

(1) No foreign material;

(2) 0.01 percent for shell, and center wall;

(3) Zero tolerance is provided for pecan weevil larvae;

(4) 3 percent for portions of kernels which are ''light amber'' or darker color, or darker than any specified lighter color classification, but which are not otherwise defective; and

(5) 3 percent for portions of kernels which fail to meet the remaining requirements of the grade, including therein not more than 0.50 percent (one-half of 1 percent) for defects causing serious damage: *Provided,* That any unused portion of this tolerance may be applied to increase the tolerance for kernels which are ''light amber'' or darker color, or darker than any specified lighter color classification.

(b) U.S. Fancy grade:

(1) No foreign material;

(2) 0.01 percent for shell and center wall;

(3) No more than 2 pecan weevil larvae;

(4) 5 percent for portions of kernels which are ''amber'' or darker color, or darker than any specified lighter color classification, but which are not otherwise defective; and

(5) 5 percent for portions of kernels which fail to meet the remaining requirements of the grade, including therein not more than 0.50 percent (one-half of 1 percent) for defects causing serious damage, including pecan weevil larvae: *Provided,* That any unused portion of this tolerance may be applied to increase the tolerance for kernels which are ''amber'' or darker color, or darker than any specified lighter color classification.

(c) U.S. Choice grade:

(1) No foreign material;

(2) 0.01 percent for shell and center wall;

(3) No more than 5 pecan weevil larvae;

(4) 15 percent for portions of kernels which are ''dark amber'' or darker color, or darker than any specified lighter color classification, but which are not otherwise defective; and

(5) 8 percent for portions of kernels which fail to meet the remaining requirements of the grade, including therein not more than 1 percent for defects causing serious damage, including pecan weevil larvae.

(d) U.S. Standard grade:

(1) No foreign material;

(2) 0.01 percent for shell and center wall;

(3) 25 percent for portions of kernels which are darker than a specified color classification, but which are not otherwise defective; and

(4) 15 percent for portions of kernels which fail to meet the remaining requirements of the grade, including therein not more than 1 percent for defects causing serious damage, including pecan weevil larvae.

Application of Standards

§ 51.1438 Application of standards.

The grade of a lot of shelled pecans shall be determined on the basis of a composite sample drawn at random from containers in various locations in the lot. However, any identifiable container or number of containers in which the pecans are obviously of a quality or size materially different from that in the majority of containers, shall be considered as a separate lot, and shall be sampled and graded separately.

Definitions

§ 51.1439 Premier half-kernel (Premier halves).

Premier half-kernel (Premier halves) means one of the separated halves of an entire pecan kernel with not more than one-eighth of its original volume missing, exclusive of the portion which formerly connected the two halves of the kernel.

§ 51.1440 Half-kernel (Halves).

Half-kernel (Halves) means one of the separated halves of an entire pecan kernel with not more than one-fourth of its original volume missing, exclusive of the portion which formerly connected the two halves of the kernel.

§ 51.1441 Piece.

Piece means a portion of a kernel which is less than three-fourths of a half-kernel, but which will not pass through a round opening four sixty-fourths (4/64) of an inch in diameter.

§ 51.1442 Meal and flour.

Meal and flour means fragments of kernels which will pass through a round opening four sixty-fourths (4/64) of an inch in diameter.

§ 51.1443 Well dried.

Well dried means that the portion of kernel is firm and crisp, not pliable, or leathery.

§ 51.1444 Well developed.

Well developed means that the kernel is full-meated through its width and length.

§ 51.1445 Fairly well developed.

Fairly well developed means that the kernel is full-meated in over 50 percent of its width and length.

§ 51.1446 Poorly developed.

Poorly developed means that the kernel is full-meated in less than 25 percent of its width and length.

§ 51.1447 Uniform in color.

Uniform in color means that 95 percent or more of the kernels in the lot have skin color within the range of one or two color classifications.

§ 51.1448 Fairly uniform in color.

Fairly uniform in color means that 85 percent or more of the kernels in the lot have skin color within the range of one or two color classifications.

§ 51.1449 Uniform in size.

Uniform in size means that, in a representative sample of 100 halves, the 10 smallest halves weigh not less than 25 percent as much as the 10 largest halves.

§ 51.1450 Fairly uniform in size.

Fairly uniform in size means that, in a representative sample of 100 halves, the 10 smallest halves weigh not less than 50 percent as much as the 10 largest halves.

§ 51.1451 Foreign material.

Foreign material includes rocks, wood, glass, plastic, or any similar material. It does not include hard shell, center wall, or pecan weevil larvae.

§ 51.1452 Damage.

Damage means any specific defect described in this section; or an equally objectionable variation of any one of these defects, or any other defect, or any combination of defects, which materially detracts from the appearance or the edible or marketing quality of the individual portion of the kernel or of the lot as a whole. The following defects shall be considered as damage:

(a) Adhering material from inside the shell when attached to more than one-fourth of the surface on one side of the half-kernel or piece;

(b) Dust or dirt adhering to the kernel when conspicuous;

(c) Internal flesh discoloration of a medium shade of gray or brown extending more than one-fourth the length of the half-kernel or piece, or lesser areas of dark discoloration affecting the appearance to an equal or greater extent;

(d) Kernel which is not well dried;

(e) Kernel which is ''dark amber'' or darker color;

(f) Kernel having more than one dark kernel spot, or one dark kernel spot more than one-eighth inch in greatest dimension;

(g) Poorly developed kernel; and

(h) Shriveling when the surface of the kernel is very conspicuously wrinkled.

§ 51.1453 Serious damage.

Serious damage means any specific defect described in this section; or an equally objectionable variation of any one of these defects, or any other defect, or any combination of defects, which seriously detracts from the appearance or the edible or marketing quality of the individual portion of kernel or of the lot as a whole. The following defects shall be considered as serious damage:

(a) Adhering material from inside the shell when attached to more than one-half of the surface on one side of the half-kernel or piece;

(b) Any plainly visible mold;

(c) Dark kernel spots when more than three are on the kernel, or when any dark kernel spot or the aggregate of two or more spots affect an area of more than 10 percent of the surface of the half-kernel or piece;

(d) Dark skin discoloration, darker than ''dark brown,'' when covering more than one-fourth of the surface of the half-kernel or piece;

(e) Decay affecting any portion of the kernel;

(f) Insects, web, or frass or any distinct evidence of insect feeding on the kernel;

(g) Internal discoloration, which is dark gray, dark brown, or black and extends more than one-third the length of the half-kernel or piece; and

(h) Rancidity [1] when the kernel is distinctly rancid to taste. Staleness of flavor shall not be classed as rancidity.

Note to § 1453(h):

[1] Refers to the tendency of the oil in a pecan kernel to become tainted as a result of oxidation or hydrolysis. Industry measures to determine the tendency of a kernel to become rancid include testing the kernel's peroxide and free fatty acid values. Peroxide values should be less than 5 mEq/kg and free fatty acids acid value should be less than 1 percent. These analyses are not performed in determination of grade.

Erin Morris,

Associate Administrator, Agricultural Marketing Service.

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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 308 and 364

RIN 3064–AF94

Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions With Total Consolidated Assets of $10 Billion or More

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking and issuance of guidelines.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) is seeking comment on proposed corporate governance and risk management guidelines (Guidelines) that would apply to all insured state nonmember banks, state-licensed insured branches of foreign banks, and insured state savings associations that are subject to Section 39 of the Federal Deposit Insurance Act (FDI Act), with total consolidated assets of $10 billion or more on or after the effective date of the final Guidelines. These proposed Guidelines would be issued as Appendix C to FDIC's standards for safety and soundness regulations in part 364, pursuant to Section 39 of the FDI Act, and would be enforceable under Section 39. The FDIC also proposes to make corresponding amendments to parts 308 and 364 of its regulations to implement the proposed Guidelines.

DATES: Comments on the proposed Guidelines must be received by December 11, 2023.

ADDRESSES: The FDIC encourages interested parties to submit written comments. Please include your name, affiliation, address, email address, and telephone number(s) in your comment. You may submit comments to the FDIC, identified by RIN 3064–AF94, by any of the following methods:

Agency Website: https://www.fdic.gov/resources/regulations/federal-register-publications. Follow instructions for submitting comments on the FDIC's website.

Mail: James P. Sheesley, Assistant Executive Secretary, Attention: Comments/Legal OES (RIN 3064–AF94), Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

Hand Delivered/Courier: Comments may be hand-delivered to the guard station at the rear of the 550 17th Street NW building (located on F Street NW) on business days between 7 a.m. and 5 p.m.

Email: comments@FDIC.gov. Include RIN 3064–AF94 in the subject line of the message.

Public Inspection: Comments received, including any personal information provided, may be posted without change to *https://www.fdic.gov/resources/regulations/federal-registerpublications/.* Commenters should submit only information that the commenter wishes to make available publicly. The FDIC may review, redact, or refrain from posting all or any portion of any comment that it may deem to be inappropriate for publication, such as irrelevant or obscene material. The FDIC may post only a single representative example of identical or substantially identical comments, and in such cases will generally identify the number of identical or substantially identical comments represented by the posted example. All comments that have been redacted, as well as those that have not been posted, that contain comments on the merits of this notice will be retained in the public comment file and will be considered as required under all applicable laws. All comments may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Division of Risk Management Supervision: Judy E. Gross, Senior Policy Analyst, 202–898–7047, *JuGross@FDIC.gov*; Legal Division: Jennifer M. Jones, Counsel, 202–898–6768; Catherine Topping, Counsel, 202–898–3975; Nicholas A. Simons, Senior Attorney, 202–898–6785; Kimberly Yeh, Senior Attorney, 202–898–6514.

SUPPLEMENTARY INFORMATION:

I. Policy Objectives

Strong corporate governance is the foundation for an insured depository institution's safe and sound operations. An effective governance framework is necessary for an insured depository institution to remain profitable, competitive, and resilient through changing economic and market conditions. The board of directors serves a critical role in maintaining an insured depository institution's safety and soundness and continued financial and operational resilience.

The FDIC observed during the 2008 financial crisis and more recent bank [1] failures in 2023 that financial institutions with poor corporate governance and risk management practices were more likely to fail.[2] Reports reviewing the recent 2023 bank failures noted that poor corporate governance and risk management practices were contributing factors.[3] Failures of insured depository institutions (IDIs) impose costs on the Deposit Insurance Fund (DIF) and negatively affect a wide variety of stakeholders including the institution's depositors and shareholders, employees, customers (including consumers and businesses that rely on the institution's services and the availability of credit), regulators, and the public as a whole. Insufficient attention and

[1] The term ''bank'' is used to mean the same thing as ''insured depository institution'' as defined in Section 3 of the FDI Act.

[2] *Lessons Learned and a Framework for Monitoring Emerging Risks and Regulatory Response,* GAO Report to Congress, GAO–15–365, June 2015; FDIC OIG Reports—Bank Failures, *https://www.fdicoig.gov/reports-publications/bank-failures;* Remarks by Martin J. Gruenberg, Chairman, FDIC to the American Association of Bank Directors, May 12, 2015, *https://archive.fdic.gov/view/fdic/1717; Review of the Federal Reserve's Supervision and Regulation of Silicon Valley Bank,* April 2023, *https://www.federalreserve.gov/publications/files/svb-review-20230428.pdf; FDIC's Supervision of Signature Bank,* April 2023, *https://www.fdic.gov/news/press-releases/2023/pr23033a.pdf.*

[3] The FDIC report on the failure of Signature Bank in 2023 found that the root cause of the failure was poor management without adequate risk management practices and controls. The institution's management did not prioritize good corporate governance practices (*FDIC's Supervision of Signature Bank,* April 28, 2023, p. 2). The Federal Reserve Board's report on the failure of Silicon Valley Bank also identified governance and risk management failures that led to the failure. (*Review of the Federal Reserve's Supervision and Regulation of Silicon Valley Bank,* April 2023, p. 1).

responsiveness to internal controls and governance processes can result in noncompliance with laws and regulations going undetected or unaddressed.

The safety and soundness standards in part 364 currently include guidelines in Appendix A,[4] which contain operational and managerial standards for insured state nonmember banks, state-licensed insured branches of foreign banks, and insured state savings associations (together, ''FDIC-supervised institutions'').[5] In smaller, noncomplex institutions, risk management processes and internal controls that generally incorporate these standards may be adequate. However, as the recent bank failures show, corporate and risk governance structure and practices should keep pace with the bank's changes in size, business model, risk profile, and complexity. Larger or more complex institutions should have more sophisticated and formal board and management structures and practices to ensure appropriate corporate governance.

In order to strengthen the corporate governance and risk management practices of large institutions, the FDIC is proposing to issue Guidelines as a new Appendix C to part 364 to address corporate governance and risk management practices and board oversight. The proposed Guidelines would apply to all FDIC-supervised institutions with total consolidated assets of $10 billion or more on or after the effective date of the final Guidelines (together ''covered institutions'' and each, a ''covered institution''). The proposed Guidelines would apply in addition to any other requirements established by law or regulation.[6] The FDIC's supervisory experience has shown that institutions with assets greater than $10 billion are larger, more complex and present a higher risk profile. The proposed Guidelines are intended to raise the FDIC's standards for corporate governance, risk management, and control to help ensure these larger institutions effectively anticipate, evaluate, and mitigate the risks they face.

In developing the proposed Guidelines, the FDIC considered other statutory and regulatory authorities that impose requirements and expectations concerning corporate governance activities and risk management practices. For example, the Office of the Comptroller of the Currency (OCC) has developed heightened expectations to strengthen the corporate governance and risk management practices of large national banks with total consolidated assets of $50 billion or more. Under guidelines the OCC issued pursuant to Section 39 of the FDI Act, it expects larger national banks to establish and implement a risk governance framework for managing and controlling the bank's risk taking.[7] The Board of Governors of the Federal Reserve System (Federal Reserve Board) has incorporated corporate governance and risk management requirements in Regulation YY [8] and various Supervision and Regulation (SR) Letters for bank holding companies with total consolidated assets of $50 billion or more. The Federal Reserve Board has also noted that the risk management processes of a regional IDI, which it generally considers to be a midsize IDI with total consolidated assets between $10 and $100 billion, should typically contain detailed guidelines that set specific prudent limits on the principal types of risks relevant to a regional IDI's consolidated activities.[9]

The proposed Guidelines are drawn from the principles set forth in the authorities noted above and would therefore align the FDIC's supervisory framework more closely with the other Federal banking agencies. Although the proposed Guidelines would apply more broadly to capture FDIC-supervised institutions with total assets of $10 billion or more, the FDIC believes that the proposed scope of application threshold is appropriate, as effective risk management practices should be tailored to the size of the institution and the nature, scope, and risk of its activities. These institutions are typically more complex and present a higher risk profile than community banking organizations with less than $10 billion in total assets.

II. Background

Prior Supervisory Guidance and Guidelines

Over many years, the FDIC has issued guidance for IDIs on corporate governance and risk management, and expectations relating to boards of directors, with all guidance and expectations scaled to the size, complexity, and risk profile of the IDI. For example, in 1988, the FDIC issued the *Pocket Guide for Directors* [10] to provide guidance to community bank directors about long-standing, broad principles on corporate governance and fiduciary responsibilities. In 1992, the FDIC issued a ''Statement Concerning the Responsibilities of Bank Directors and Officers.'' [11] In 2005, the FDIC issued a document, ''Corporate Codes of Conduct: *Guidance on Implementing an Effective Ethics Program*.'' [12] Further, in 2018 the FDIC published an issue of *Supervisory Insights* [13] as a resource specifically for community bank directors with an interest in bank

[4] *See* 12 CFR part 364, Appendix A; *https://www.fdic.gov/regulations/laws/rules/2000-8630.html#fdic2000appendixatopart364.*

[5] The FDIC is the federal banking regulator for such institutions set forth in Section 3(q)(1) of the FDI Act, 12 U.S.C. 1813(q)(1), and has the authority to promulgate safety and soundness regulations for such institutions pursuant to Section 39 of the FDI Act, 12 U.S.C. 1831p–1.

[6] All FDIC-supervised institutions, including covered institutions, may continue to utilize existing guidance in establishing appropriate corporate guidance processes. However, should an inconsistency exist between existing guidance and the proposed Guidelines, the proposed Guidelines will govern the activities of a covered institution since any final guidelines will be codified in Appendix C to part 364.

[7] *See* OCC Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches; Integration of Regulations, 79 FR 54518 (Sept. 11, 2014), *https://www.federalregister.gov/documents/2014/09/11/2014-21224/occ-guidelines-establishing-heightened-standards-for-certain-large-insured-national-banks-insured;* OCC, Comptroller's Handbook—Corporate and Risk Governance, *https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/corporate-risk-governance/index-corporate-and-risk-governance.html.*

[8] 12 CFR 252.22, subpart C—Risk Committee Requirements for Bank Holding Companies with Total Consolidated Assets of $50 Billion or More and Less Than $100 Billion. The Federal Reserve Board initially set the application of risk committee requirements under Regulation YY, among other requirements, for banks with total consolidated assets of $10 billion or more pursuant to Section 165 of the Dodd-Frank Act of 2010. 79 FR 17239, 17248 (Mar. 27, 2014). This threshold was raised from $10 billion to $50 billion pursuant to changes made under the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018. 84 FR 59032, 59055 (Nov. 1, 2019).

[9] *See* SR 16–11: *Supervisory Guidance for Assessing Risk Management at Supervised Institutions with Total Consolidated Assets Less than $100 Billion* (June 8, 2016; revised and reposted February 17, 2021, p. 3). SR letter 95–51, *Rating the Adequacy of Risk Management Processes and Internal Controls at State Member Banks and Bank Holding Companies* (Nov. 14, 1995; revised Feb. 26, 2021) remains applicable to state member banks and bank holding companies with $100 billion or more in total assets. The Federal Reserve Board's Commercial Bank Examination Manual, Community Bank Supervision Process (Nov. 2020) applies the term ''community bank'' to generally describe a bank with $10 billion or less in total consolidated assets.

[10] *https://www.fdic.gov/regulations/resources/director/pocket/.*

[11] Financial Institution Letter (FIL—87—92) dated December 3, 1992, *https://www.fdic.gov/regulations/laws/rules/5000-3300.html.*

[12] *https://www.fdic.gov/news/financial-institution-letters/2005/fil10505.html.*

[13] This is an informational resource but is not regulatory guidance: Special Governance Issue; April 2016, revised October 2018, *https://www.fdic.gov/regulations/examinations/supervisory/insights/sise16/si-se2016.pdf.*

governance and bank directors' responsibilities.

The FDIC's safety and soundness standards in part 364 currently include guidelines in Appendix A that contain operational and managerial standards.[14] Appendix A describes the fundamental governance and risk management standards the FDIC expects FDIC-supervised institutions to implement in a manner appropriate to the scope and complexity of their operations. In addition to Appendix A, the FDIC includes corporate governance and risk management expectations relevant to specific areas in topical rules, such as for appraisals[15] and stress testing,[16] and in guidance, such as the Interagency Guidance on Third-Party Relationships: Risk Management.[17]

Examinations for Safety and Soundness

Corporate governance and risk management practices are core considerations in evaluating management at IDIs as part of FDIC's examinations for safety and soundness. Section 4.1 of the FDIC's *Risk Management Manual of Examination Policies*[18] (Manual) reiterates the importance of good management:

> In the complex, competitive, and rapidly changing environment of financial institutions, it is extremely important for all members of bank management to be aware of their responsibilities and to discharge those responsibilities in a manner which will ensure stability and soundness of the institution, so that it may continue to provide to the community the financial services for which it was created.

Section 4.2 of the Manual discusses the importance of risk assessment and management:

> Risk assessments are conducted in order to identify, measure, and prioritize risks so that attention is placed first on areas of greatest importance. Risk assessments should analyze threats to all significant business lines, the sufficiency of mitigating controls, and any residual risk exposures.

Although the FDIC has not previously issued supervisory guidelines or regulations specifically on corporate governance and risk management for covered institutions, the FDIC expects these larger IDIs to have more detailed and formal guidance frameworks, given their size and complexity. The FDIC has implemented a continuous examination process (CEP) for the largest IDIs that it supervises.[19] IDIs that are supervised under a CEP are not directly tied to an asset size; however, most FDIC-supervised IDIs with assets of $10 billion or more are supervised through a CEP since they are larger, more complex, or present a higher risk profile. The CEP includes onsite targeted reviews of areas the examiner determines are necessary to complete a full-scope examination; ongoing monitoring and assessment of institution risks, policies, procedures, and financial condition; and frequent communication with bank management. A dedicated or designated examiner-in-charge (EIC) oversees the continuous examination process and may be supported by additional dedicated examination staff. IDIs with assets of $10 billion or more are also subject to increased off-site review activities and more granular risk-based deposit insurance pricing due to their increased size and complexity.

The requirements in these proposed Guidelines generally reflect existing principles and what examiners consider necessary for the safe and sound operation of a covered institution. In addition, these proposed Guidelines are intended to be generally consistent with the goals communicated through the OCC's and Federal Reserve Board's published issuances in an effort to harmonize corporate governance and risk management requirements for covered institutions that present a higher risk profile with those applicable to entities supervised by the other Federal banking agencies.

Most of the risk management practices to be established and maintained by a covered institution to meet these safety and soundness standards, including having appropriate loan review and credit underwriting and administration practices, are already components of the institution's risk governance framework. As discussed below in Section III, the FDIC is adding a requirement (consistent with the OCC and Federal Reserve Board standards) for covered institutions to establish a three-lines-of-defense model: business units (front line units), independent risk management unit, and internal audit unit.

Rulemaking Authority

The FDIC is issuing the proposed Guidelines pursuant to Section 39[20] of the FDI Act. Section 39 generally prescribes safety and soundness standards for insured depository institutions. Under subsection (a) of the statute, the FDIC, as the appropriate Federal banking agency for insured state nonmember banks, state-licensed insured branches of foreign banks, and insured state savings associations, may prescribe such standards, including other operational and managerial standards, by issuing a regulation or guideline. Pursuant to Section 39, if a covered institution fails to meet a standard prescribed by regulation, the FDIC must require the institution to submit a plan specifying the steps that it will take to comply with the standard. If a covered institution fails to meet a standard prescribed by guideline, the FDIC has the discretion to decide whether to require the submission of a plan.[21] The issuance of these standards as Guidelines rather than as a regulation provides the FDIC with supervisory flexibility to pursue the course of action that is most appropriate given the specific circumstances of a covered institution's failure to meet one or more of the standards, and the covered institution's self-corrective and remedial responses.[22]

III. Description of the Proposed Guidelines

The proposed Guidelines contain standards for corporate governance and risk management for covered institutions. The proposed Guidelines include a description of the general obligations of the board to ensure good corporate governance.[23] The FDIC expects all FDIC-supervised institutions to have good corporate governance, including the key component of an active and involved board protecting the interests of the institution rather than the interests of the parent or affiliate of

[14] 12 CFR part 364, Appendix A; *https://www.fdic.gov/regulations/laws/rules/2000-8630.html#fdic2000appendixatopart364.*

[15] 12 CFR part 323.

[16] 12 CFR part 325.

[17] 88 FR 37920 (Jun. 9, 2023).

[18] *https://www.fdic.gov/regulations/safety/manual/.*

[19] *See* Section 1.1 of the Manual.

[20] 12 U.S.C. 1831p–1.

[21] Pursuant to Section 39, if the FDIC determines that an IDI fails to meet any standard prescribed in the guidelines issued under subsection (a) or (b) of Section 39, the FDIC may require the IDI to submit a plan that specifies the steps that the institution will take to correct the deficiency (such plan is referred to as a ''Section 39 Plan''). Further, Section 39 provides that if an IDI fails to submit an acceptable Section 39 Plan or fails in any material respect to implement an acceptable Section 39 Plan, the FDIC, by order shall require the institution to correct the deficiency and may take additional enumerated actions, including growth restrictions, increased capital requirements, and restrictions on interest rates paid on deposits.

[22] The FDIC's procedural rules implementing Section 39 are contained in 12 CFR part 308, subpart R. As part of this rulemaking, an amendment to 12 CFR 308.302(a) is being proposed to add a reference the proposed Guidelines. Similarly, a new paragraph (c) is being proposed to 12 CFR 364.101 to add a reference to the proposed Guidelines.

[23] Under the proposed Guidelines, the FDIC reserves authority to modify or extend the time for compliance for any IDI with $10 billion or more in assets and to modify the proposed Guidelines, as necessary, to address their applicability to insured branches of foreign banks because those institutions do not have a board.

the institution. The proposed Guidelines for covered institutions emphasize the importance of developing a strategic plan and risk management policies and procedures and selecting and supervising senior management so that a covered institution will operate in a safe and sound manner. The proposed Guidelines also emphasize the importance for the board and management to adopt a code of ethics, to demonstrate high ethical standards in the covered institutions' operations, and to act to ensure the covered institution and its employees adhere to applicable laws and regulations, including consumer protection laws and regulations, and the Community Reinvestment Act.

A. Section I—Introduction

This section describes the scope of FDIC-supervised institutions that would be subject to the proposed Guidelines. The proposed Guidelines would apply to all insured state nonmember banks, state-licensed insured branches of foreign banks, and insured state savings associations that are subject to the provisions of Section 39 of the FDI Act, with total consolidated assets of $10 billion or more on or after the effective date of the final Guidelines. The proposal defines ''total consolidated assets'' for purposes of meeting the $10 billion threshold as total assets reported on an institution's Consolidated Reports of Condition and Income (Call Report) for the two most recent consecutive quarters. The institutions which meet these criteria are ''covered institutions'' under the proposed Guidelines. As analyzed more fully in the discussion of the expected effects of the proposed Guidelines below, the FDIC believes this proposed $10 billion threshold will reduce the likelihood of failure and the magnitude of losses in the event of a failure. As of March 31, 2023, there are 57 covered institutions.[24]

The FDIC proposes to apply the Guidelines to institutions whose Call Report filings reflect two consecutive quarters of total assets above $10 billion to provide institutions an ''on-ramp'' for compliance. This provides a certain amount of time for institutions to develop the policies, procedures, and programs they need to comply with the proposed Guidelines before they become a ''covered institution'' on the as-of date of the Call Report for the second consecutive quarter in which their total consolidated assets exceed $10 billion. Additionally, it will allow institutions that may only briefly exceed the threshold to reduce their total consolidated assets over the following quarter without needing to comply with the Guidelines. The FDIC expects that institutions would be well aware in advance if they would exceed the $10 billion threshold and develop compliance programs in advance or plan to reduce their assets. Finally, the FDIC proposes to consider an institution to no longer be a ''covered institution'' if its Call Report filings show total consolidated assets below $10 billion for four consecutive quarters. The FDIC believes that these asset thresholds based on quarterly Call Report filings strike a balance between application of the Guidelines for larger, more complex institutions, while not capturing less-complex institutions whose total assets only exceed $10 billion briefly or whose size is reduced over time. This proposed asset threshold, however, is subject to the FDIC's existing authority as described below.

The proposed Guidelines include preservation and reservation of the FDIC's existing authority to address unsafe or unsound practices of all FDIC-supervised institutions. The Guidelines preserve the FDIC's authority to bring any enforcement action available to it independently of, in conjunction with, or in addition to any action under Section 39 of the FDI Act. Further, the FDIC reserves the authority to apply the proposed Guidelines, in whole or in part, to institutions with less than $10 billion in total consolidated assets if the FDIC determines that the institution's operations are highly complex or present heightened risk. The FDIC also reserves the authority, for each covered institution, to extend the time for compliance with these Guidelines or modify these Guidelines, as necessary, and can determine that compliance should no longer be required for covered institutions, if the institution's operations are no longer highly complex or no longer present a heightened risk. The FDIC's reservation of authority is not restricted by the asset threshold, as described above.

The Introduction also includes Definitions for terms used throughout the proposed Guidelines and a description of the role, responsibility, and structure of certain positions and functions within a covered institution that have a role in the risk management and corporate governance of the covered institution. This section defines both the Chief Audit Officer (CAO) and the Chief Risk Officer (CRO) within a covered institution, describing their responsibilities and reporting structure. The CAO and CRO lead the internal audit unit and the independent risk management unit, respectively. The internal audit unit and the independent risk management unit maintain independence from front line units through the structure outlined in their respective definitions and as further detailed throughout the proposed Guidelines. Front line units mean those units that, in general, generate revenue or reduce costs for the covered institution. This proposed section also defines a covered institution's parent company. Finally, this proposed section defines the risk appetite and risk profile for the covered institution.

B. Section II—Corporate Governance

The board of directors of a covered institution has the ultimate responsibility for the safe and sound operation of the institution, overseeing management, and fulfilling its fiduciary duties. Effective corporate governance depends upon a board of directors that is active and engaged. As noted elsewhere in the discussion of these proposed Guidelines, the FDIC has observed that institutions with weak corporate governance are more likely to fail and are more likely to experience significant losses upon failure. To ensure the safety and soundness of covered institutions and the stability of the financial system, the FDIC is proposing these Guidelines for the boards of covered institutions regarding their obligations, composition, duties, and committee structure to set expectations for corporate governance.

Subsection A—Board of Directors—General Obligations

Proposed Section II, Subsection A describes the general obligations of a covered institution's board of directors. The board is ultimately responsible for the affairs of the covered institution and each individual member must abide by certain legal duties. These legal duties flow from the myriad federal and state laws applicable to the covered institution, securities law and bank regulation, common law, and other sources that may impose criminal or civil liability on directors that fail to discharge their duties. Boards should familiarize themselves with and refer to all applicable federal and state law requirements.

Subsection B—Board Composition

These proposed Guidelines also establish an expectation for the composition of the board of directors. There should be at least a majority of independent directors on the board. An appropriately sized, diverse board of

[24] FDIC Call Report Data, March 31, 2023. Count excludes First Republic Bank, which was closed by the California Department of Financial Protection and Innovation and the FDIC was appointed Receiver on May 1, 2023.

directors promotes effective, independent oversight of a covered institution and is important to the overall risk management of the institution. Diversity of demographic representation, opinion, experience, and ownership level is key to a board composition that can oversee management, address a variety of risks, and challenge others when necessary. A board that includes multiple members with similar experiences, opinions, or interests in the covered institution may result in a lack of creativity or individual responsibility for decisions, or gaps in knowledge, experience, or oversight, increasing risk to the institution.

The covered institution's organizational documents or state chartering authority may have requirements for board members, including a requirement for a certain number of directors. The proposed Guidelines expand upon, but do not replace, these requirements by providing covered institutions various considerations for ensuring an effective board composition. In determining the appropriate number of directors and the board's composition in accordance with state law, the board should consider how the selection of, and diversity among board members collectively and individually, may best promote effective, independent oversight of the covered institution's management and satisfy all legal requirements for outside and independent directors.[25]

Subsection C—Duties of the Board

The duties of the board of directors of a covered institution flow from their responsibilities to fulfill their fiduciary duties, oversee management, and ensure safe and sound operation of the institution. As these responsibilities ultimately lie with the board, the FDIC is proposing the following Guidelines for the minimum duties of the boards of covered institutions. Each of the following duties is an integral component of the board's overall responsibility for risk management of the covered institution, holding executives and management accountable, and ensuring ethical operations.

The proposed Guidelines state that the board of a covered institution should set an appropriate tone for the institution. The ''tone at the top'' is integral to promoting a culture and environment of responsible and ethical behavior that discourages imprudent risk-taking in pursuit of profit. The proposed Guidelines include this responsibility for the board, in alignment with similar guidelines imposed by the Federal Reserve Board and the OCC. The tone set by the board is closely related to other concepts throughout the proposed Guidelines, including a Code of Ethics that encourages responsible behavior and a Compensation and Performance Management Program that does not incentivize imprudent risk-taking. By adhering to the law, these proposed Guidelines, and the board's own policies, the board sets the tone for the covered institution as a whole and reduces the likelihood or cost of failure.

The proposed Guidelines state that the board is responsible for the strategic plan and direction of the covered institution. Development and approval of a strategic plan is a common responsibility of a board of directors and its inclusion in these proposed Guidelines elaborates on the FDIC's expectations for such a plan to ensure the board of a covered institution is engaged with its business objectives while appropriately managing risk. A strategic plan developed by the Chief Executive Officer (CEO) with input from front-line units, independent risk management, and internal audit, and ultimately approved by the board, sets the direction of a covered institution to achieve business goals and manage the covered institution's risks. The strategic plan should cover at least a three-year period and be reviewed and approved annually to account for changing business conditions and risks to the covered institution.

The board of directors of a covered institution is also responsible for establishing the policies by which the institution operates, and these proposed Guidelines provide a high-level overview of such responsibility. Similar to a strategic plan, the adoption of policies ensures board engagement, prudent and proper risk management, and safe and sound operation. These proposed Guidelines do not prescribe the exact policies that the board of a covered institution may adopt; each institution varies in its business activities and unique risks and is responsible for making that determination itself. At a minimum, the covered institution should adopt policies and procedures to ensure safe and sound operation and fulfill the responsibilities outlined in Appendix A of part 364. For example, such policies and procedures may include a loan and/or credit policy, certain internal controls, and guides for assets and liabilities. Other statutes, regulations, or supervisory policies may require adoption of policies and procedures as well, such as compliance with the Bank Secrecy Act, consumer protection laws, the Community Reinvestment Act, and other legal requirements that may exist. The board should periodically review and revise its policies to ensure that they remain applicable and account for new or changing risks of the institution. Finally, compliance with the board's policies should be periodically reviewed by the internal audit function of the institution.

A Code of Ethics, written and adopted by the board, is integral to establishing an appropriate tone in a covered institution and setting expectations for behavior that manages risk. The proposed Guidelines state that the Code of Ethics should apply to all directors, management, and employees. The proposed Guidelines also state, broadly, the areas that should be addressed by such a Code, including procedures and points of contact for reporting illegal or unethical behavior. A Code of Ethics should include topics addressing legal requirements, such as insider information, disclosure, and self-dealing.

The board of a covered institution should also provide active oversight of management. As the body that appoints and compensates the CEO (and possibly other management as well, either as a whole or by committee), it is the responsibility of the board of the covered institution to oversee the management that it has hired. Similarly, the board is responsible for overseeing compliance with the policies that it establishes, such as the strategic plan and the Code of Ethics, and is ultimately responsible for compliance with applicable laws and regulations. Under these proposed Guidelines, the board should hold management accountable and challenge and question management as necessary to ensure safe and sound operation of the covered institution.

The obligation of an individual board member to exercise independent judgment is included in the proposed Guidelines. Exercising sound, independent judgment is integral to a director's responsibility and duties to a covered institution. In addition, individual directors and the board as a whole should exercise independent judgment by ensuring that they are not excessively influenced by a single dominant policymaker, who may be a director, management, shareholder, or other individual. Such dominant policymakers present risks to the board

[25] For example, the Depository Institutions Management Interlocks Act (12 U.S.C. 3201 *et seq.*) that generally prohibits a management official from serving two nonaffiliated depository organizations in situations where the management interlock likely would have an anticompetitive effect.

and covered institutions by inhibiting board members' exercise of independent judgment, causing a power vacuum if they leave the institution, and presenting difficulty if mismanagement can be attributed to a single dominant individual.

The proposed Guidelines provide that the board of a covered institution must also select and appoint qualified executive officers. This typically includes the CEO, but may also include other officers appointed by the board as a whole or by committee. Such selection and appointment is standard among boards of covered institutions; these proposed Guidelines provide a minimum expectation for selection criteria of personnel, grounds for dismissal, succession planning, and training.

The board of a covered institution should also provide ongoing training to each of its directors. To that end, the proposed Guidelines include examples of training that a board may conduct to ensure that it has the knowledge, abilities, and skills to understand industry trends, statutory and regulatory developments, and an understanding of the issues that affect the covered institution. The formal training program should include, at a minimum, the products, services, lines of business, and risks of the covered institution; laws, regulations, and supervisory requirements applicable to the covered institution; and other topics that the board may identify to ensure that the institution maintains safe and sound operation and the board can execute its duties appropriately.

A self-assessment at the board level is necessary for the directors of a covered institution to examine their own compliance, hold themselves accountable, and make plans to improve any gaps or deficiencies in their performance. Identifying and addressing deficiencies at the board level ensures one more layer of protection against risk. To that end, these proposed Guidelines state that the board should conduct such a self-assessment on a regular basis.

The board should also establish Compensation and Performance Management Programs. The proposed Guidelines include this as a component of the overall risk management of a covered institution; incentives and compensation programs may pose safety and soundness risks if they encourage noncompliance with laws, regulations, or internal policies to meet business objectives. To safeguard against those risks, these Guidelines propose that a Compensation and Performance Management Program be established by the board to ensure adherence to an effective risk management program, ensure issues identified by the risk management and internal audit functions are addressed, and attract and retain competent staff.

Subsection D—Committees of the Board

The board of directors of a covered institution is expected to work through a committee structure that allows directors to stay informed, divide labor, and handle matters that require detailed review and in-depth consideration. These proposed Guidelines set the minimum expectations for committees of the board that oversee critical elements of the covered institution's overall risk management. The committees proposed in these Guidelines are in addition to, not in lieu of, any committees that may be required by other laws, regulations, or supervisory requirements.

An Audit Committee must be established as defined in these proposed Guidelines and as required by Section 36 of the FDI Act [26] and part 363 of the FDIC's regulations.[27] The Audit Committee, composed entirely of outside and independent directors as required by statute and regulation, oversees financial reporting, independent audits, the Chief Audit Officer, and the internal audit function. Furthermore, this Committee should report to the full board regarding the progress of the covered institution in addressing issues identified by the internal audit function and recommending further action.

A Compensation Committee established under these proposed Guidelines must comply with any exchange rules that may be applicable to publicly traded covered institutions and the FDIC's regulations, including Appendix A of part 364. The Compensation Committee assists in managing the risks of a covered institution by ensuring that compensation and performance management do not reward or encourage imprudent risk-taking or violations of legal requirements in pursuit of profit or business objectives. Furthermore, compensation that is excessive or that could lead to a material financial loss constitutes an unsafe and unsound practice that this Committee is also designed to guard against.

These proposed Guidelines include the establishment of a Trust Committee if the covered institution has trust powers. This Committee oversees and manages the risks presented by the operation of a trust department by ensuring that the trust department is separate and apart from other departments of the covered institution, trust assets are separated from other assets of the covered institution, assets of each trust account are separated from the assets of other accounts, and ensuring overall compliance with applicable laws and regulations. These proposed Guidelines include these requirements as best practices for management of a trust department in a covered institution.

These proposed Guidelines also include requirements for a Risk Committee. The Risk Committee is responsible for approving and periodically reviewing the risk management policies of a covered institution and overseeing the risk management framework. To ensure that the Risk Committee is independent and able to effectively complete its mission, and to minimize the risk of failure and the magnitude of losses of a covered institution, these proposed Guidelines include requirements consistent with that of other Federal banking agencies. By requiring that the Committee has an independent director as its chair and be an independent committee of the board that reports directly to the board, these proposed Guidelines help to ensure that the individuals responsible for oversight of the covered institution's overall risks are free to make recommendations to the board and challenge management as necessary. At least one individual on the Committee should be experienced in managing the risks of a firm commensurate with the size, business model, complexity and risk profile of the covered institution to ensure that the Committee has the necessary expertise to fulfill its obligations. Reviewing reports from the CRO and meeting with the Committee not less than quarterly ensures that the Risk Committee can stay abreast of the risks of the covered institution, including any internal or external changes that may affect the institution, and make recommendations accordingly. Finally, the Risk Committee overseeing the compensation and performance management of the CRO ensures that the CRO can maintain their independence and objectively assess the risks of the covered institution. The proposed Guidelines regarding the Risk Committee ensure proper oversight of the covered institution's independent risk management function and the risks of the institution itself. These requirements support the continued

[26] 12 U.S.C. 1831m.

[27] 12 CFR part 363.

safety and soundness of large and complex institutions.

The board should also create other committees as required or appropriate for the board to perform its duties under these proposed Guidelines. While the Committees outlined in these proposed Guidelines represent the FDIC's minimum expectations for division of labor and expertise among the board of directors of a covered institution, it does not obviate the institution from creating board committees as necessary, commensurate with its risk profile and operations of the institution to ensure safety and soundness. For example, many institutions find it prudent to have a credit committee that establishes loan and credit policies of the covered institution and reviews and approves loans above a certain amount. Other institutions may be heavily involved in financial technology and determine that it is necessary to have committees addressing information technology, cybersecurity, or partnerships. A covered institution should consider its risk profile and complexity of operations to determine whether a board committee is necessary to ensure matters requiring detailed review and in-depth consideration are addressed appropriately.

C. Section III—Board and Management Responsibility Regarding Risk Management and Audit

Under Proposed Section III, the FDIC would expect a covered institution to have and adhere to a risk management program for managing and controlling the covered institution's risk taking. Three distinct units should have responsibility and be held accountable by the CEO and the board for monitoring and reporting on the covered institution's compliance with the risk management program: front line units, the independent risk management unit, and the internal audit unit. The proposed Guidelines describe the responsibilities of each of these units in detail.

The proposed Guidelines provide that for a covered institution that has a parent company, if the risk profiles of each entity are substantially similar, the covered institution may adopt and implement all or any part of its parent company's risk management program that: satisfies the minimum standards in these Guidelines; ensures that the safety and soundness of the covered institution is not jeopardized by decisions made by the parent company's board and management; and ensures that the covered institution's risk profile is easily distinguished and separate from that of its parent for risk management and supervisory reporting purposes. Consideration of these factors may require the covered institution to have separate and focused governance and risk management practices.

Under these proposed Guidelines, a covered institution's risk management program should include a risk profile and a risk appetite statement. These documents form the foundation of an effective risk management program by providing an objective assessment of the institution's risks, and based on that risk profile, the board should establish written limits and levels of risks that the institution will accept. The independent risk management unit should develop the risk management program based on the risk profile of the institution and the risk appetite statement. At least annually and as the risks of the institution change, whether by internal or external factors, the risk management unit should review and update the risk management program. These proposed Guidelines provide the FDIC's expectations for the scope of the risk management program, including the risk categories, risk control infrastructure, and processes and systems for implementing and monitoring policies and procedures that govern, identify, and report risk. The risk management program should be effectively communicated throughout the institution so that all units understand their respective responsibilities.

Under the three-lines-of-defense model in these proposed Guidelines, a covered institution should have three units, held accountable by the CEO and the board, for monitoring and reporting on compliance with the risk management program. The front line units, which are generally business units that generate revenue or save costs for the covered institution as defined in these Guidelines, are responsible for ensuring that their activities do not create excessive risks or exceed the risk appetite of the institution. The independent risk management unit, under direction of the CRO, should identify, assess, and oversee the covered institution's risk-taking activities on an ongoing basis. The independent risk management unit and CRO should be able to communicate with the CEO and the Risk Committee of the board of directors to identify and report risks and suspected instances of noncompliance. The internal audit unit, under direction of the CAO, should ensure that the covered institution complies with laws and regulations and adheres to the covered institution's risk management program. It should establish and adhere to an audit plan and report its findings, including any recommendations, to the Audit Committee of the board of directors. This three-lines-of-defense model, when taken as a whole with the duties and oversight of the board under proposed Section II of these Guidelines, ensures safety and soundness, reduces the likelihood of failure, and reduces the magnitude of any loss by preventing a single point of failure within an organization and providing for multiple checks within a covered institution's risk management.

The proposed Guidelines also provide the FDIC's expectations regarding the board's establishment of, and the covered institution's adherence to, processes governing breaches to risk limits and violations of law or regulations. The front line units and independent risk management unit, consistent with their respective responsibilities, should identify breaches of the institution's risk appetite and other risk limits, distinguish breaches based on severity, report on the breach, its impact, and resolution, and establish consequences for breaches of risk limits. Similarly, the front line units and risk management unit should identify known or suspected violations of law or regulations. All violations of law or regulations and documentation regarding efforts to return to compliance should be documented in writing, distributed to relevant parties within the institution, and records should be retained for FDIC review. Known or suspected violations of law involving dishonesty, misrepresentation, or willful disregard for legal requirements must be promptly reported as required by law and on a timetable acceptable to the agency with jurisdiction.

IV. Expected Effects of Implementing the Proposed Guidelines

As previously discussed, if approved, the proposed rule would establish proposed Guidelines that include standards for corporate governance and risk management for covered institutions. As of the quarter ending March 31, 2023, the FDIC supervises 3,012 IDIs, of which 57 reported total consolidated assets of $10 billion or more.[28] Therefore, the FDIC estimates that 57 FDIC-supervised IDIs will be directly affected by the proposed rule, if approved.

The proposed Guidelines contain expectations for roles and responsibilities of the board, size and makeup of the board, organization of the

[28] FDIC Call Report Data, March 31, 2023. Count excludes First Republic Bank, which was closed by the California Department of Financial Protection and Innovation and the FDIC was appointed Receiver on May 1, 2023.

board, committee structures of the board, development and maintenance of a strategic plan, development and maintenance of risk management policies, hiring and oversight of senior management, development and maintenance of processes for responding to violations of laws, regulations, or breaches of internal risk limits or other internal policies and procedures.

As previously discussed, all FDIC-supervised institutions have existing requirements to establish operational and management standards to ensure the safe and sound operation of the IDI appropriate to the size of the IDI and the nature, scope and risk of its activities.[29] Additionally, certain FDIC-supervised institutions are subject to audit requirements, including the establishment of an audit committee as well as its makeup.[30] Finally, as previously discussed the FDIC has issued several guidance items related to appropriate risk management and ethics.[31]

The FDIC believes that the proposed rule will benefit covered institutions by reducing the likelihood and magnitude of losses and the likelihood of failure. The FDIC does not have access to information that would enable a quantitative estimate of the benefits of the proposed rule. Although there are existing regulations and guidance related to corporate governance and risk management, the FDIC has not previously issued supervisory guidelines or regulations specifically on corporate governance and risk management for covered institutions. The FDIC believes that adoption of the proposed Guidelines would benefit covered institutions by establishing clear expectations for covered institutions and strengthening corporate governance and risk management. Additionally, by adopting the proposed Guidelines in Appendix C to part 364, the FDIC could require a compliance plan or take other corrective action if warranted further reducing the likelihood and magnitude of loss, and the likelihood of failure.

The proposed Guidelines would result in some compliance costs for covered institutions. As previously discussed, FDIC-supervised IDIs have an existing requirement to establish operational and management standards to ensure the safe and sound operation of the IDI appropriate to the size of the IDI and the nature, scope and risk of its activities. Additionally, the FDIC has issued a number of guidance items related to appropriate risk management and ethics. However, while the FDIC has communicated through the supervisory process for larger, more complex institutions an expectation that corporate governance and risk management frameworks need to be more robust and suitable for the IDI's risk profile and business model, the FDIC has not previously issued supervisory guidance specifically on corporate governance and risk management for covered institutions. Based on the foregoing information, the FDIC estimates that the proposed rule, if adopted, would compel covered institutions to expend 91,375 labor hours in the first year, and 90,365 labor hours each additional year, to comply with the recordkeeping, reporting, and disclosure requirements. At an estimated wage rate of $139.33 [32] per hour, this would amount to total additional estimated reporting, recordkeeping, and disclosure costs of $12.73 million in the first year, and $12.59 million each additional year. This estimated annual cost is less than 0.03 percent of annual noninterest expense for all covered institutions. Additionally, the FDIC believes that covered institutions are likely to incur other regulatory costs to achieve compliance with the proposed rule, if adopted, such as hiring additional staff and changes to internal systems and processes.

If adopted, the FDIC believes that the proposed rule would benefit the financial sector and customers by reducing the likelihood of failure and associated costs. Bank failures impose costs on the DIF and negatively affect a wide variety of stakeholders, and reduce public confidence in the financial system. The FDIC believes that adoption of the proposed rule would help to limit such costs.

V. Alternatives Considered

The FDIC considered three alternatives: (1) maintaining the status quo with no specific guidance for covered institutions; (2) issuing guidance specific to covered institutions; and (3) issuing regulations on corporate governance for covered institutions. The FDIC believes that the proposed Guidelines, if adopted, would improve upon the status quo by consolidating and codifying the FDIC's expectations for a covered institution's effective corporate governance and risk management practices and potentially reducing future losses or bank failures and that these benefits outweigh the potential costs. Additionally, the FDIC believes that the proposed Guidelines are more appropriate than the status quo alternative because they would further codify the FDIC's expectations for effective corporate governance and risk management practices of a covered institution while still allowing the FDIC to consider appropriate variances in an individual covered institution's risk profile. The FDIC also considered the alternative of issuing guidance for covered institutions. However, such guidance would not provide an enforcement framework to ensure compliance such as compliance plans under 12 CFR part 308, subpart R, or other actions.

VI. Request for Comments

The FDIC requests comment on all aspects of the proposed rule and proposed Guidelines, including the following:

1. Should the proposed Guidelines apply to FDIC-supervised institutions with $10 billion or more in total consolidated assets, or would a higher or lower threshold be appropriate? Alternatively, should the proposed Guidelines only apply to FDIC-supervised institutions that are examined under the FDIC's Continuous Examination Process? Please explain.

2. Is there a need to differentiate corporate governance and risk management requirements for covered institutions with $50 billion or more in total consolidated assets (or some other threshold)? Please explain.

3. Should the proposed Guidelines apply to any insured state nonmember bank or insured state savings association with total consolidated assets less than $10 billion if that institution's parent company controls at least one covered institution?

4. The proposed Guidelines include a reservation of authority enabling the FDIC to determine that compliance with the proposed Guidelines should not be, or no longer be, required for a covered institution based on risk and complexity. Should there be an application process in accordance with subpart A of part 303 of the FDIC's regulations for a covered institution to request exemption from the

[29] 12 CFR 364.101, Appendix A.

[30] 12 CFR 363.2.

[31] *See* footnotes 10–15.

[32] The recordkeeping, reporting, and disclosure compliance burden is expected to be distributed between executives, lawyers and financial analysts. The estimated weighted average hourly compensation cost of these employees are found by using the 75th percentile hourly wages reported by the Bureau of Labor Statistics (BLS) National Industry-Specific Occupational Employment and Wage Estimates for the relevant occupations in the Depository Credit Intermediation sector, as of May 2022. These wages are adjusted to account for inflation and compensation rates for health and other benefits, as of March 2023, to provide an estimate of overall compensation.

requirements of these proposed Guidelines? If so, what criteria would be appropriate for FDIC to establish to consider such a request?

5. Should the covered institution and its parent holding company with other affiliates be required to have separate risk management officers and staff? Please explain.

6. The proposed Guidelines provide that a covered institution may use its parent company's risk governance framework to satisfy the Guidelines based on certain factors. What other factors, if any, should the FDIC consider?

7. Should the proposed Guidelines include more specific suggestions for corporate governance? If so, what additional suggestions should be included?

8. Should the proposed Guidelines include more specific requirements for risk management? If so, what additional requirements should be included?

9. Do the proposed Guidelines provide sufficient and appropriate requirements regarding the role of the board for corporate governance and risk management? Please explain.

10. Do the proposed Guidelines provide sufficient and appropriate requirements regarding the role of executive management for managing the covered institution and its risks? Please explain.

11. Should the CRO or the CAO report to the board or solely to a board committee? Please explain.

12. Do the CRO or the CAO and their associated functions have sufficient independence under the proposed Guidelines? Please explain.

13. Would the proposed Guidelines have any costs or benefits that the FDIC has not identified? If so, please identify and discuss.

14. Are there alternative ways to achieve the objectives of these proposed Guidelines that would impose lower burdens and costs on covered institutions? If so, what alternatives would be appropriate?

VII. Regulatory Analysis

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency, in connection with a proposed rule, to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities.[33] However, an initial regulatory flexibility analysis is not required if the agency certifies that the proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. The Small Business Administration (SBA) has defined ''small entities'' to include banking organizations with total assets of less than or equal to $850 million.[34] Generally, the FDIC considers a significant economic impact to be a quantified effect in excess of 5 percent of total annual salaries and benefits or 2.5 percent of total noninterest expenses. The FDIC believes that effects in excess of one or more of these thresholds typically represent significant economic impacts for FDIC-supervised IDIs. The proposed rule would only apply to FDIC-supervised state nonmember banks, savings associations, and state branches of foreign banks having total consolidated assets of $10 billion or more. As of the quarter ending March 31, 2023, the FDIC supervised 3,012 depository institutions, of which 2,306 are considered ''small'' for the purposes of RFA. As of the quarter ending March 31, 2023, there are no small, FDIC-insured institutions with $10 billion or more in total consolidated assets. In light of the foregoing, the FDIC certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities. Accordingly, an initial regulatory flexibility analysis is not required.

The FDIC invites comments on all aspects of the supporting information provided in this RFA section. In particular, would this proposed rule have any significant effects on small entities that the FDIC has not identified?

B. Paperwork Reduction Act

Certain provisions of the proposed rule contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (PRA).[35] In accordance with the PRA, the FDIC may not conduct or sponsor, and an organization is not required to respond to this information collection, unless the information collection displays a currently valid Office of Management and Budget (OMB) control number. The FDIC will request approval from the OMB for this proposed information collection. OMB will assign an OMB control number.

OMB Number: 3064–NEW.

Frequency of Response: Periodic—see table below.

Affected Public: FDIC-supervised IDIs.

Total Estimated Annual Burden: 91,375 hours.

The FDIC estimates that a covered institution that currently has strong corporate governance and risk management programs may not need to significantly increase the number of hours it spends on corporate governance and risk management to comply with the proposed Guidelines.

ESTIMATED HOURLY BURDEN—2023 PART 364, APPENDIX C NPR

Number	Information collection description and citation	Type of burden	Frequency	Number respondents	Number of responses per respondent	Time per response	Total estimated annual burden (hours)
1	Audit Committee, Review and Approval of the Internal Audit Unit's Charter Section I(D)(7)(b) One-Time.	Recordkeeping ...	One-Time	1	1	40	40
2	Audit Committee, Annual Review and Approval of the Internal Audit Unit's Charter Section I(D)(7)(c) Ongoing.	Recordkeeping ...	Annually	1	1	20	20
3	Development of a Written Strategic Plan Section II(C)(2) One-Time.	Recordkeeping ...	One-Time	1	1	120	120
4	Annual Evaluation and Approval of Strategic Plan Section II(C)(2) Ongoing.	Recordkeeping ...	Annually	57	1	60	3,420

[33] 5 U.S.C. 601 *et seq.*

[34] The SBA defines a small banking organization as having $850 million or less in assets, where an organization's ''assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' *See* 13 CFR 121.201 (as amended by the SBA [87 FR 69118 (Nov. 17, 2022)], effective December 19, 2022). In its determination, the ''SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.'' *See* 13 CFR 121.103. Following these regulations, the FDIC uses an insured depository institution's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the insured depository institution is ''small'' for the purposes of RFA.

[35] 44 U.S.C. 3501–3521.

ESTIMATED HOURLY BURDEN—2023 PART 364, APPENDIX C NPR—Continued

Number	Information collection description and citation	Type of burden	Frequency	Number respondents	Number of responses per respondent	Time per response	Total estimated annual burden (hours)
5	Board, Establishment and Approval of Policies Governing Operations Section II(C)(3) One-Time.	Recordkeeping	One-Time	1	1	40	40
6	Board, Annual Review Policies Governing Operations Section II(C)(3) Ongoing.	Recordkeeping	Annually	57	1	20	1,140
7	Establishment of a Written Code of Ethics Section II(C)(4) One-Time.	Recordkeeping	One-Time	1	1	40	40
8	Annual Review Written Code of Ethics Section II(C)(4) Ongoing.	Recordkeeping	Annually	57	1	20	1,140
9	Establishment of a Management Performance Review Process Section II(C)(7) One-Time.	Recordkeeping	One-Time	1	1	40	40
10	Annual Review of Management Performance Review Process Section II(C)(7) Ongoing.	Recordkeeping	Annually	57	1	20	1,140
11	Development of a Succession Plan Section II(C)(7) One-Time.	Recordkeeping	One-Time	1	1	40	40
12	Annual Review Succession Plan Section II(C)(7) Ongoing.	Recordkeeping	Annually	57	1	20	1,140
13	Establishment of a Training Program for Directors Section II(C)(8) One-Time.	Recordkeeping	One-Time	1	1	50	50
14	Annual Review Training Program for Directors Section II(C)(8) Ongoing.	Recordkeeping	Annually	57	1	25	1,425
15	Board Annual Self-Assessment Section II(C)(9) Ongoing.	Recordkeeping	Annually	57	1	20	1,140
16	Establishment of a Compensation and Performance Management Program Section II(C)(10) One-Time.	Recordkeeping	One-Time	1	1	100	100
17	Annual Review of Compensation and Performance Management Program Section II(C)(10) Ongoing.	Recordkeeping	Annually	57	1	50	2,850
18	Establishment of a Written Charter for Board Committees Section II(D) One-Time.	Recordkeeping	One-Time	1	1	40	40
19	Annual Review of Written Charter for Board Committees Section II(D) Ongoing.	Recordkeeping	Annually	57	1	20	1,140
20	Board Approval of Charter of Internal Audit Function Section II(D)(1)(e) One-Time.	Recordkeeping	One-Time	1	1	20	20
21	Board Annual Review of Charter of Internal Audit Function Section II(D)(1)(f) Ongoing.	Recordkeeping	Annually	57	1	10	570
22	Audit Committee, Approval of all Audit Services Section II(D)(1)(b) Ongoing.	Recordkeeping	On Occasion	57	1	40	2,280
23	Audit Committee, Approval all Decisions Regarding the Appointment or Removal and Annual Compensation and Salary Adjustment for the CAO Section II(D)(1)(d) Ongoing.	Recordkeeping	On Occasion	57	1	40	2,280
24	Risk Committee, Approval of Risk Management Policies Section II(D)(4) One-Time.	Recordkeeping	One-Time	1	1	40	40
25	Risk Committee, Annual Review of Charter of Internal Audit Function Section II(D)(4) Ongoing.	Recordkeeping	Annually	57	1	20	1,140
26	Risk Committee, Quarterly Review of CRO Reports Section II(D)(4)(e) Ongoing.	Recordkeeping	Quarterly	57	4	40	9,120
27	Risk Committee, Quarterly Documentation of Proceedings and Risk Management Decisions Section II(D)(4)(f) Ongoing.	Recordkeeping	Quarterly	57	4	40	9,120
28	Risk Committee, Approval of Decisions Regarding Appointment or Removal of CRO Section II(D)(4)(g) Ongoing.	Recordkeeping	On Occasion	57	1	40	2,280
29	Board Establishment of a Comprehensive Risk Management Program Section III(A) One-Time.	Recordkeeping	One-Time	1	1	100	100
30	Board Annual Review of Comprehensive Risk Management Program Section III(A) Ongoing.	Recordkeeping	Annually	57	1	50	2,850
31	Board Establishment of a Risk Profile Section III(B) One-Time.	Recordkeeping	One-Time	1	1	40	40
32	Board Quarterly Review of Risk Profile Section III(B) Ongoing.	Recordkeeping	Quarterly	57	4	40	9,120
33	Establishment of a Comprehensive Written Statement that Establishes Risk Appetite Limits Section III(B) One-Time.	Recordkeeping	One-Time	1	1	40	40
34	Board Quarterly Review and Approval of Risk Appetitive Statement Section III(B) Ongoing.	Recordkeeping	Quarterly	57	4	20	4,560
35	Report Risk Limit Breaches to the FDIC Section III(C)(2)(c)(iii) Ongoing.	Reporting	On Occasion	57	1	20	1,140

ESTIMATED HOURLY BURDEN—2023 PART 364, APPENDIX C NPR—Continued

Number	Information collection description and citation	Type of burden	Frequency	Number respondents	Number of responses per respondent	Time per response	Total estimated annual burden (hours)
36	Front Line Unit, Establishment of Written Policies that Include Risk Limits Section III(C)(3)(a)(ii) One-Time.	Recordkeeping ...	One-Time	1	1	40	40
37	Front Line Unit, Annual Review of Written Policies that Include Risk Limits Section III(C)(3)(a)(ii) Ongoing.	Recordkeeping ...	Annually	57	1	20	1,140
38	Front Line Unit, Establish Procedures and Processes, as Necessary to Ensure Compliance with Board Policies Section III(C)(3)(a)(iii) One-Time.	Recordkeeping ...	One-Time	1	1	40	40
39	Front Line Unit, Annual Review of Procedures and Processes, as Necessary to Ensure Compliance with Board Policies Section III(C)(3)(a)(iii) Ongoing.	Recordkeeping ...	Annually	57	1	20	1,140
40	Front Line Unit, Quarterly Monitor and Report Compliance with Respective Risk Limits Section III(C)(3)(a)(v) Ongoing.	Recordkeeping ...	Quarterly	57	4	40	9,120
41	Independent Risk Management Unit, Quarterly Monitor and Report on the Covered Institution's Risk Profile Relative to Risk Appetite and Concentration Limits Section III(C)(3)(b)(iii) Ongoing.	Recordkeeping ...	Quarterly	57	4	40	9,120
42	Independent Risk Management Unit, Establishment of Policies Relative to Concentration Risk Limits Section III(C)(3)(b)(iv) One-time.	Recordkeeping ...	One-Time	1	1	40	40
43	Independent Risk Management Unit, Review and Update of Policies Relative to Concentration Risk Limits Section III(C)(3)(b)(iv) Ongoing.	Recordkeeping ...	Annually	57	1	40	2,280
44	Independent Risk Management Unit, Establishment of Procedures and Processes to Ensure Compliance with Board Risk Management Policies Section III(C)(3)(b)(v) One-time.	Recordkeeping ...	One-Time	1	1	20	20
45	Independent Risk Management Unit, Review and Update of Procedures and Processes to Ensure Compliance with Board Risk Management Policies Section III(C)(3)(b)(v) Ongoing.	Recordkeeping ...	Annually	57	1	10	580
46	Independent Risk Management Unit, Quarterly Monitor and Report to CEO and Risk Committee Front Line Units' Compliance with Risk Limits Section III(C)(3)(b)(vii) Ongoing.	Recordkeeping ...	Quarterly	57	4	10	2,280
47	Internal Audit Unit, Establishment of an Audit Plan Section III(C)(3)(c)(ii)One-Time.	Recordkeeping ...	One-Time	1	1	40	40
48	Internal Audit Unit, Quarterly Report Changes to Audit Plan Section III(C)(3)(c)(ii) Ongoing.	Recordkeeping ...	Quarterly	57	4	10	2,280
49	Board, Establishment of Processes that Require the Front Line and Independent Risk Management Units to Identify and Distinguish Breaches, as well as Establishment of Accountability for Reporting and Resolving Breaches Section III(E) One-Time.	Recordkeeping ...	One-Time	1	1	40	40
50	Board, Annual Review Processes that Require the Front Line and Independent Risk Management Units to Identify and Distinguish Breaches, as well as Establish Accountability for Reporting and Resolving Breaches Section III(E) Ongoing.	Recordkeeping ...	Annually	57	1	20	1,140
51	Front Line and Independent Risk Management Units Report to the FDIC Breach of a Risk Limit or Noncompliance with the Risk Appetite Statement or Risk Management Program Section III(E)(3) Ongoing.	Reporting	On Occasion	57	1	20	1,140
52	Board, Establishment of Processes that Require Front Line and Independent Risk Management Units to Identify, Distinguish, Document and Report Violations of Law or Regulations Section III(F) One-Time.	Recordkeeping ...	One-Time	1	1	40	40

ESTIMATED HOURLY BURDEN—2023 PART 364, APPENDIX C NPR—Continued

Number	Information collection description and citation	Type of burden	Frequency	Number respondents	Number of responses per respondent	Time per response	Total estimated annual burden (hours)
53	Board, Annual Review of Processes that Require Front Line and Independent Risk Management Units to Identify, Distinguish, Document and Report Violations of Law or Regulations Section III(F) Ongoing.	Recordkeeping ...	Annually	57	1	20	1,140
Total Hourly Burden				.....	.....	.....	91,375

General Description

Section 39 of the FDI Act requires the FDIC to issue certain safety and soundness standards by regulation or guideline. In this instance, the FDIC is proposing guidelines to address corporate governance and risk management by covered institutions. The FDIC estimates that most, if not all covered institutions, as part of their standard governance and risk management practices, maintain procedures discussed in the proposed Guidelines, so the FDIC is assigning a one placeholder for implementation burden. However, the FDIC is estimating the burden associated with what covered institutions need to do going forward to comply with the proposed Guidelines.

This information collection includes the need for a strategic plan, a risk committee, board review of information and policies, formal training program for directors, self-assessments, compensation and performance management programs, risk profile and risk appetite statement, a written risk management program, front line units, an independent risk management unit, an internal audit unit, and processes for governing risk limit breaches and noncompliance with laws or regulation.

Comments are invited on:

(a) Whether the proposed collection of information is necessary for the proper performance of the functions of the FDIC, including whether the information will have practical utility;

(b) The accuracy of the FDIC's estimate of burden of the proposed collection of information, including the validity of the methodology and assumptions used, including the FDIC's estimated implementation burden;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the information collection on those who are to respond, including appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses); and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments on the collection of information should be sent to the address listed in the **ADDRESSES** section of this document. A copy of the comments may also be submitted to the OMB desk officer by mail to: U.S. Office of Management and Budget, 725 17th Street NW, #10235, Washington, DC 20503, or by facsimile to 202–395–6974; or email to *oira_submission@omb.eop.gov*, Attention, Federal Banking Agency Desk Officer.

C. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to Section 302(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 [36] (RCDRIA), in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, each Federal banking agency must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on affected depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, Section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on insured depository institutions generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.[37] The FDIC invites comments that will further inform its consideration of RCDRIA.

D. Plain Language

Section 722 of the Gramm-Leach-Bliley Act [38] requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC invites your comments on how to make the proposed rule and Guidelines easier to understand. For example:

- Has the FDIC organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposed rule and proposed Guidelines clearly stated? If not, how could the proposed rule and proposed Guidelines be more clearly stated?
- Do the proposed rule and proposed Guidelines contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the proposed rule and proposed Guidelines easier to understand? If so, what changes to the format would make the proposed rule and proposed Guidelines easier to understand?
- What else could the FDIC do to make the proposed rule and proposed Guidelines easier to understand?

E. Providing Accountability Through Transparency Act of 2023

The Providing Accountability Through Transparency Act of 2023 (12 U.S.C. 553(b)(4)) requires that a notice of proposed rulemaking include the internet address of a summary of not more than 100 words in length of a proposed rule, in plain language, that shall be posted on the internet website under section 206(d) of the E-Government Act of 2002 (44 U.S.C. 3501 note).

[36] 12 U.S.C. 4802(a).

[37] 12 U.S.C. 4802(b).

[38] Public Law 106–102, sec. 722, 113 Stat. 1338, 1471 (1999).

In summary, the FDIC is proposing to issue Guidelines as a new Appendix C to part 364 (part 364) to strengthen the corporate governance and risk management practices and board oversight of FDIC-supervised institutions with total consolidated assets of $10 billion or more. The proposed Guidelines are intended to raise the FDIC's standards for corporate governance, risk management, and control to help ensure these larger institutions effectively anticipate, evaluate, and mitigate the risks they face. The proposal and the required summary can be found at *https://www.fdic.gov/resources/regulations/federal-register-publications/.*

List of Subjects

12 CFR Part 308

Administrative practice and procedure, Bank deposit insurance, Banks, Banking, Claims, Crime, Equal access to justice, Fraud, Investigations, Lawyers, Penalties, Safety and soundness compliance plans, Savings associations.

12 CFR Part 364

Banks, Banking, Information, Safety and soundness guidelines.

Authority and Issuance

For the reasons set forth in the preamble, the Federal Deposit Insurance Corporation proposes to amend parts 308 and 364 of chapter III of title 12 of the Code of Federal Regulations as follows:

PART 308—RULES OF PRACTICE AND PROCEDURE

■ 1. The authority citation for part 308 continues to read as follows:

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 93(b), 164, 505, 1464, 1467(d), 1467a, 1468, 1815(e), 1817, 1818, 1819, 1820, 1828, 1829, 1829(b), 1831i, 1831m(g)(4), 1831o, 1831p–1, 1832(c), 1884(b), 1972, 3102, 3108(a), 3349, 3909, 4717, 5412(b)(2)(C), 5414(b)(3); 15 U.S.C. 78(h) and (i), 78o(c)(4), 78o–4(c), 78o–5, 78q–1, 78s, 78u, 78u–2, 78u–3, 78w, 6801(b), 6805(b)(1); 28 U.S.C. 2461 note; 31 U.S.C. 330, 5321; 42 U.S.C. 4012a; Pub. L. 104–134, sec. 31001(s), 110 Stat. 1321; Pub. L. 109–351, 120 Stat. 1966; Pub. L. 111–203, 124 Stat. 1376; Pub. L. 114–74, sec. 701, 129 Stat. 584.

■ 2. Revise § 308.302 (a) to read as follows:

§ 308.302 Determination and notification of failure to meet a safety and soundness standard and request for compliance plan.

* * * * *

(a) *Determination.* The FDIC may, based upon an examination, inspection or any other information that becomes available to the FDIC, determine that a covered institution has failed to satisfy the safety and soundness standards set out in part 364 of this chapter and in the Interagency Guidelines Establishing Standards for Safety and Soundness in appendix A, the Interagency Guidelines Establishing Standards for Safeguarding Customer Information in appendix B, and the Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions with Total Consolidated Assets of $10 Billion or More in appendix C to part 364 of this chapter.

* * * * *

PART 364—STANDARDS FOR SAFETY AND SOUNDNESS

■ 3. The authority citation for part 364 continues to read as follows:

Authority: 12 U.S.C. 1818 and 1819 (Tenth), 1831p–1; 15 U.S.C. 1681b, 1681s, 1681w, 6801(b), 6805(b)(1).

■ 4. Add paragraph (c) to § 364.101 to read as follows:

§ 364.101 Standards for safety and soundness.

* * * * *

(c) *Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions with Total Consolidated Assets of $10 Billion or More.* The Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions with Total Consolidated Assets of $10 Billion or More pursuant to Section 39 of the Federal Deposit Insurance Act (12 U.S.C. 1831p-1), as set forth as appendix C to this part, apply to all insured state nonmember banks, state-licensed insured branches of foreign banks that are subject to the provisions of Section 39 of the Federal Deposit Insurance Act, and state savings associations with $10 billion or more in total consolidated assets.

■ 5. Add Appendix C to part 364 to read as follows:

Appendix C to Part 364—Guidelines Establishing Standards for Corporate Governance and Risk Management for Covered Institutions With Total Consolidated Assets of $10 Billion or More

Table of Contents

I. Introduction

Section 39 of the Federal Deposit Insurance Act (FDI Act) authorizes the Federal Deposit Insurance Corporation (FDIC) to establish safety and soundness standards by regulation or by guidelines. The following Guidelines address standards for corporate governance, risk management, and boards of directors' oversight for covered institutions. These standards are in addition to other standards or requirements in law or regulation.[39]

A. *Scope.* These Guidelines apply to all insured state nonmember banks, state-licensed insured branches of foreign banks, and insured state savings associations that are subject to the provisions of Section 39 of the FDI Act, with total consolidated assets of $10 billion or more on or after the effective date of these Guidelines (together ''covered institutions'' and each, a ''covered institution''). Total consolidated assets means the covered institution's total assets, as reported on the covered institution's Consolidated Reports of Condition and Income (Call Report)[40] filing, for the two most recent consecutive quarters. An insured state nonmember bank, state-licensed insured branch of a foreign bank, or an insured state savings association that does not come within the scope of these Guidelines on the effective date, but subsequently becomes subject to the Guidelines because total consolidated assets are $10 billion or more after the effective date, as reported on the Call Report for the two most recent consecutive quarters, shall be considered a covered institution and subject to the Guidelines. If a covered institution under the Guidelines reports consolidated assets of less than $10 billion in its Call Report filings for four consecutive quarters, the covered institution will be classified as a non-covered institution beginning the following quarter.

B. *Preservation of Existing Authority.* Neither Section 39 of the FDI Act (12 U.S.C. 1831p–1) nor these Guidelines in any way limits the authority of the FDIC to address unsafe or unsound practices, unsafe or

[39] The roles and responsibilities provided for in these Guidelines are in addition to those set forth in existing laws, regulations, and regulatory guidelines, including in Appendices A and B in part 364. Many of the risk management practices established and maintained by a covered institution to meet these standards, including loan review and credit underwriting and administration practices, should be components of its risk governance framework, within the construct of the three distinct units identified herein: front line unit, independent risk management unit, and internal audit unit.

[40] For insured branches of foreign banks, the term ''Call Report'' means the branch's FFIEC 002 filing.

unsound conditions, or violations of law. Action under Section 39 and these Guidelines may be taken independently of, in conjunction with, or in addition to any other enforcement action available to the FDIC.

C. *Reservation of Authority.*

1. Upon notice to the institution, the FDIC reserves the authority to apply these Guidelines, in whole or in part, to an institution that has total consolidated assets less than $10 billion, if the FDIC determines such institution's operations are highly complex or present a heightened risk that warrants the application of these Guidelines.

2. The FDIC reserves the authority, for each covered institution, to extend the time for compliance with these Guidelines or modify these Guidelines as necessary.

3. The FDIC reserves the authority to determine that compliance with these Guidelines should not be, or should no longer be, required for a covered institution. The FDIC would generally make the determination under this paragraph if a covered institution's operations are not or are no longer highly complex or no longer present a heightened risk. In determining whether a covered institution's operations are highly complex or present a heightened risk, the FDIC will consider factors such as: nature, scope, size, scale, concentration, interconnectedness, and mix of the activities of the institution.

D. *Definitions.*

1. *Chief Audit Officer* (CAO) means an individual who leads the covered institution's internal audit unit, possesses the skills and abilities to effectively implement the internal audit program, and reports directly to either the covered institution's board of directors (the board) or the board's audit committee and chief executive officer (CEO).

2. *Chief Risk Officer* (CRO) means an individual who leads a covered institution's independent risk management unit and is experienced in identifying, assessing, and managing risk exposures of large financial firms, with unrestricted access to the board and its committees, and reports directly to the board or the board's risk committee and, solely for administrative matters, the CEO.

3. *Control* means the power, directly or indirectly, to direct the management or policies of a covered institution or to vote 25 percent or more of any class of voting securities of a covered institution.

4. *Corporate governance* means the set of processes, customs, policies, and laws affecting the way a corporation [41] is directed, administered, and controlled and how it manages risks and ensures compliance with laws and regulations, including consumer protection laws and regulations and the Community Reinvestment Act. Corporate governance also includes the relationships among the many stakeholders involved and the corporation's goals.

5. *Front line unit* means any organizational unit within the covered institution that:

a. Engages in activities designed to generate revenue or reduce expenses for the covered institution;

b. Provides operational support or servicing to any organizational unit or function within the covered institution for the delivery of products or services to customers; [42] or

c. Provides technology services to any organizational unit or function covered by these Guidelines.

6. *Independent risk management unit* means any organizational unit within the covered institution that is directed by the CRO and which has responsibility for identifying, measuring, monitoring, or controlling aggregate risks. Such unit maintains independence from front line units through the following reporting structure:

a. The CRO has unrestricted access to the board of directors and its committees, including the risk committee, to address risks and issues identified through the independent risk management unit's activities;

b. The board of directors or the risk committee reviews and approves the risk governance framework;

c. The independent risk management unit adheres to compensation and performance management programs that ensure that the covered institution provides incentives to the independent risk management unit staff that ensure their independence, are consistent with providing an objective assessment of the risks taken by the covered institution, and comply with laws and regulations regarding excessive or incentive compensation, and complies with the covered institution's compensation policies; and

d. No front line unit executive oversees the independent risk management unit.

7. *Internal audit unit* [43] means the organizational unit within the covered institution that is designated to fulfill the role and responsibilities outlined in part 364, Appendix A, II.B. The internal audit unit should maintain independence from the front line and independent risk management units through the following reporting structure:

a. The CAO has unrestricted access to the board's audit committee to address risks and issues identified through the internal audit unit's activities;

b. The board's audit committee, in accordance with Section II.6.a. of these Guidelines, reviews and approves the internal audit unit's charter, audit plans, and decisions regarding appointment, removal, and compensation of the CAO;

c. The board's audit committee, in accordance with Section II.6.a. of these Guidelines, at least annually or more frequently, as necessary, reviews the internal audit unit's charter, audit plans, and decisions regarding appointment, removal, and compensation of the CAO;

d. The CEO or the audit committee oversees the internal audit unit's administrative activities; and

e. No front line unit executive oversees the internal audit unit.

8. *Parent company* means any legal entity that controls the covered institution as defined in these Guidelines.

9. *Risk appetite* means the aggregate level and types of risk the board and management are willing to assume to achieve the covered institution's strategic objectives and business plan, consistent with safe and sound operation and compliance with applicable laws and regulations.

10. *Risk profile* means a point-in-time assessment of the covered institution's risks aggregated within and across each relevant risk category, using methodologies consistent with the risk appetite.

II. Corporate Governance

A. *Board of Directors—General Obligations.* The board of directors is ultimately responsible for the affairs of a covered institution. Each member of the board has a duty to safeguard, through the lawful, informed, efficient, and able administration of the covered institution, the interests of the covered institution and to oversee and confirm that the covered institution operates in a safe and sound manner, in compliance with all laws and regulations. The board, in supervising the covered institution, should consider the interests of all its stakeholders, including shareholders, depositors, creditors, customers, regulators, and the public.

1. *Governing laws.* In the exercise of their duties, directors are governed by federal and state banking, securities, and antitrust statutes and by common law (all of which may impose potential liability on all directors). Directors who fail to discharge their duties may be subject to removal from office, criminal prosecution, civil money penalties imposed by covered institution regulators, and civil liability.

B. *Board Composition.* The covered institution's organizational documents or state chartering authority may have requirements for board members, including the appropriate number of members on its board of directors. However, in determining the appropriate number of directors and the board's composition, the board should consider how the selection of and diversity among board members collectively and individually may best promote effective, independent oversight of covered institution management and satisfy all legal requirements for outside and independent directors.[44] Important aspects of diversity may include: social, racial, ethnic, gender, and age differences; skills, differences in experience, perspective, and opinion (including professional, educational, and community or charitable service experience); and differences in the extent of directors' ownership interest in the covered institution

[41] As used in these Guidelines, the term ''corporate'' and ''corporation'', where appropriate, includes alternative forms of business enterprises, such as limited liability companies.

[42] Notwithstanding the foregoing, ''front line unit'' does not ordinarily include an organizational unit or function thereof within a covered institution when it is providing solely legal services to the covered institution.

[43] *See* 12 CFR part 364, Appendix A—Section II.B.

[44] For example, 12 CFR part 348 implements the Depository Institution Management Interlocks Act. That Act prohibits interlocking relationships of management officials of various nonaffiliated depository institutions, depending on the asset size and geographical proximity of the organizations.

(for example, directors who own only the amount of stock required by state law or those who share ownership interests with family members, but are not employed by the covered institution).

The board should include a majority of outside and independent directors. An independent director is generally a director that is (a) not a principal, member, officer, or employee of the institution, and (b) not a principal, member, director, officer, or employee of any affiliate or principal shareholder of the institution.[45]

C. *Duties of the Board.*

1. *Set an Appropriate Tone.* The board should establish a corporate culture and work environment that promotes responsible, ethical behavior. This culture and environment should not condone or encourage imprudent risk-taking, unethical behavior, or violations of law, regulation, or policy in pursuit of profit or other business objectives, and the board should hold directors, officers, and employees accountable for such conduct. By adhering to the requirements of law, regulation, these Guidelines, and the covered institution's own policies and procedures (including a Code of Ethics and a Compensation and Performance Management Program under these Guidelines), the board's actions should reflect its commitment to integrity, honesty, and ethical conduct.

2. *Approve Strategic Plan for the Covered Institution.* The board is responsible for providing clear objectives within which the covered institution's management can operate and administer the covered institution's affairs. The board should direct the CEO to develop a written strategic plan with input from front-line units, independent risk management, and internal audit. The strategic plan should implement operating budgets and encompass the covered institution's philosophy and mission. At least annually, the board should evaluate and approve the strategic plan, monitor management's efforts to implement the strategic plan and respond to unanticipated external developments, and ensure the strategic plan is consistent with policies the board has approved. The strategic plan should discuss the covered institution's goals and objectives over, at a minimum, a three-year period and:

a. Articulate an overall mission statement and strategic objectives for the covered institution, including an explanation of how the covered institution will achieve those objectives;

b. Contain a comprehensive assessment of risks that currently affect the covered institution or that could affect the covered institution during the period covered by the strategic plan;

c. Explain how the covered institution will update, as necessary, its risk management program to account for changes in the covered institution's risks projected under the strategic plan; and

d. Explain how the covered institution will review, update, and approve the strategic plan, as necessary, if the covered institution's risk profile, risk appetite, or operating environment changes in ways not considered in the strategic plan.

3. *Approve Policies.* The board is responsible for establishing and approving the policies that govern and guide the operations of the covered institution in accordance with its risk profile and as required by law and regulation. These policies ensure that the board has a fundamental understanding of the business of banking and the covered institution's associated risks, the risks undertaken by the institution are prudently and properly managed, and the covered institution is operating in a safe and sound manner. Such policies may include, but are not limited to, applicable internal controls, loan and credit policies, asset and liability management, and other operational and managerial standards to fulfill the responsibilities outlined in part 364, Appendix A, II. Such policies should also address other legal requirements, including but not limited to statutes and regulations regarding real estate lending, Anti Money Laundering/Countering the Financing of Terrorism (AML/CFT) compliance, consumer protection laws, anti-fraud, and the Community Reinvestment Act (CRA). Policies should be written and reviewed at least annually to ensure that they remain applicable and up-to-date as the covered institution's risks may change based on internal or external circumstances. Compliance with the covered institution's policies and procedures should be periodically reviewed by internal audit.

4. *Establish a Code of Ethics.* The board should establish a written code of ethics for the covered institution, covering directors, management, and employees, addressing areas such as:

a. Conflicts of interest, self-dealing, protection and proper use of covered institution assets, integrity of financial recordkeeping, and compliance with laws and regulations;

b. How to report illegal or unethical behavior, and forbidding retaliation for such reporting (also known as a whistleblower policy); and

c. Identifying officials, such as an ethics officer or the covered institution's counsel, employees can contact to seek advice in the event ethical issues arise and to whom and under what circumstances (including those that do not disclose the employee's identity) the ethics officer or counsel must report ethical issues affecting the covered institution to senior management and the board.

At least annually, the board should review and update, as necessary, the code of ethics.

5. *Provide active oversight of management.* The board should actively oversee the covered institution's activities, including all material risk-taking activities. The board should hold management accountable for adhering to the strategic plan and approved policies and procedures to ensure the covered institution's compliance with safe and sound banking practices and all applicable laws and regulations. In providing active oversight, the board should question, challenge, and when necessary, oppose recommendations and decisions made by management that are not in accordance with the covered institution's risk appetite, could jeopardize the safety and soundness of the covered institution, or undermine compliance with applicable laws or regulations. The board also must ensure that management corrects deficiencies that auditors or examiners identify in a timely manner.

6. *Exercise independent judgment.* When carrying out his or her duties, each director should exercise sound, independent judgment. To the extent possible, the board should ensure that it is not excessively influenced by a dominant policymaker, whether management, a director, a shareholder, or any combination thereof. Risks inherent in such a situation include, but are not limited to:

a. A dominant policymaker may inhibit the directors' exercise of independent judgment or prevent the board from fulfilling its responsibilities;

b. Loss of a dominant officer with concentrated authority may deprive the covered institution of competent management; and

c. Problems resulting from mismanagement are more difficult to solve because the covered institution's problems are often attributed to the one individual that dominates the covered institution.

7. *Select and Appoint Qualified Executive Officers.* The board must select and appoint executive officers who are qualified to administer the covered institution's affairs effectively and soundly. The selection criteria should include integrity, technical competence, character, and experience in financial services. In addition, the board should implement a formal appraisal process to periodically review management performance. If any executive officer, including the CEO, is unable to meet reasonable standards of executive ability or ethical standards, the board should dismiss and replace that officer. The board should develop a succession plan to address the possible or eventual loss of the CEO and other key personnel, and at least annually, such plan should be reviewed and updated, as necessary, by the board. The board should also require the covered institution to implement adequate training and personnel activities so that there is continuity of qualified management and competent staff.

8. *Provide Ongoing Training to Directors.* To ensure each member of the board has the knowledge, skills, and abilities needed to stay abreast of general industry trends and any statutory and regulatory developments pertinent to their institution and to meet the standards set forth in these Guidelines, the board should establish and adhere to a formal, ongoing training program for directors. This program should include training on:

a. Products, services, lines of business, and risks that have a significant impact on the covered institution;

[45] In instances where an affiliate or a principal shareholder is a holding company, and the holding company conducts limited or no additional business operations outside the institution, an independent director of the holding company may also be an independent director of the institution, as long as they are not a principal, member, director, officer, or employee of any other institution or holding company affiliates.

b. Laws, regulations, and supervisory requirements applicable to the covered institution; and

c. Other topics identified by the board.

9. *Self-assessments.* The board should conduct an annual self-assessment evaluating its effectiveness in meeting the standards of these Guidelines.

10. *Compensation and Performance Management Programs.* If not properly structured, incentive compensation arrangements for executive and non-executive employees may pose safety and soundness risks by providing incentives to take imprudent risks that are not consistent with the long-term health of the organization. Some incentive programs may inadvertently encourage noncompliance with laws or regulations. To avoid these risks, the board should establish, and the covered institution should adhere to compensation and performance management programs that are consistent with applicable laws and regulations and are appropriate to:

a. Ensure the CEO, front line, independent risk management, and internal audit units implement and adhere to, an effective risk management program;

b. Ensure front line unit compensation plans and decisions appropriately consider the level and severity of issues and concerns identified by the independent risk management and internal audit units, even if the covered institution has not or will not realize a loss; and

c. Attract and retain competent staff needed to design, implement, and maintain an effective risk management program.

At least annually, the board should review and update, as necessary, the compensation and performance management programs.

D. *Committees of the Board.* The board should implement an organizational structure to keep members informed and provide an adequate framework to oversee the covered institution. Establishing board committees allows for a division of labor and enables directors with expertise to handle matters that require detailed review and in-depth consideration. In addition, certain laws and regulations or supervisory policies may require the covered institution to establish certain board committees. Each committee should have a board-approved written charter outlining its purpose and responsibilities:

1. *Audit Committee:* The covered institution must have an Audit Committee that complies with Section 36 of the Federal Deposit Insurance Act and part 363 of the FDIC's regulations.[46] The audit committee of a covered institution must be composed entirely of outside and independent directors. The audit committee:

a. Oversees the covered institution's accounting and financial reporting processes and audits of its financial statements and its internal control over financial reporting;

b. Approves all audit services; assists board oversight of the integrity of the covered institution's financial statements and disclosures;

c. Appoints, compensates, and retains any public accounting firm to prepare any audit report and oversees the work of such firms in preparing or issuing any audit report;

d. Approves all decisions regarding the appointment or removal and annual compensation and salary adjustment for the CAO;

e. Approves the charter of and oversees the covered institution's internal audit function, including reviewing and approving audit plans and reports of the internal audit function regarding the effectiveness of the risk management program and identified or suspected violations of law or regulations, determining whether and how identified issues are being addressed, and making recommendations, as necessary, to the board for further corrective action;

f. At least annually, reviews and updates, as necessary, the charter of the covered institution's internal audit function; and

g. Satisfies all other requirements of law, regulation, and applicable exchange rules.

2. *Compensation Committee:* A covered institution's Compensation Committee must comply with applicable laws and regulations,[47] including the FDIC's regulations.[48] The committee should monitor adherence to a compensation and performance management program, review compensation packages for executives, and consider executive officer performance evaluations. Compensation includes all direct and indirect payments or benefits, both cash and non-cash as defined in part 364, Appendix A, I.B.3. A covered institution is prohibited from paying compensation that constitutes an unsafe and unsound practice (including excessive compensation or compensation that could lead to material financial loss) and should ensure that their incentive compensation arrangements do not encourage imprudent risk-taking behavior or create incentives for violations of legal requirements.

3. *Trust Committee:* If the covered institution has trust powers, it should have a trust committee to ensure that operation of the trust department is separate and apart from every other department of the covered institution, trust assets are separated from assets owned by the covered institution, assets of each trust account are separated from the assets of every other trust account, and the trust department otherwise complies with all applicable laws and regulations.

4. *Risk Committee:* The covered institution must have a risk committee that approves and at least annually reviews and updates, as necessary, the risk management policies of the covered institution's operations and that oversees the operation of the covered institution's risk management framework. The risk committee must:

a. Be chaired by an independent director;

b. Be an independent committee of the board that has, as its sole function, responsibility for the risk management policies of the covered institution and oversight of the covered institution's risk management framework;

c. Report directly to the covered institution's board of directors;

d. Include at least one member experienced in identifying, assessing, and managing risk exposures of large firms;

e. Receive and review regular reports on not less than a quarterly basis from the CRO;

f. Meet at least quarterly, or more frequently as necessary, and fully document and maintain records of its proceedings, including risk management decisions;

g. Review and approve all decisions regarding the appointment or removal of the CRO, and ensure that the CRO's compensation is consistent with providing an objective assessment of the risks taken by the covered institution.

5. *Other Committees as Required to Perform Duties:* The covered institution should establish other committees, as necessary, in accordance with its risk profile such as compliance, lending, information technology, cybersecurity, and investments.

At least annually, the board should review and update, as necessary, the written charter for each committee.

III. Board and Management Responsibilities Regarding Risk Management and Audit

The board of a covered institution should establish, and management should implement and manage, a comprehensive and independent risk management function and effective programs for internal controls, risk management, and audit.

A. *Risk Management Program.* The covered institution should have and adhere to a risk management program that identifies, measures, monitors, and manages risks of the covered institution through a framework appropriate for the current and forecasted risk environment and that meets the minimum standards of these Guidelines. The risk management program should cover the following risk categories as applicable: credit, concentration, interest rate, liquidity, price, model, operational (including, but not limited to, conduct, information technology, cyber-security, AML/CFT compliance, and the use of third parties to perform or provide services or materials for the institution), strategic, and legal risk. The risk management program should ensure that the covered institution's activities are conducted in compliance with applicable laws and regulations. At least annually, the board should review and update, as necessary, the risk management program.

For a covered institution that has a parent company, if the risk profiles of each entity are substantially similar, the covered institution may adopt and implement all or any part of its parent company's risk management program that:

[46] *See* 12 CFR part 363 Annual Independent Audits and Reporting Requirements; *see also* part 364, Appendix A—Section II.B. If permitted under Section 36 and part 363 of the FDIC's regulations, the audits of the financial statements and of internal control over financial reporting may be done at the consolidated holding company level and not the covered institution level.

[47] For example, any covered company that has securities registered with the Securities and Exchange Commission (SEC) must have a compensation committee composed entirely of independent directors, 15 U.S.C 78j–3; 17 CFR parts 229 and 240; *see, e.g.,* NYSE Listed Company Manual Section 303A.04(a), Nasdaq Equity Rule 5605(e), and any other or successor corporate governance rules prescribed by the exchange's governing body.

[48] *See* 12 CFR part 364, Appendix A—Section II.B.

1. Satisfies the minimum standards in these Guidelines;

2. Ensures that the safety and soundness of the covered institution is not jeopardized by decisions made by the parent company's board and management;

3. Ensures that the covered institution's risk profile is easily distinguished and separate from that of its parent for risk management and supervisory reporting purposes; and

4. Consideration of these factors may require the covered institution to have separate and focused governance and risk management practices.

B. *Risk Profile and Risk Appetite Statement.* The covered institution should create and quarterly review and update, as necessary, a risk profile that identifies its current risks. Based upon its risk profile, the covered institution should have a comprehensive written statement, that is reviewed quarterly and updated, as necessary, that establishes risk appetite limits for the covered institution, both in the aggregate and for lines of business and material activities or products. The risk appetite statement should:

1. Reflect the level of risk that the board and management are willing to accept.

2. Include both qualitative components and quantitative limits:

a. The qualitative components should describe a safe and sound risk culture and how the covered institution will assess and accept risks, including those that are difficult to quantify.

b. Quantitative limits should explicitly constrain the size of risk exposures relative to the covered institution's earnings, capital, and liquidity position that management may accept without board approval.

3. Set limits at levels that take into account appropriate capital and liquidity buffers and that prompt management and the board to reduce risk before the covered institution's risk profile jeopardizes the adequacy of its earnings, liquidity, or capital.

The board should review and approve the risk appetite statement at least quarterly, or more frequently, as necessary, based on the size and volatility of risks and any material changes in the covered institution's business model, strategy, risk profile, or market conditions. The covered institution's management, front line units, and independent risk management unit should incorporate the risk appetite statement, concentration risk limits, and front line unit risk limits into:

a. Strategic and annual operating plans;

b. Capital stress testing and planning processes;

c. Liquidity stress testing and planning processes;

d. Product and service risk management processes, including those for approving new and modified products and services;

e. Decisions regarding acquisitions and divestitures; and

f. Compensation and performance management programs.

C. *Risk Management Program Standards.*

1. *Governance.* The independent risk management unit should design a formal, written risk management program that implements the covered institution's risk appetite statement and ensures compliance with applicable laws and regulations. The unit should review the risk management program at least annually, and as often as necessary, to address changes in the covered institution's risk profile caused by internal or external factors or the evolution of industry risk management practices. The board or the Risk Committee should review and approve the risk management program and any changes to the program.

2. *Scope of risk management program.* The risk management program, at a minimum, should cover the following risk categories as applicable: credit, concentration, interest rate, liquidity, price, model, operational (including, but not limited to, conduct, information technology, cyber-security, AML/CFT compliance, and the use of third parties to perform or provide services or materials for the institution), strategic, and legal risk. The risk management program should be commensurate with the covered institution's structure, risk profile, complexity, activities, and size and should include:

a. Policies and procedures establishing risk-management governance, risk management procedures, and risk control infrastructure for its operations; and

b. Processes and systems for implementing and monitoring compliance with such policies and procedures, including those for:

i. Identifying and reporting risks (including emerging risks) and risk management deficiencies and ensuring effective and timely implementation of actions to address emerging risks and risk management deficiencies for its operations;

ii. Identifying and reporting to the Risk Committee and to the internal audit unit known or suspected noncompliance with applicable laws or regulations;

iii. Establishing managerial and employee responsibility for risk management;

iv. Ensuring the independence of the risk management function;

v. Integrating risk management and associated controls with management goals and its compensation structure for operations; and

vi. Identifying, measuring, monitoring, and controlling the covered institution's concentration of risk.

c. Policies, procedures, and processes designed to ensure that the covered institution's risk data aggregation and reporting capabilities are appropriate for its size, complexity, and risk profile and support supervisory reporting requirements. Collectively, these policies, procedures, and processes should provide for:

i. The design, implementation, and maintenance of a data architecture and information technology infrastructure that supports the covered institution's risk aggregation and reporting needs during normal and stressed times;

ii. The capturing and aggregating of risk data and reporting of material risks, concentrations, breaches of risk limits, and emerging risks in a timely manner to the board and the CEO;

iii. The establishment of protocols for when and how to inform board, front line unit management, independent risk management, and the FDIC of a risk limit breach that takes into account the severity of the breach and its impact on the bank, with a requirement to provide a written description of how a breach will be resolved; and

iv. The distribution of risk reports to all relevant parties at a frequency that meets their needs for decision-making purposes.

3. *Responsibilities.* Three distinct units should have responsibility and be held accountable by the CEO and the board for monitoring and reporting on the covered institution's compliance with the risk management program: front line units, the independent risk management unit, and the internal audit unit.[49] Monitoring and reporting should be performed, as often as necessary, based on the size and volatility of risks and any material change in the covered institution's business model, strategy, risk profile, or market conditions.

The responsibilities for each of these units are:

a. *Front Line Units.* Front line units should appropriately assess and effectively manage all of the risks associated with their activities to ensure that front line units do not create excessive risks and, when aggregated across front line units, these risks do not exceed the limits established in the covered institution's risk appetite statement. In fulfilling this responsibility, each front line unit should:

i. Assess, on an ongoing basis, the material risks associated with its activities and products and use such risk assessments as the basis for fulfilling its responsibilities under this paragraph 3(a) and for determining needed actions to strengthen risk management or reduce risk because of changes in the unit's risk profile, products, or other conditions.

ii. Establish and adhere to a set of written policies that include front line unit risk limits as approved by the board. Such policies should ensure risks associated with the front line unit's activities are effectively identified, measured, monitored, and controlled, consistent with the covered institution's risk appetite statement, concentration risk limits, and all policies established within the risk management program.

iii. Establish and adhere to procedures and processes, as necessary, to ensure compliance with board policies, including risk policies and applicable laws and regulations, and at least annually, update, as necessary, such procedures and processes.

iv. Adhere to all applicable policies, procedures, and processes established by independent risk management.

v. Monitor compliance with their respective risk limits and report at least quarterly to the independent risk management unit.

vi. Develop, attract, train, retain, and maintain competent staff at levels required to carry out the unit's role and responsibilities effectively.

vii. Adhere to compensation and performance management programs that

[49] These roles and responsibilities are in addition to any roles and responsibilities set forth in Appendices A and B to part 364.

comply with laws and regulations regarding excessive or incentive compensation and covered institution compensation policies.

At least annually, each front line should review and update, as necessary, the written policies that include risk limits.

b. *Independent Risk Management Unit.* Under the direction of the CRO, the independent risk management staff should oversee the covered institution's risk-taking activities and assess risks and issues independent of the CEO and front line units. In fulfilling these responsibilities, independent risk management should:

i. Take primary responsibility and be held accountable by the CEO and the board for designing a comprehensive written risk management program that meets these Guidelines.

ii. Identify and assess, on an ongoing basis, the covered institution's material risks, in the aggregate and for lines of business and material activities or products, and use such risk assessments as the basis for fulfilling its responsibilities under these Guidelines and for determining needed actions to strengthen risk management or reduce risk given changes in the covered institution's risk profile, products, or other conditions.

iii. Monitor the covered institution's risk profile relative to the covered institution's risk appetite and compliance with concentration risk limits and report on such monitoring to the Risk Committee at least quarterly.

iv. Establish and adhere to policies that include concentration risk limits. Such policies should ensure that risks, both in the aggregate and for lines of business and material activities or products, within the covered institution are effectively identified, measured, monitored, and controlled, and are consistent with the covered institution's risk appetite statement and all policies and processes established within the risk management program. At least annually, such policies should be reviewed and updated, as necessary.

v. Establish and adhere to procedures and processes, as necessary, to ensure compliance with the board risk management policies and with applicable laws and regulations. At least annually, such procedures and processes should be reviewed and updated, as necessary.

vi. Ensure that front line units meet the standards in paragraph 3(a).

vii. When necessary due to the level and type of risk, monitor front line units' compliance with front line unit risk limits, engage in ongoing communication with front line units regarding adherence to these limits, and report at least quarterly any concerns to the CEO and the Risk Committee.

viii. Identify and communicate to the CEO and the Risk Committee:

a. Material risks and significant instances where independent risk management's assessment of risk differs from that of a front line unit;

b. Significant instances where a front line unit is not adhering to the risk governance program; and

c. Identified or suspected instances of noncompliance with laws or regulations.

ix. Identify and communicate to the Risk Committee:

a. Material risks and significant instances where independent risk management's assessment of risk differs from the CEO's assessment; and

b. Significant instances where the CEO is not adhering to, or holding front line units accountable for adhering to, the risk governance program.

x. Develop, attract, train, retain, and maintain competent staff at levels required to carry out the unit's role and responsibilities effectively.

xi. Adhere to compensation and performance management programs that ensure that the covered institution provides compensation and other incentives to the independent risk management unit staff that ensure their independence, are consistent with providing an objective assessment of the risks taken by the covered institution, and comply with applicable laws and regulations regarding excessive or incentive compensation, and covered institution compensation policies.

c. *Internal Audit Unit.* In addition to meeting the standards for and fulfilling its obligations of internal audit otherwise required the internal audit unit should ensure that the covered institution's risk management program complies with these Guidelines and is appropriate for the size, complexity, and risk profile of the covered institution. In carrying out its responsibilities the internal audit unit should:

i. Maintain a complete and current inventory of all of the covered institution's material businesses, product lines, services, and functions, and assess the risks associated with each, which collectively provide a basis for the audit plan required in paragraph 3(c)(ii).

ii. Establish and adhere to an audit plan, updated quarterly or more often, as necessary, that takes into account the covered institution's risk profile and emerging risks and issues. The audit plan should require the internal audit unit to evaluate the adequacy of and compliance with policies, procedures, and processes established by front line units and the independent risk management unit under the risk management program. Changes to the audit plan should be communicated to the Audit Committee as they occur.

iii. Report in writing, conclusions, issues, recommendations, and management's response from audit work carried out under the audit plan described in paragraph 3(c)(ii) to the Audit Committee. The internal audit unit's reports to the Audit Committee should identify the root cause of any investigated issue and include:

1. A determination of whether the root cause creates an issue that has an impact on one organizational unit or multiple organizational units within the covered institution; and

2. A determination of the effectiveness of the front line units and the independent risk management unit in identifying and resolving issues in a timely manner.

iv. Establish and adhere to processes for independently assessing, at least annually, the design and effectiveness of the risk management program. The internal audit unit, an external party, or the internal audit unit in conjunction with an external party may conduct the assessment. The assessment should include a conclusion regarding the covered institution's compliance with the standards set forth in these Guidelines.

v. Identify and communicate to the Audit Committee significant instances where front line units or independent risk management are not adhering to the risk management program. This communication should document instances of identified or suspected non-compliance with applicable laws or regulations.

vi. Establish and adhere to a quality assurance process that ensures internal audit's policies, procedures, and processes comply with applicable regulatory and industry guidance, are appropriate for the size, complexity, and risk profile of the covered institution, are updated to reflect changes to internal and external risk factors, and are consistently followed.

vii. Develop, attract, train, retain, and maintain competent staff at levels required to carry out the unit's role and responsibilities effectively.

viii. Adhere to compensation and performance management programs that comply with applicable laws and regulations regarding excessive or incentive compensation and covered institution compensation policies.

D. *Communication Processes.* The risk management program should require that the covered institution initially communicate and provide ongoing communication and reinforcement of the covered institution's risk appetite statement and risk management program throughout the covered institution in a manner that ensures management and all employees align their risk-taking decisions with applicable aspects of the risk appetite statement.

E. *Processes Governing Risk Limit Breaches.* The board should establish, and the covered institution should adhere to, processes that require front line units and the independent risk management unit, consistent with their respective responsibilities to:

1. Identify breaches of the risk appetite statement, concentration risk limits, and front line unit risk limits.

2. Distinguish breaches based on the severity of their impact on the covered institution.

3. Inform front line unit management, the CRO, the Risk Committee, the Audit Committee, the CEO, and the FDIC in writing of a breach of a risk limit or noncompliance with the risk appetite statement or risk management program describing the severity of the breach, its impact on the covered institution, and how the breach will be, or has been, resolved.

4. Establish accountability for reporting and resolving breaches that include consequences for risk limit breaches that take into account the magnitude, frequency, and recurrence of breaches, even if the covered institution did not realize a loss from such breaches.

At least annually, the board should review and update, as necessary, the processes related to risk limit breaches.

F. *Processes Governing Identification of and Response to Violations of Law or Regulations.*

The board should establish, and the covered institution should adhere to, processes [50] that require front line units and the independent risk management unit, consistent with their respective responsibilities to:

1. Identify known or suspected violations of law or regulations applicable to the activities conducted by their units.

2. Distinguish between violations of law or regulations that appear largely technical, inadvertent, or insignificant and those that appear willful or may involve dishonesty or misrepresentation.

3. Document all violations of law or regulations in writing and notify the CEO, Audit Committee, and the Risk Committee, including information about actions that are being taken to return the institution to compliance with the applicable law or regulatory requirement.

4. Ensure that known or suspected violations of law involving dishonesty, misrepresentation or willful disregard for requirements, whether by a customer or by any covered institution's director, manager, employee, or person or entity performing services for the covered entity, are promptly reported as required by law or regulation [51] and to relevant law enforcement and federal and state agencies, and take prompt action to cease such activity and prevent its recurrence.

5. Report all violations of law or regulation in a manner and on a timetable acceptable to the agency with jurisdiction over that law or regulation and establish accountability for resolving violations, even if the covered institution did not realize a loss from such violations.

At least annually, the board should review and update, as necessary, the processes related to identification of and response to violations of law or regulations.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on October 3, 2023.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2023–22421 Filed 10–10–23; 8:45 am]

BILLING CODE 6714–01–P

[50] The covered institution may seek legal advice (from in-house or outside legal advisors) regarding any breach, including known or suspected violation of law, but the covered institution's policies and processes should state that seeking legal advice does not abrogate the requirement to report any breach.

[51] *See, e.g.,* 12 CFR part 353.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1991; Project Identifier AD–2023–00700–E]

RIN 2120–AA64

Airworthiness Directives; CFM International, S.A. Engines

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 CFM International, S.A. (CFM) Model LEAP–1A23, LEAP–1A24, LEAP–1A24E1, LEAP–1A26, LEAP–1A26CJ, LEAP–1A26E1, LEAP–1A29, LEAP–1A29CJ, LEAP–1A30, LEAP–1A32, LEAP–1A33, LEAP–1A33B2, and LEAP–1A35A engines. This proposed AD was prompted by a report of multiple aborted takeoffs and air turn-backs (ATBs) caused by high-pressure compressor (HPC) stall, which was induced by high levels of non-synchronous vibration (NSV). Additional manufacturer investigation revealed that wear on the No. 3 bearing spring finger housing can lead to high levels of NSV. This proposed AD would require initial and repetitive calculations of the levels of NSV, inspection of the stage 2 high-pressure turbine (HPT) nozzle assembly honeycomb and HPT stator stationary seal honeycomb and, depending on the results of the calculations and inspections, replacement of certain parts. This proposed AD would also require replacement of the No. 3 bearing spring finger housing. 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 November 27, 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* by searching for and locating Docket No. FAA–2023–1991; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For service information identified in this NPRM, contact CFM International, S.A., GE Aviation Fleet Support, 1 Neumann Way, M/D Room 285, Cincinnati, OH 45215; phone: (877) 432–3272; email: *aviation.fleetsupport@ge.com.*
- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110.

FOR FURTHER INFORMATION CONTACT: Mehdi Lamnyi, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7743; email: *mehdi.lamnyi@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–2023–1991; Project Identifier AD–2023–00700–E'' 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 Mehdi Lamnyi, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA was notified by the engine manufacturer of three aborted takeoffs and two ATBs caused by HPC stall. Additional manufacturer investigation revealed that wear on the No. 3 bearing spring finger housing can lead to high levels of NSV, which could induce HPC stall. As a result of its investigation, the manufacturer published service information that specifies procedures for addressing this situation. This condition, if not addressed, could result in engine power loss at a critical phase of flight such as takeoff or climb, loss of engine thrust control, reduced controllability of the airplane, and loss of the airplane.

FAA's Determination

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

Related Service Information Under 1 CFR Part 51

The FAA reviewed CFM Service Bulletin (SB) LEAP–1A–72–00–0504–01A–930A–D, Issue 001, dated June 14, 2023. This service information identifies affected No. 3 bearing spring finger housings and specifies procedures for monitoring NSV during engine operation. This service information also specifies procedures for replacing the No. 3 bearing spring finger housings, inspecting the stage 2 HPT nozzle assembly honeycomb and HPT stator stationary seal honeycomb, and replacing the stage 2 HPT nozzle assembly honeycomb and HPT stator stationary seal. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

Proposed AD Requirements in This NPRM

This proposed AD would require repetitive calculations of the levels of NSV and, depending on the results of the calculations, replacement of the No. 3 bearing spring finger housing. This proposed AD would require, following the removal and replacement of the No. 3 bearing spring finger housing, inspection of the stage 2 HPT nozzle assembly honeycomb and HPT stator stationary seal honeycomb for rubs and, depending on findings, replacement of the stage 2 HPT nozzle assembly honeycomb and HPT stator stationary seal. This proposed AD would also require replacement of the No. 3 bearing spring finger housing, regardless of calculated level of NSV, at a certain time.

Interim Action

The FAA considers that this proposed AD would be an interim action. The design approval holder is currently developing a modification to address this issue. The FAA may consider additional rulemaking on this subject.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 48 engines installed on airplanes of U.S. registry. The FAA estimates that 33 engines installed on airplanes of U.S. registry would require replacement of the No. 3 bearing spring finger housing.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Calculate NSV data	1 work-hour × $85 per hour = $85	$0	$85	$4,080
Replace No. 3 bearing spring finger housing	17 work-hours × $85 per hour = $1,445	64,590	66,035	2,179,155

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Inspect stage 2 HPT nozzle assembly honeycomb and HPT stator stationary seal honeycomb.	4 work-hours × $85 per hour = $340	$0	$340
Replace stage 2 HPT nozzle assembly honeycomb	8 work-hours × $85 per hour = $680	58,536	59,216
Replace HPT stator stationary seal	8 work-hours × $85 per hour = $680	6,855	7,535

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:

CFM International, S.A.: Docket No. FAA–2023–1991; Project Identifier AD–2023–00700–E.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by November 27, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to CFM International, S.A. (CFM) Model LEAP–1A23, LEAP–1A24, LEAP–1A24E1, LEAP–1A26, LEAP–1A26CJ, LEAP–1A26E1, LEAP–1A29, LEAP–1A29CJ, LEAP–1A30, LEAP–1A32, LEAP–1A33, LEAP–1A33B2, and LEAP–1A35A engines with an installed No. 3 bearing spring finger housing having part number (P/N) 2629M62G01 and a serial number identified in Table 1 or Table 2 of CFM Service Bulletin (SB) LEAP–1A–72–00–0504–01A–930A–D, Issue 001, dated June 14, 2023 (CFM SB LEAP–1A–72–00–0504–01A–930A–D).

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by a report of multiple aborted takeoffs and air turn-backs caused by high-pressure compressor (HPC) stall, which was induced by high levels of non-synchronous vibration (NSV), and an additional manufacturer investigation that revealed wear on the No. 3 bearing spring finger housing. The FAA is issuing this AD to prevent HPC stall. The unsafe condition, if not addressed, could result in engine power loss at a critical phase of flight such as takeoff or climb, loss of engine thrust control, reduced controllability of the airplane, and loss of the airplane.

(f) Compliance

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

(g) Required Actions

(1) Within 125 flight cycles (FCs) after the effective date of this AD and thereafter at intervals not to exceed 125 FCs, calculate the NSV data in accordance with the Accomplishment Instructions, paragraphs 5.A.(1) and 5.A.(3), or 5.B.(1) and 5.B.(3) of CFM SB LEAP–1A–72–00–0504–01A–930A–D.

(2) If, during any calculation required by paragraph (g)(1) of this AD, the NSV data exceeds the limits specified in the Accomplishment Instructions, paragraph 5.A.(4)(a)1 or 5.B.(4)(a)1 of CFM SB LEAP–1A–72–00–0504–01A–930A–D, discontinue the calculations required by paragraph (g)(1) of this AD and within 150 FCs of performing the calculation:

(i) Remove from service the No. 3 bearing spring finger housing having P/N 2629M62G01 and a serial number identified in Table 1 or Table 2 of CFM SB LEAP–1A–72–00–0504–01A–930A–D and replace with a part eligible for installation.

(ii) Inspect the stage 2 high-pressure turbine (HPT) nozzle assembly honeycomb for rubs in accordance with the Accomplishment Instructions, paragraphs 5.A.(4)(a)3b1) or 5.B.(4)(a)3b1) of CFM SB LEAP–1A–72–00–0504–01A–930A–D.

(iii) Inspect the HPT stator stationary seal honeycomb for rubs in accordance with the Accomplishment Instructions, paragraphs 5.A.(4)(a)3b2) or 5.B.(4)(a)3b2) of CFM SB LEAP–1A–72–00–0504–01A–930A–D.

(3) If, during the inspection required by paragraph (g)(2)(ii) of this AD, the stage 2 HPT nozzle assembly honeycomb fails to meet the serviceability criteria referenced in the Accomplishment Instructions, paragraphs 5.A.(4)(a)3b1) or 5.B.(4)(a)3b1) of CFM SB LEAP–1A–72–00–0504–01A–930A–D, before further flight, replace the stage 2 HPT nozzle assembly honeycomb.

(4) If, during the inspection required by paragraph (g)(2)(iii) of this AD, the HPT stator stationary seal honeycomb fails to meet the serviceability criteria referenced in the Accomplishment Instructions, paragraphs 5.A.(4)(a)3b2) or 5.B.(4)(a)3b2) of CFM SB LEAP–1A–72–00–0504–01A–930A–D, before further flight, replace the HPT stator stationary seal.

(5) At the next piece-part exposure after the effective date of this AD, but before exceeding 9,900 cycles since new, replace the No. 3 bearing spring finger housing having P/N 2629M62G01 and a serial number identified in Table 1 of CFM SB LEAP–1A–72–00–0504–01A–930A–D with a part eligible for installation.

(h) Terminating Action

Replacement of the No. 3 bearing spring finger housing having P/N 2629M62G01 and a serial number identified in Table 1 or Table 2 of CFM SB LEAP–1A–72–00–0504–01A–930A–D with a part eligible for installation, as specified in paragraphs (g)(2)(i) and (g)(5) of this AD, constitutes terminating action for the calculations required by paragraph (g)(1) of this AD.

(i) Definition

For the purpose of this AD, a ''part eligible for installation'' is a No. 3 bearing spring finger housing that does not have P/N 2629M62G01 and a serial number identified in Table 1 or Table 2 of CFM SB LEAP–1A–72–00–0504–01A–930A–D.

(j) 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 office, send it to the attention of the person identified in paragraph (k) of this AD and email it 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.

(3) For service information that contains steps that are labeled as Required for Compliance (RC), the following provisions apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, that are required by paragraph (g) of this AD must be done to comply with this AD. An AMOC is required for any deviations to RC steps required by paragraph (g) of this AD, including substeps and identified figures.

(ii) Steps not labeled 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 RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

(k) Related Information

For more information about this AD, contact Mehdi Lamnyi, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: (781) 238–7743; email: *mehdi.lamnyi@faa.gov.*

(l) Material Incorporated by Reference

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

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

(i) CFM International, S.A. Service Bulletin LEAP–1A–72–00–0504–01A–930A–D, Issue 001, dated June 14, 2023.

(ii) [Reserved]

(3) For service information identified in this AD, contact CFM International, S.A., GE Aviation Fleet Support, 1 Neumann Way, M/D Room 285, Cincinnati, OH 45215; phone: (877) 432–3272; email: *aviation.fleetsupport@ge.com.*

(4) You may view this service information at FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (817) 222–5110.

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

Issued on October 3, 2023.

Ross Landes,

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

[FR Doc. 2023–22373 Filed 10–10–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–109348–22]

RIN 1545–BQ69

Identification of Monetized Installment Sale Transactions as Listed Transactions; Hearing Cancellation

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Cancellation of a notice of public hearing on a proposed rulemaking and notice of public hearing.

SUMMARY: This document cancels a public hearing on proposed regulations that would identify monetized installment sale transactions and substantially similar transactions as listed transactions, a type of reportable transaction.

DATES: The public hearing scheduled for October 12, 2023, at 10 a.m. ET is cancelled.

FOR FURTHER INFORMATION CONTACT: Vivian Hayes of the Publications and Regulations Branch, Associate Chief Counsel (Procedure and Administration) at (202) 317–6901 (not a toll-free number).

SUPPLEMENTARY INFORMATION: A notice of proposed rulemaking and a notice of public hearing that appeared in the **Federal Register** on August 4, 2023 (88 FR 51756) announced that a public hearing being held in person and by teleconference was scheduled for October 12, 2023, at 10 a.m. ET. The subject of the public hearing is under 26 CFR part 1.

The public comment period for these regulations expired on October 3, 2023. The notice of proposed rulemaking and notice of public hearing instructed those interested in testifying at the public hearing to submit a request to testify and an outline of the topics to be addressed. We did not receive a request to testify at the Public Hearing. Therefore, the public hearing scheduled for October 12, 2023, at 10 a.m. ET is cancelled.

Oluwafunmilayo A. Taylor,

Section Chief, Publications and Regulations Branch, Associate Chief Counsel (Procedure & Administration).

[FR Doc. 2023–22468 Filed 10–10–23; 8:45 am]

BILLING CODE 4830–01–P

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 210

[Docket No. 2022–5]

Termination Rights, Royalty Distributions, Ownership Transfers, Disputes, and the Music Modernization Act

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Supplemental notice of proposed rulemaking; extension of comment period.

SUMMARY: The U.S. Copyright Office is extending the deadline to submit comments in connection with a supplemental notice of proposed rulemaking regarding the applicability of the derivative works exception to termination rights under the Copyright Act to the new statutory mechanical blanket license established by the Music Modernization Act and other matters relevant to identifying the proper payee to whom the mechanical licensing collective must distribute royalties.

DATES: Initial written comments are due no later than 11:59 p.m. Eastern Time on Wednesday, November 8, 2023. Written reply comments are due no later than 11:59 p.m. Eastern Time on Tuesday, November 28, 2023.

ADDRESSES: For reasons of governmental efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov.* Specific instructions for submitting comments are available on the Copyright Office's website at *https://copyright.gov/rulemaking/mma-termination.* If electronic submission of comments is not feasible due to lack of access to a computer or the internet, please contact the Copyright Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Rhea Efthimiadis, Assistant to the General Counsel, by email at *meft@copyright.gov* or telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION: On September 26, 2023, the U.S. Copyright Office issued a supplemental notice of proposed rulemaking seeking comments from the public on questions regarding the applicability of the derivative works exception to termination rights under the Copyright Act to the new statutory mechanical blanket license established by the Music Modernization Act and other matters relevant to identifying the proper payee to whom the mechanical licensing collective must distribute royalties.[1] The supplemental notice set an October 26, 2023 deadline for submitting initial comments and a November 13, 2023 deadline for reply comments.

[1] 88 FR 65908 (Sept. 26, 2023).

To ensure that members of the public have sufficient time to prepare responses to the Office, and to ensure that the Office can proceed on a timely basis with its inquiry of the issues identified in its supplemental notice with the benefit of a complete record, the Office is extending the comment period deadlines as set forth here. Initial written comments will now be due by 11:59 p.m. Eastern Time on Wednesday, November 8, 2023. Reply comments will now be due by 11:59 p.m. Eastern Time on Tuesday, November 28, 2023.

Dated: October 5, 2023.

Suzanne V. Wilson,

General Counsel and Associate Register of Copyrights.

[FR Doc. 2023–22485 Filed 10–10–23; 8:45 am]

BILLING CODE 1410–30–P

Notices

Federal Register
Vol. 88, No. 195
Wednesday, October 11, 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 COMMERCE

Bureau of Industry and Security

[Docket Number: 23–BIS–TDO2]

In the Matter of: Southwind Airlines, Appellant; Final Decision and Order

Before me for my final decision is a Recommended Decision (RD) issued by Administrative Law Judge (ALJ) Tommy Cantrell on August 24, 2023, and received by my office on August 25, 2023. The RD recommends that this appeal filed by Cortex Havacilik ve Turizm Ticaret Anonim Sirketi d/b/a Southwind Airlines (Southwind) be dismissed. As further discussed below, I accept the findings of fact and conclusions of law made by the ALJ in his RD.

I. Background

Southwind appeals a Temporary Denial Order (TDO) temporarily denying the export privileges of Nordwind Airlines (Nordwind), first issued by the Assistant Secretary of Commerce for Export Enforcement (Assistant Secretary) of the Bureau of Industry and Security (BIS or the Agency) on June 24, 2022, 87 FR 38704. The Export Administration Regulations (EAR or Regulations) at 15 CFR 766.24 authorize the Assistant Secretary to issue a TDO for a period of up to 180 days to prevent an ''imminent violation'' of the Regulations. 15 CFR 766.24(b)(1), (b)(4). Moreover, a TDO may be made applicable to ''related persons'' in accordance with § 766.23 of the Regulations.

The Agency subsequently renewed the TDO against Nordwind twice, on December 20, 2022, 87 FR 79725, and June 15, 2023, 88 FR 40202. Upon the second renewal, the Agency added OOO Pegas Touristik (Pegas) as a related person to the TDO, then modified the TDO on June 27, 2023, to remove Pegas as a related person, 88 FR 42290.

On August 8, 2023, Southwind, through counsel, filed an appeal with the U.S. Coast Guard ALJ Docketing Center (Docketing Center) pursuant to 15 CFR 766.23(c) of the EAR. After assignment of the matter to an ALJ by the Docketing Center on August 14, 2023, BIS filed a response to the appeal on August 21, 2023. On August 24, 2023, ALJ Cantrell issued the RD, which my office received on August 25, 2023. On August 31, 2023, the BIS Appeals Coordinator requested views from the parties on an extension of time to issue my Final Decision in this appeal. Both parties consented, and on August 31, 2023, I issued an Order extending the period of time to issue this Final Decision to September 29, 2023.

II. Standard

As described above, § 766.24(b) of the Regulations addresses the Assistant Secretary's authority to issue TDOs. To issue a TDO, BIS must make a showing that the order is necessary in the public interest to prevent an ''imminent violation'' of the Regulations. 15 CFR 766.24(b)(1). The Regulations authorize the issuance of a TDO on an *ex parte* basis but require that the order define the imminent violation and state why it was issued without a hearing. *Id.* at § 766.24(b)(2). BIS also has the authority to renew the TDO for additional periods. *Id.* at § 766.24(d)(1).

To prevent evasion of the TDO, the Assistant Secretary may apply the terms of the TDO to ''related persons,'' that is, ''other persons then or thereafter related to the respondent by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business.'' *Id.* at § 766.23(a). When seeking to add a related person to a denial order, ''BIS shall, except in an ex parte proceeding under § 766.24(a) of this part,'' give that person notice and an opportunity to oppose such an action. *Id.* at § 766.23(b).

''Related persons'' may not oppose the issuance or renewal of a TDO, but may file an appeal with an ALJ, who issues an RD for the review of the Under Secretary in accordance with § 766.24(e) of the Regulations. *See id.* at §§ 766.23(c)(2)(ii), 766.24(d)(3)(ii). For appeals by related persons, the Regulations provide that the ''sole issues to be raised and ruled on in any such appeal are whether the person so named is related to the respondent and whether the order is justified in order to prevent evasion.'' *Id.* at § 766.23(c).

III. Discussion

Southwind's appeal specifically requests that an Order be issued ''that the [Nordwind] TDO Renewal be withdrawn and that BIS issue an order affirmatively reinstating the status quo as it existed prior to June 15, 2023, and making it clear that companies may continue to transact with Southwind Airlines.'' Southwind Appeal at 18. The limited scope of the appeal under § 766.23 (c) of the Regulations prevents me from doing as Southwind requests.

The ALJ makes twelve recommended findings of fact in the RD. RD at 3–4. I accept these recommended findings of fact.

Regarding the first conclusion of law in the RD, I agree that Southwind is not a ''related person'' with standing to bring an appeal pursuant to 15 CFR 766.23. Southwind alleges that it suffered harm as a result of the June 15, 2023, TDO, which stated, in relevant part, that BIS's Office of Export Enforcement ''has reason to believe that Pegas has made additional efforts to evade export controls on Russia in part by entering into charter agreements with a Turkish airline that started shortly after the imposition of stringent Russia-related export controls [. . .] for international flights into Russia on U.S. origin aircraft without the required BIS authorization.'' BIS Ex. 1 at 7. This language was removed in the June 27, 2023, modified TDO issued against Nordwind only.

Southwind concedes that BIS did not name Southwind Airlines as a related person subject to the terms of the TDO but alleges that the language in the TDO was sufficiently detailed to identify Southwind as the ''Turkish airline'' that ''entered into charter agreements'' with Pegas in support of its efforts to evade U.S. export controls on Russia. Southwind Appeal at 12. According to Southwind, this language has had the same effect on Southwind as if it had actually been named as a related person. Southwind states that the interpretation of this language by a key business partner, Pratt & Whitney, led Pratt & Whitney to cease support of engines aboard aircraft leased by Southwind, jeopardizing its business operations. *Id.* at 2. Nevertheless, BIS has never named Southwind as a related person subject to the Nordwind TDO. Nor, as observed in

the RD, does a mere inference by a business partner that Southwind is the unnamed ''Turkish airline'' described in the TDO render Southwind a related person with standing to appeal the Nordwind TDO. RD at 5. As such, Southwind does not have appeal rights under § 766.23(c), which provides only ''persons named by BIS in an order as related to the respondent'' an avenue for appeal.

Regarding the second conclusion of law in the RD, I agree that Southwind seeks relief outside the scope of 15 CFR 766.23. The Regulations limit the scope of the appeal to two issues: whether the related person is indeed related to the respondent subject to the TDO—Nordwind in this case—and whether the TDO is justified to prevent evasion. 15 CFR 766.23(c). Southwind's request that BIS withdraw the June 15, 2023, TDO and issue an order removing the reference to the ''Turkish airline'' and clarifying that Southwind did not engage in any EAR violations does not fall within the scope of appeal as outlined in § 766.23(c). The ALJ has concluded that he cannot direct BIS to provide this requested relief to Southwind; I agree.

IV. Conclusion and Order

Based on my review of the record, I accept the findings of fact and conclusions of law made by the ALJ in his RD. I also confirm that Southwind has never been a party to the Nordwind TDO, and therefore has never been subject to the license requirements and prohibitions in the Nordwind TDO. Moreover, I confirm that as of the date of issuance of this Final Decision and Order, Southwind is not listed on the BIS Denied Persons List. Accordingly, it is therefore *ordered:*

First, that this appeal is *dismissed.*

Second, that this Final Decision and Order shall be served on Appellants and on BIS and shall be published in the **Federal Register**. In addition, the ALJ's Recommended Decision shall also be published in the **Federal Register**.

This Order, which constitutes the Department's final decision with regard to this appeal, is effective immediately.

Dated: September 29, 2023.

Alan F. Estevez,

Under Secretary of Commerce for Industry and Security.

UNITED STATES DEPARTMENT OF COMMERCE

BUREAU OF INDUSTRY AND SECURITY

WASHINGTON, DC 20230

In the Matter of: Southwind Airlines, Southwind Airlines, Appellant.

Docket No.: 23–TDO–0002

RECOMMENDED DECISION

Issued by: Honorable Tommy Cantrell, Administrative Law Judge

Issued: August 24, 2023

On August 8, 2023, Cortex Havacilik ve Turizm Ticaret Anonim Sirketi d/b/a Southwind Airlines (Southwind) filed an appeal pursuant to 15 CFR 766.23(c) of the Export Administration Regulations (EAR).[1] Specifically, Southwind asks that I issue an order directing BIS to withdraw a June 15, 2023, Temporary Denial Order (TDO) issued to Nordwind Airlines. Southwind also asks that I issue an order ''removing the reference to the Turkish airline and clarifying it has no reason to believe this Company is engaged in any violations of the EAR.'' (Appeal at 3). For the reasons set forth herein, I recommend this appeal be *dismissed*.

Background

On June 15, 2023, the Assistant Secretary of Commerce for Export Enforcement (Assistant Secretary) renewed a TDO to Russian airline Nordwind Airlines pursuant to 15 CFR 766.24. (BIS Ex. 1).[2] The renewed TDO added the corporation Pegas Touristik a/k/a Pegas Touristik OOO (Pegas) as a related person in accordance with 15 CFR 766.23. *Id.* Furthermore, the TDO stated the Office of Export Enforcement (OEE) ''has reason to believe that Pegas has made additional efforts to evade export controls on Russia in part by entering into charter agreements with *a Turkish airline that started shortly after the imposition of stringent Russia-related export controls*.'' *Id.* (emphasis added). However, nothing in the TDO named the Turkish airline.

Thereafter, on June 27, 2023, the Assistant Secretary removed Pegas from the Nordwind TDO. (BIS Ex. 2). On July 28, 2023, Southwind contacted BIS and informed BIS, Pratt & Whitney, a business partner, inferred that Southwind was the ''Turkish airline'' described in the TDO. (Ex. 1).[3] In response to this exchange, BIS provided Southwind with an email confirming it was not ''on the BIS Entity List or Denied Persons List.'' (Exs. 15, 16, 17). However, according to Southwind, this did not resolve the misunderstanding regarding its operations. (Ex. 14 at 3).

On August 8, 2023, Southwind filed this appeal with the United States Coast Guard Administrative Law Judge Docketing Center (Docketing Center).[4] The appeal letter includes 25 exhibits. On August 14, 2023, the Docketing Center assigned this case to me for adjudication. BIS submitted its response to the appeal on August 21, 2023, and included 3 exhibits. The record is now closed and the appeal is ripe for decision.

Recommended Findings of Fact

1. On June 15, 2023, the Assistant Secretary renewed a Temporary Denial Order (TDO) issued to Russian airline Nordwind Airlines. (BIS Ex. 1). BIS renewed the Nordwind TDO pursuant to 15 CFR 766.24 to prevent an ''imminent violation'' of the Export Administration Regulations (EAR). *Id.*

2. The renewed TDO added Pegas as a related person and stated the OEE ''has reason to believe that Pegas has made additional efforts to evade export controls on Russia in part by entering into charter agreements with a Turkish airline that started shortly after the imposition of stringent Russia-related export controls . . . for international flights into Russia on U.S.-origin aircraft without the required BIS authorization.'' (BIS Ex. 1).

3. Southwind's business partner Pratt & Whitney inferred Southwind was the ''Turkish airline'' referenced in the TDO and stopped providing support to Southwind's aircraft engines. (Ex. 1).

4. On June 27, 2023, following discussions between Pegas and BIS, the Assistant Secretary issued a modified TDO removing Pegas as a related person. (BIS Ex. 2).

5. The modified TDO states ''Pegas Touristik should be removed from the TDO to allow the opportunity for additional administrative process under Part 766 of the Regulations.'' (BIS Ex. 2).

6. On June 28, 2023, counsel for Southwind informed BIS ''problems are mounting for the company given the language in the [modified] TDO.'' (Ex. 14, p. 3). Counsel noted Pegas' removal from the TDO did not ''resolve the misunderstanding'' regarding Southwind's operations. (Ex. 14, p. 3).

7. Southwind reiterated its issues to BIS on multiple occasions in late July 2023. (Ex. 16). It requested BIS provide an email Southwind could forward to Pratt & Whitney to ''assuage their concerns that BIS would find a violation if they serviced the engines.'' (Ex. 16).

[1] I note Southwind also submitted an appeal to the Undersecretary of Commerce for Industry and Security pursuant to 15 CFR 756.2 on August 7, 2023. (Appeal at 8).

[2] ''BIS Ex.'' references the exhibits attached to BIS's response dated August 21, 2023.

[3] ''Ex.'' refers to the exhibits attached to Southwind's appeal dated August 8, 2023.

[4] Pursuant to an interagency agreement, United States Coast Guard Administrative Law Judges are permitted to adjudicate BIS cases.

8. On July 24, 2023, Southwind responded to a number of questions from BIS regarding the ownership and operation of the company. (Ex. 15).

9. On July 28, 2023, the Office of Chief Counsel for Industry and Security sent Southwind an email confirming ''neither Southwind nor Cortex Havacilik VE TUR TIC. A.C. are on the BIS Entity List or Denied Persons List.'' (Ex. 17).

10. The email further states: ''[N]o Southwind aircraft are currently on the list of aircraft identified on BIS's website as having operated in apparent violation of U.S. export controls on Russia. However, this list of aircraft is not exhaustive, and the restrictions also apply in any situation in which a person has knowledge that a violation of the EAR has occurred, is about to occur, or is intended to occur in connection with an aircraft or other item that is subject to the EAR, whether or not such aircraft or other item is included on BIS's website.'' (Ex. 17).

11. Southwind forwarded the BIS email to Pratt & Whitney on July 28, 2023. (Ex. 18).

12. On August 2, 2023, Pratt & Whitney restored access to the ''P&W Engine Wise Connect Portal and the applications accessed through the portal'' but noted ''the Engine Health Monitoring/ADEM application will again be functional, however, no engine data is being transmitted.'' (Ex. 18).

Opinion and Recommended Conclusions of Law

BIS regulations related to export administration are issued ''under laws relating to the control of certain exports, reexports, and activities.'' 15 CFR 730.1.[5] These export control provisions ''are intended to serve the national security, foreign policy, nonproliferation of weapons of mass destruction, and other interests of the United States.'' 15 CFR 730.6. To prevent an imminent violation of the EAR, the Assistant Secretary may issue a TDO on an *ex parte* basis. 15 CFR 766.24(a). The TDO ''will deny export privileges to any person named in the order as provided for in § 764.3(a)(2) of the EAR.'' 15 CFR 766.24(a). The order is valid for 180 days, but the Assistant Secretary may renew it, more than once, in additional 180-day increments. 15 CFR 766.24(b)(4), 766.24(d)(4). The Assistant Secretary may also modify or amend a TDO. 15 CFR 766.24(d), 766.23(b).

To prevent evasion of the TDO, the Assistant Secretary may apply the order ''not only to the respondent, but also to other persons then or thereafter related to the respondent by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business.'' 15 CFR 766.23(a), 766.24(c). When adding a related person to an order affecting export privileges, ''BIS shall, except in an *ex parte* proceeding under § 766.24(a)'' give that person notice and an opportunity to oppose the action. 15 CFR 766.23(b).

Where the Assistant Secretary issues or renews a TDO on an *ex parte* basis pursuant to 15 CFR 766.24, persons ''designated as a related person may not oppose the issuance or renewal of the temporary denial order, but may file an appeal in accordance with § 766.23(c).'' 15 CFR 766.24(d)(3)(ii). In such an appeal, the ''sole issues to be raised and ruled on . . . are whether the person so named is related to the respondent and whether the order is justified in order to prevent evasion.'' 15 CFR 766.23(c). An administrative law judge then submits a recommended decision to the Under Secretary for Industry and Security ''recommending whether the issuance or the renewal of the temporary denial order should be affirmed, modified, or vacated.'' 15 CFR 766.24(e)(4).

Having outlined the relevant regulations governing this appeal, I now turn to the facts of the case and conclude Southwind has no standing to bring this appeal pursuant to 15 CFR 766.23(c) as it was not named by BIS as a related person. I also conclude the relief Southwind seeks is outside the scope of an appeal as set forth in 15 CFR 766.23(c).

1. Southwind Is Not a ''Related Person'' With Standing To Bring an Appeal Pursuant to 15 CFR 766.23

As a preliminary matter, BIS did not name Southwind as a related person when it renewed the Nordwind TDO on June 15, 2023. It simply did not apply the Nordwind TDO to Southwind. Pratt & Whitney *inferred* Southwind was the ''Turkish airline'' associated with Pegas, a corporation designated by BIS as related to Nordwind. But this inference does not render Southwind a related person with standing to appeal the Nordwind TDO. *See* 15 CFR 766.23(c) (''Any person *named by BIS* in an order as related to the respondent may appeal that action'') (emphasis added).[6]

2. Southwind Seeks Relief Outside the Scope of 15 CFR 766.23

Even if BIS had named Southwind as a related person with standing to bring this appeal, Southwind seeks relief outside the scope of such an appeal. 15 CFR 766.23(c). The regulations specifically limit the appeal to two issues: whether Southwind is related to Nordwind and whether the TDO is justified in order to prevent evasion. 15 CFR 766.23(c). Southwind does not ask me to rule on either issue, and even so, the record shows there is no current TDO naming Southwind as a related person that I could affirm, modify, or vacate as part of this appeal.[7]

Southwind instead asks that I direct BIS to (1) withdraw the June 15, 2023, TDO, and (2) issue an order removing the reference to the ''Turkish airline'' and clarifying Southwind did not engage in any violations of the EAR. Southwind seeks to reinstate ''the status quo prior to June 15, 2023, making it clear that companies may continue to transact with Southwind Airlines.'' (Appeal, p. 12). I cannot direct BIS to provide this relief to Southwind.

I note, however, BIS emailed Southwind on July 28, 2023, definitively stating the company is not on the BIS Entity List or Denied Persons List, and none of Southwind's aircraft are ''on the list of aircraft identified on BIS's website as having operated in apparent violation of U.S. export controls on Russia.'' (Ex. 17). Furthermore, the current version of the Nordwind TDO, published on the Federal Registry on July 30, 2023, does not prohibit any company from transacting with Southwind. (BIS Ex. 2).

In light of the above, I recommend Southwind's appeal be *dismissed*.

Done and dated this 24th day of August 2023, at Galveston, Texas.

[5] The EAR primarily relate to the implementation of the Export Administration Act of 1979. 15 CFR 730.2.

[6] It also follows that because Southwind was not named as a related person, the regulations did not require BIS to give it notice and an opportunity to oppose the renewal of the TDO. 15 CFR 766.23(b). This is especially true in the present case, where BIS issued and renewed the TDO on an *ex parte* basis pursuant to 15 CFR 766.24. *See* 15 CFR 766.24(d)(3)(ii) (where TDO is issued or renewed on *ex parte* basis, related persons ''may not oppose the issuance or renewal of the TDO but may file an appeal in accordance with § 766.23(c)''); 15 CFR 766.23(b).

[7] As noted above, the June 28, 2023, modification removed Pegas as a related person. (BIS Ex. 2). I cannot rule on whether the June 15, 2023, TDO, which is no longer in effect and which did not name Southwind as a related party, was justified to prevent evasion of the Nordwind TDO.

TOMMY CANTRELL
ADMINISTRATIVE LAW JUDGE
UNITED STATES COAST GUARD

Certificate of Service

I hereby certify that I have served by electronic mail the foregoing Recommended Decision to Dismiss Appeal upon the following:

Gregory Michelsen, Esq., Andrea Duvall, Esq., Attorneys for Bureau of Industry and Security, Office of Chief Counsel for Industry and Security, U.S. Department of Commerce (*Sent via electronic mail*)

Wendy Wysong, Esq., Ali Burney, Esq., Steptoe & Johnson HK LLP, Attorneys for Respondent (*Sent via electronic mail*)

U.S. Coast Guard, ALJ Docketing Center, Attn: Hearing Docket Clerk (*Sent via electronic mail*)

I hereby certify that I have forwarded by Express Courier the foregoing Recommended Decision to Dismiss Appeal *and* the case file upon the following:

Alan F. Estevez, Under Secretary for Industry and Security, Bureau of Industry and Security, U.S. Department of Commerce (*Sent via Fed Ex*)

Done and dated August 24, 2023, at Galveston, Texas.

Ericka J. Pollard
Paralegal Specialist to
Tommy Cantrell
Administrative Law Judge
United States Coast Guard

[FR Doc. 2023–22434 Filed 10–10–23; 8:45 am]
BILLING CODE 3510–DT–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[Docket Number: 23–BIS–TDO–1]

In the Matter of: OOO Pegas Touristik, 5 Building 1, Volokoplamsk Highway, Moscow, Russian Federation, 125080, Appellant; Final Decision and Order

Before me for my final decision is a Recommended Decision (RD), issued on August 23, 2023, by Administrative Law Judge (ALJ) Tommy Cantrell. The RD recommends that this appeal filed by OOO Pegas Touristik (Pegas) be dismissed. As further discussed below, I accept the findings of fact and conclusions of law in the ALJ's RD.

I. Background

Pegas appeals a Temporary Denial Order (TDO) temporarily denying the export privileges of Nordwind Airlines (Nordwind), first issued by the Assistant Secretary of Commerce for Export Enforcement (Assistant Secretary) of the Bureau of Industry and Security (BIS or the Agency) on June 24, 2022, 87 FR 38704. The Export Administration Regulations (EAR or Regulations) at 15 CFR 766.24 authorize the Assistant Secretary to issue a TDO for a period of up to 180 days to prevent an ''imminent violation'' of the Regulations. 15 CFR 766.24(b)(1), (b)(4). Moreover, a TDO may be made applicable to ''related persons'' in accordance with § 766.23 of the Regulations.

The Agency subsequently renewed the TDO against Nordwind twice, on December 20, 2022, 87 FR 79725, and June 15, 2023, 88 FR 40202. Upon the second renewal, the Agency added Pegas as a related person to the TDO, then modified the TDO on June 27, 2023, to remove Pegas as a related person, 88 FR 42290.

On August 4, 2023, Pegas, through counsel, filed an appeal (Pegas Appeal) with the U.S. Coast Guard ALJ Docketing Center (Docketing Center) pursuant to 15 CFR 766.23(c) of the EAR. After assignment of the matter to an ALJ by the Docketing Center on August 10, 2023, BIS filed a response to the appeal on August 17, 2023. ALJ Cantrell issued the August 23, 2023, RD, which my office received on August 24, 2023. On August 24, 2023, Pegas requested a hearing and/or opportunity to respond to the ALJ's RD. Upon consideration of the views of the parties, I issued an order on August 29, 2023, denying Pegas's request for a hearing and granting its request to submit a response. The order also extended the period of time to issue this Final Decision and set forth a schedule for additional written submissions by the parties. Consistent with the order, Pegas filed a ''Response to the Administrative Law Judge's Recommended Decision'' (Pegas Response) on September 6, 2023, and the Agency filed a ''Reply to Response by Non-Party OOO Pegas Touristik'' (BIS Reply) on September 15, 2023.

II. Standard

As described above, § 766.24(b) of the Regulations addresses the Assistant Secretary's authority to issue TDOs. To issue a TDO, BIS must make a showing that the order is necessary in the public interest to prevent an ''imminent

violation'' of the Regulations. 15 CFR 766.24(b)(1). The Regulations authorize the issuance of a TDO on an *ex parte* basis but require that the order define the imminent violation and state why it was issued without a hearing. *Id.* at § 766.24(b)(2). BIS also has the authority to renew the TDO for additional periods. *Id.* at § 766.24(d)(1).

To prevent evasion of the TDO, the Assistant Secretary may apply the terms of the TDO to ''related persons,'' that is, ''other persons then or thereafter related to the respondent by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business.'' *Id.* at § 766.23(a). When seeking to add a related person to a denial order, ''BIS shall, except in an *ex parte* proceeding under § 766.24(a) of this part,'' give that person notice and an opportunity to oppose such an action. *Id.* at § 766.23(b).

''Related persons'' may not oppose the issuance or renewal of a TDO, but may file an appeal with an ALJ, who issues an RD for the review of the Under Secretary in accordance with § 766.24(e) of the Regulations. *See id.* at §§ 766.23(c)(2)(ii), 766.24(d)(3)(ii). For appeals by related persons, the Regulations provide that the ''sole issues to be raised and ruled on in any such appeal are whether the person so named is related to the respondent and whether the order is justified in order to prevent evasion.'' *Id.* at § 766.23(c).

III. Discussion

Pegas's appeal requests that an Order be issued ''that orders the Assistant Secretary to issue an amended Order that retroactively nullifies and voids the addition of Pegas Touristik as a related person to the TDO and the subjection of Pegas Touristik to a denial order from June 15, 2023, to June 27, 2023.'' Pegas Appeal at 11. Pegas also seeks a public acknowledgement from BIS that its designation of Pegas as a related person to the TDO and the addition of Pegas to the BIS Denied Persons List was in error. Pegas Appeal at 10, Pegas Response at 8. In short, the limited scope of the appeal under § 766.23(c) of the Regulations prevents me from doing as Pegas requests.

The ALJ makes twelve recommended findings of fact in the RD. RD at 2–3. I accept these recommended findings of fact. Three of the Recommended Facts (2, 9, and 10) were discussed in the additional submissions by the parties, and warrant additional discussion. In its response to the RD, Pegas describes these three Recommended Facts as ''materially incomplete and/or misleading,'' but concedes that Recommended Facts 9 and 10 are indeed factually accurate. Pegas Response at 6–7. Because both parties agree on accuracy, *see id.,* BIS Reply at 2, I decline to disturb the ALJ's fact determinations and accept Recommended Facts 9 and 10 as set forth in the RD. Regarding Recommended Fact 2, Pegas argues that this fact should be ''clarified'' to reflect additional information about alleged deficiencies in the TDO renewal process, but does not explicitly contest its accuracy. Pegas Response at 6. I am unpersuaded by Pegas's contention that Recommended Fact 2 as submitted by the ALJ is insufficient, and think the clarification requested by Pegas is not necessary for the disposition of this § 766.23(c) appeal. Thus I accept Recommended Fact 2 as set forth in the RD.

Regarding the conclusion of law in the RD, I agree that Pegas seeks relief outside the scope of an appeal as set forth in 15 CFR 766.23(c). As discussed above, the Regulations limit the scope of the appeal to two issues: whether the related person is related to the respondent subject to the TDO, and whether the TDO is justified to prevent evasion. 15 CFR 766.23(c). Although Pegas takes issue in its appeal with the process by which it was added as a related person to the Nordwind TDO on June 15, 2023, Pegas's appeal does not address in detail whether it is indeed related to Nordwind, nor does it address whether the TDO was justified to prevent evasion. Regardless, as of June 27, 2023, Pegas was no longer a related person under § 766.23 to the Nordwind TDO, and therefore an appeal under § 766.23(c) is no longer available to Pegas. The ALJ concludes that he ''cannot rule on these issues because there is no TDO currently in effect naming Pegas as a related person, thus, [he] cannot affirm, modify, or vacate as part of this appeal,'' RD at 5, and I agree.

IV. Conclusion and Order

Based on my review of the record, I accept the findings of fact and conclusions of law made by the ALJ in his RD. I also confirm that as of the date of issuance of this Final Decision and Order, Pegas is not listed on the BIS Denied Persons List, nor is it subject to the license requirements and prohibitions in the Nordwind TDO. Accordingly, it is therefore *ordered:*

First, that this appeal is *dismissed.*

Second, that this Final Decision and Order shall be served on Appellants and on BIS and shall be published in the **Federal Register**. In addition, the ALJ's Recommended Decision shall also be published in the **Federal Register**.

This Order, which constitutes the Department's final decision with regard to this appeal, is effective immediately.

Dated: September 29, 2023.

Alan F. Estevez,

Under Secretary of Commerce for Industry and Security.

UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF INDUSTRY AND SECURITY, WASHINGTON, DC 20230

In the matter of: OOO Pegas Touristik, Appellant.

Docket No.: 23–BIS–TDO1

RECOMMENDED DECISION

Issued by: Honorable Tommy Cantrell, Administrative Law Judge

Issued: August 23, 2023

On August 4, 2023, OOO Pegas Touristik (Pegas) filed an appeal pursuant to 15 CFR 766.23(c) of the Export Administration Regulations (EAR). Specifically, Pegas requests I issue an order directing the Assistant Secretary of Commerce for Export Enforcement (Assistant Secretary) to ''issue an amended Order that retroactively nullifies and voids the addition of Pegas as a related person'' to a Temporary Denial Order (TDO) issued to Nordwind Airlines (Nordwind), ''as well as Pegas Touristik's inclusion in the [Denied Persons List] order from June 15, 2023, to June 27, 2023.'' (Appeal at 3). The Bureau of Industry and Security (BIS) opposes the appeal, arguing there is no factual or legal basis to support the appeal or the relief Pegas seeks. For the reasons set forth herein, I recommend the appeal be *dismissed.*

I. Procedural Background

On June 24, 2022, the Assistant Secretary issued a TDO to Russian airline Nordwind pursuant to 15 CFR 766.24. (Ex. 1).[1] In accordance with BIS regulations, the Assistant Secretary renewed the TDO for an additional 180 days on December 20, 2022. (Ex. 2). The Assistant Secretary again renewed the TDO on June 15, 2023, this time adding Pegas as a related person pursuant to 15 CFR 766.23 of the EAR. (Ex. 3).[2] Thereafter, following discussions and an exchange of information between BIS and Pegas, the Assistant Secretary issued a ''Modification of June 15, 2023 Renewal of Temporary Denial Order,''

[1] ''Ex. 1'' references the first of 12 exhibits attached to the Appeal dated August 4, 2023.

[2] BIS published this TDO on the **Federal Register** on June 21, 2023. *See* 88 FR 40202.

removing Pegas from the Nordwind TDO. (Exs. 3–7).[3]

On August 4, 2023, Pegas filed this appeal with the United States Coast Guard Administrative Law Judge Docketing Center (Docketing Center).[4] The appeal letter included twelve exhibits. On August 10, 2023, the Docketing Center assigned this case to me for adjudication. BIS submitted its response to the appeal on August 17, 2023. The record is now closed and the appeal is ripe for decision.

II. Recommended Findings of Fact

1. On June 24, 2022, the Assistant Secretary issued a Temporary Denial Order (TDO) to Russian airline Nordwind Airlines (Norwind), temporarily denying Nordwind's export privileges on an *ex parte* basis pursuant to 15 CFR 766.24 to prevent an ''imminent violation'' of the Export Administration Regulations (EAR). (Ex. 1).

2. On June 15, 2023, the Assistant Secretary renewed the TDO and added Pegas as a related person. (Ex. 3).

3. As modified, the June 15, 2023, TDO refers to both Nordwind Airlines and Pegas as ''Denied Persons'' who ''may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology . . . exported or to be exported from the United States that is subject to the EAR . . . .'' [5] (Ex. 3).

4. BIS published the June 15, 2023 TDO in the **Federal Register** on June 21, 2023. *See* 88 FR 40202.

5. On June 20, 2023, Pegas contacted BIS to express concerns about the TDO, specifically arguing the addition of Pegas as a related person was legally and factually incorrect because BIS did not provide Pegas with advance notice or an opportunity to oppose the action. (Ex. 4).

6. On June 21, 2023, the Office of Export Enforcement (OEE) requested information from Pegas regarding its business operations, ownership and corporate structure, and other facts related to certain individuals, including information regarding whether Pegas was related to Nordwind Airlines. (Ex. 5).

7. Following discussions between Pegas and BIS, on June 27, 2023, the Assistant Secretary issued a modified TDO removing Pegas as a related person. (Exs. 6a, 6b, 7).

8. BIS published the June 27, 2023, TDO in the **Federal Register** on June 30, 2023. *See* 88 FR 42290.

9. The modified TDO does not discuss specific reasons for the removal but states the OEE requested ''Pegas Touristik be removed from the TDO to allow the opportunity for additional administrative process under Part 766 of the Regulations.'' (Ex. 7).

10. On July 24, 2023, BIS corrected the Table of Contents for Export Violations on its website to indicate the June 15, 2023, TDO related solely to Nordwind Airlines. (Ex. 11).

11. On July 28, 2023, Pegas requested the Assistant Secretary issue an order which clearly and definitively states ''Pegas Touristik was erroneously added as a related person to the June 15 Order and to the List of Denied Persons'' and ''Pegas Touristik has never been subject to a valid denial order imposed by the U.S. Department of Commerce's Bureau of Industry and Security.'' (Ex. 10).

12. In response, BIS sent Pegas an email noting the following: ''BIS issued an Order on June 27, 2023, removing Pegas Touristik as a party from the June 15, 2023 Nordwind TDO. Additionally, on July 24, 2023, BIS amended the caption in its EFOIA Table of Contents. Given the above, no further action is necessary.'' (Ex. 11).

III. Opinion and Recommended Conclusion of Law

BIS regulations related to export administration are issued ''under laws relating to the control of certain exports, reexports, and activities.'' 15 CFR 730.1.[6] Its export control provisions ''are intended to serve the national security, foreign policy, nonproliferation of weapons of mass destruction, and other interests of the United States.'' 15 CFR 730.6. To prevent an imminent violation of the EAR, BIS may request the Assistant Secretary issue a TDO on an *ex parte* basis. 15 CFR 766.24(a). The TDO is only valid for 180 days, but the Assistant Secretary may renew it in additional 180-day increments as deemed necessary. 15 CFR 766.24(b)(4), 766.24(d)(4). When deciding to renew an order, the only issue to be considered ''is whether the temporary denial order should be continued to prevent an imminent violation.'' 15 CFR 766.24(d)(3). The Assistant Secretary may also modify or amend a TDO. 15 CFR 766.24(d), 766.23(b).

To prevent evasion of a TDO, the Assistant Secretary may apply the order ''not only to the respondent, but also to other persons then or thereafter related to the respondent by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business.'' 15 CFR 766.23(a), 766.24(c). When adding a related party to an order affecting export privileges, ''BIS shall, except in an *ex parte* proceeding under § 766.24'' give that person notice and an opportunity to oppose the action. 15 CFR 766.23(b).

Where the Assistant Secretary issues or renews a TDO on an *ex parte* basis pursuant to 15 CFR 766.24, persons ''designated as a related person may not oppose the issuance or renewal of the temporary denial order, but may file an appeal in accordance with § 766.23(c).'' 15 CFR 766.24(d)(3)(ii). The *only* issues that may be raised on appeal are ''whether the person so named is related to the respondent and whether the order is justified in order to prevent evasion.'' 15 CFR 766.23(c). An administrative law judge then submits a recommended decision to the Under Secretary for Industry and Security ''recommending whether the issuance or the renewal of the temporary denial order should be affirmed, modified, or vacated.'' 15 CFR 766.24(e)(4).

Having outlined the relevant regulations governing this appeal, I now turn to the facts of the case.

a. Pegas Seeks Relief Outside the Scope of an Appeal as Set Forth in 15 CFR 766.23(c)

Here, the issues that may be raised and ruled upon in an appeal under 15 CFR 766.23(c) are (1) whether Pegas is related to Nordwind Airlines, and (2) whether the order naming Pegas as a related person is justified to prevent evasion of the Nordwind TDO. 15 CFR 766.23(c). Pegas does not argue either of these issues.[7] Ultimately, I cannot rule on these issues because there is no TDO currently in effect naming Pegas as a related person, thus, I cannot affirm, modify, or vacate as part of this appeal.

[3] BIS published this TDO on the **Federal Register** on June 30, 2023. *See* 88 FR 42290.

[4] Pursuant to an interagency agreement, United States Coast Guard (USCG) Administrative Law Judges are permitted to adjudicate BIS cases.

[5] The TDO refers to Pegas as a ''Denied Person'' but the record does not contain a separate ''Denied Persons List'' or ''DPL.'' For purposes of this decision, I consider the naming of Pegas as a related person the same as its inclusion on a DPL.

[6] The EAR primarily relate to the implementation of the Export Administration Act of 1979. 15 CFR 730.2.

[7] At the crux of Pegas's appeal is the argument BIS acted outside its regulations when it named the company a related party without first giving it notice and an opportunity to oppose the action. It asserts this allegedly *ultra vires* activity should render the June 15, 2023, TDO null and void. I note, however, the Assistant Secretary issued and renewed the Nordwind TDO on an *ex parte* basis pursuant to 15 CFR 766.24. Specifically, the June 15, 2023, TDO which added Pegas as a related party was also issued *ex parte* in accordance with 15 CFR 766.24. As such, as a related party Pegas could not oppose its issuance or renewal but could file an appeal pursuant to § 766.23(c). 15 CFR 766.24(d)(3)(ii); 15 CFR 766.23(b).

15 CFR 766.24(e)(4). The Assistant Secretary removed Pegas from the Nordwind TDO on June 27, 2023. (Ex. 7). According to Pegas, BIS also removed it from its list of ''Denied Persons.'' (Ex. 9). The latest version of the Nordwind TDO is not called into question and remains in effect regarding Nordwind Airlines—not Pegas—until December 12, 2023.

While I understand Pegas's business concerns, the regulations do not grant me authority to issue an order retroactively nullifying the addition of Pegas as a related party in the June 15, 2023, TDO. In light of the above, I recommend this appeal be dismissed.

Done and dated this 23rd day of August 2023, at Galveston, Texas.

TOMMY CANTRELL
ADMINISTRATIVE LAW JUDGE
UNITED STATES COAST GUARD

Certificate of Service

I hereby certify that I have served by electronic mail the foregoing Recommended Decision upon the following:

Gregory Michelsen, Esq., Andrea Duvall, Esq., Attorneys for Bureau of Industry and Security, Office of Chief Counsel for Industry and Security, U.S. Department of Commerce (*Sent via electronic mail*)

Melissa B. Mannino, Esq., Lana Muranovic, Esq., Orga Cadet, Esq., BAKER & HOSTETLER LLP, Attorneys for Respondent (*Sent via electronic mail*)

U.S. Coast Guard, ALJ Docketing Center, Attn: Hearing Docket Clerk (*Sent via electronic mail*)

I hereby certify that I have forwarded by Express Courier the foregoing Recommended Decision *and* the case file upon the following:

Alan F. Estevez, Under Secretary for Industry and Security, Bureau of Industry and Security, U.S. Department of Commerce (*Sent via Fed Ex*)

Done and dated August 23, 2023, at Galveston, Texas

Ericka J. Pollard
Paralegal Specialist to
Tommy Cantrell
Administrative Law Judge
United States Coast Guard

[FR Doc. 2023–22433 Filed 10–10–23; 8:45 am]
BILLING CODE 3510–33–P

DEPARTMENT OF EDUCATION

Presidential Advisory Commission on Advancing Educational Equity, Excellence, and Economic Opportunity for Black Americans; Meeting

AGENCY: White House Initiative on Advancing Educational Equity, Excellence, and Economic Opportunity for Black Americans, Office of the Secretary, U.S. Department of Education.

ACTION: Announcement of an open meeting.

SUMMARY: This notice sets forth the agenda for the October 26–27, 2023, meeting of the Presidential Advisory Commission on Advancing Educational Equity, Excellence, and Economic Opportunity for Black Americans (PAC) and provides information to members of the public about how to submit written comments before the meeting. Notice of the meeting is required and is intended to notify the public of its opportunity to attend.

DATES: The PAC will be meeting on October 26 and 27, 2023, from 10 a.m. to 5 p.m. E.D.T.

ADDRESSES: The October 26, 2023, meeting will be held at the White House. The October 27, 2023, meeting will be in the Barnard Auditorium at the U.S. Department of Education, located at 400 Maryland Avenue SW, Washington, DC 20202. The public may join both meetings virtually.

FOR FURTHER INFORMATION CONTACT: Monique Toussaint, Designated Federal Official, U.S. Department of Education, White House Initiative on Advancing Educational Equity, Excellence, and Economic Opportunity for Black Americans, 400 Maryland Avenue SW, Washington, DC 20202. Telephone: (202) 260–0964. Email: *monique.toussaint@ed.gov.*

SUPPLEMENTARY INFORMATION:

PAC's Statutory Authority and Function: The PAC is established by Executive Order 14050 (October 19, 2021). The PAC is governed by the provisions of 5 U.S.C. Chapter 10 (Federal Advisory Committees), which sets forth standards for the formation and use of advisory committees. The purpose of the PAC is to advise the President, through the Secretary of the U.S. Department of Education, on all matters pertaining to advancing educational equity, excellence, and economic opportunity for Black Americans and communities.

The PAC shall advise the President in the following areas: (i) what is needed for the development, implementation, and coordination of educational programs and initiatives at the Department and other agencies to improve educational opportunities and outcomes for Black Americans; (ii) how to promote career pathways for in-demand jobs for Black students, including registered apprenticeships, internships, fellowships, mentorships, and work-based learning initiatives; (iii) how to increase public awareness of and generate solutions for the educational and training challenges and equity disparities that Black Americans face and the causes of these challenges; and (iv) approaches to establish local and national partnerships with public, private, philanthropic, and nonprofit stakeholders to advance the mission and objectives of Executive Order 14050, consistent with applicable law.

Meeting Agenda: The meeting agenda will include welcome remarks; a discussion of the PAC's function and mission; a discussion of the PAC's strategic priorities; panels by subject matter experts; student performances; and a group discussion. There will be a public comment period for written comments that were submitted in response to the **Federal Register** notice.

Access to the Meeting: An RSVP is required in order to attend the meeting virtually. Submit a reservation by email to the *whblackinitiative@ed.gov* mailbox. RSVPs for both meeting days must be received by the end of the business day on October 25, 2023. Include in the subject line of the email request ''Meeting RSVP.'' The email must include the name(s), title, organization/affiliation (if applicable), mailing address, email address, telephone number, of the person(s) requesting to attend. Members of the public that RSVP will get information on how to attend the meeting virtually.

Submission of written comments: The public may provide written comments pertaining to the work of the PAC prior to the October 26–27, 2023 meeting. Comments must be submitted by 5 p.m. E.D.T. on October 25, 2023 to the *whblackinitiative@ed.gov* mailbox and include in the subject line ''PAC Written Comments: Public Comment.'' The email must include the name(s), title, organization/affiliation, mailing address, email address, and telephone number, of the person(s) making the comment. Comments should be submitted as a Microsoft Word document or in a medium compatible with Microsoft Word (not a PDF file) that is attached to an electronic mail message (email) or provided in the body of an email message. Please do not send material directly to the PAC members.

Access to Records of the Meeting: The Department will post the official report of the meeting on the Initiative's website no later than 90 days after the meeting. Pursuant to 5 U.S.C. 1009, the public may also inspect the meeting materials and other PAC records at 400 Maryland Avenue SW, Washington, DC, by emailing *whblackinitiative@ed.gov* to schedule an appointment.

Reasonable Accommodations: The meeting sites are accessible to individuals with disabilities. If you will need an auxiliary aid or service to participate in the meeting (*e.g.,* interpreting service, assistive listening device, or materials in an alternate format), notify the contact person listed in this notice at least one week before the meeting date. Although we will attempt to meet a request received after that date, we may not be able to make available the requested auxiliary aid or service because of insufficient time to arrange it.

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

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

Authority: Presidential Executive Order 14050.

Donna M. Harris-Aikens,

Deputy Chief of Staff for Strategy, Office of the Secretary.

[FR Doc. 2023–22501 Filed 10–10–23; 8:45 am]

BILLING CODE 4000–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than October 26, 2023.

A. Federal Reserve Bank of Atlanta (Erien O. Terry, Assistant Vice President), 1000 Peachtree Street NE, Atlanta, Georgia 30309; Comments can also be sent electronically to *Applications.Comments@atl.frb.org:*

1. *John Gregory Batchelor, John Gregory Mitchell Batchelor, Rebecca Ann Batchelor Reeves, Ray Bradley Reeves, Hilda Olivia Batchelor, and John John II LLC, all of Russellville, Alabama; and John Bradley Batchelor Reeves, Tuscumbia, Alabama;* as a group acting in concert, to retain voting shares of Pinnacle Bancshares, Inc., and thereby indirectly retain voting shares of Pinnacle Bank, both of Jasper, Alabama.

2. *Wirt Adams Yerger, Jr. Legacy Trust, Jackson, Mississippi, Wirt Adams Yerger IV, as trustee, Ridgeland, Mississippi;* to join the Yerger Family Group, as a group acting in concert, to retain voting shares of PriorityOne Capital Corporation, and thereby indirectly retain voting shares of PriorityOne Bank, both of Magee, Mississippi.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–22489 Filed 10–10–23; 8:45 am]

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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 November 13, 2023.

A. Federal Reserve Bank of Dallas (Karen Smith, Director, Mergers & Acquisitions) 2200 North Pearl Street, Dallas, Texas 75201–2272. Comments can also be sent electronically to *Comments.applications@dal.frb.org:*

1. *Unifi Financial, Inc., San Antonio, Texas;* to become a bank holding company by acquiring Stockmens National Bank in Cotulla, Cotulla, Texas.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–22490 Filed 10–10–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2013–N–0804; FDA–2010–N–0598; FDA–2022–N–0081; FDA–2022–N–1886; FDA–2022–N–2657; FDA–2023–N–0895; FDA–2023–N–0343; FDA–2023–N–0134; FDA–2022–N–3208; FDA–2017–N–0084; FDA–2023–N–1168; FDA–2016–N–2474; FDA–2014–N–0086; FDA–2017–N–0366; FDA–2019–N–3657; FDA–2023–N–0155; FDA–2010–N–0601; FDA–2023–N–2757]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approvals

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is publishing a list of information collections that have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: JonnaLynn Capezzuto, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–3794, *PRAStaff@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: The following is a list of FDA information collections recently approved by OMB under section 3507 of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). The OMB control number and expiration date of OMB approval for each information collection are shown in table 1. Copies of the supporting statements for the information collections are available on the internet at *https://www.reginfo.gov/public/do/PRAMain.* An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

TABLE 1—LIST OF INFORMATION COLLECTIONS APPROVED BY OMB

Title of collection	OMB control No.	Date approval expires
Premarket Notification Submission 510(k), Subpart E	0910–0120	7/31/2026
Good Manufacturing Practice Regulations for Type A Medicated Articles	0910–0154	7/31/2026
Tradeoff Analysis of Prescription Drug Product Claims in Direct-to-Consumer and Healthcare Provider Promotion	0910–0917	7/31/2026
Endorser Status and Actual Use in Direct-to-Consumer Television Ads	0910–0918	7/31/2026
Assessing Physiological, Neural and Self-Reported Response to Tobacco Education Messages	0910–0919	7/31/2026
Imports and Electronic Import Entries	0910–0046	8/31/2026
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Quantitative Research on Front of Package Labeling on Packaged Foods	0910–0920	8/31/2026
Current Good Manufacturing Practice Regulations for Medicated Feed	0910–0152	9/30/2026
Medical Devices—Voluntary Improvement Program	0910–0922	9/30/2026

Dated: October 5, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–22465 Filed 10–10–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Institute on Drug Abuse Special Emphasis Panel, November 8, 2023, 10:00 a.m. to November 8, 2023, 5:00 p.m., National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 which was published in the **Federal Register** on October 3, 2023, FR Doc. 2023–21775, 88–FR 68128. This notice is being amended to change the meeting contact person from Dr. Preethy Nayar to Dr. Jenny Raye Browning, Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, National Institute on Drug Abuse, NIH, (301) 443–4577, *jenny.browning@nih.gov.* The meeting date, time and location will remain the same. The meeting is closed to the public.

Dated: October 4, 2023.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–22444 Filed 10–10–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–DTS#–36725; PPWOCRADI0, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting electronic comments on the significance of properties nominated before September 30, 2023, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted electronically by October 26, 2023.

ADDRESSES: Comments are encouraged to be submitted electronically to *National_Register_Submissions@nps.gov* with the subject line ''Public Comment on <property or proposed district name, (County) State>.'' If you have no access to email, you may send them via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C Street NW, MS 7228, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Sherry A. Frear, Chief, National Register of Historic Places/National Historic Landmarks Program, 1849 C Street NW, MS 7228, Washington, DC 20240, *sherry_frear@nps.gov,* 202–913–3763.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before September 30, 2023. Pursuant to Section 60.13 of 36 CFR part 60, comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Nominations submitted by State or Tribal Historic Preservation Officers.

Key: State, County, Property Name, Multiple Name (if applicable), Address/Boundary, City, Vicinity, Reference Number.

CALIFORNIA

Los Angeles County

Watts Happening Cultural Center, 1827 E 103rd St., Los Angeles, SG100009466

Riverside County

Evergreen Cemetery, 4414 Fourteenth St., Riverside, SG100009467

San Bernardino County

City Transfer and Storage Company Warehouse, 440 Oriental Ave., Redlands, SG100009474

Tuolumne County

Sierra Railway Locomotive No. 3, 10501 Reservoir Rd., Jamestown, SG100009468

DELAWARE

Sussex County

Prospect A.M.E. Church, 220 South Railroad Ave., Georgetown, SG100009498

DISTRICT OF COLUMBIA

District of Columbia

Eastern High School, (Public School Buildings of Washington, DC MPS), 1730 East Capitol Street NE, Washington, MP100009489

GEORGIA

Fulton County

Buildings at 523–549 Stewart Avenue, 565 Northside Dr. SW, 523 to 529 Metropolitan Parkway, 523 Stewart Avenue, 35 Stewart Avenue, Atlanta, SG100009517

Capitol View Apartments, 1191 Metropolitan Parkway, Atlanta, SG100009520

IOWA

Dallas County

Redfield GAR Hall, 1213 Thomas St., Redfield, SG100009484

Henry County

West Main Street Residential Historic District, 301–407 and 302–402 W Main St., Wayland, SG100009485

Louisa County

Fairview Church and Cemetery, 11501 Co Rd. H22, Wapello vicinity, SG100009486

Muscatine County

Nichols, Benjamin F. and Susan M. (Jenkins), House, 815 Ijem Avenue, Nichols, SG100009487

Fairport Biological Station Historic District, 3390 Highway 22, Fairport vicinity, SG100009488

KENTUCKY

Bath County

Sharpsburg Historic District, Main Street, Back Street, Public Street, Camp Street, West Tunnel Hill Road, Forest Avenue, Sharpsburg, SG100009521

Boone County

Dinsmore House, (Boone County, Kentucky MPS), W of Burlington on KY 18, Burlington vicinity, MP79000962

Boyle County

The Norton Center for the Arts, 600 West Walnut Street, Danville, SG100009524

Bracken County

F.A. Neider Company, (Augusta MRA), 207 Seminary, Augusta, MP100009535

Campbell County

Terrace Gardens, 1300 Dayton Avenue, Dayton, SG100009534

Jefferson County

Olds Motor Works, 728–730 S 4th Street, Louisville, SG100009532

East Smoketown District, 733, 801–827, 829 Logan Street, 929, 930 Mason Avenue, 925, 935 Lampton Street, South Fork of Beargrass Creek, Louisville, SG100009533

Kenton County

Magnus Metal Company Building, 4 Highway Avenue, Ludlow, SG100009531

Pulaski County

Pin Oak Site, Address Restricted, Somerset vicinity, SG100009538

Woodford County

Millville General Store, 5660 McCracken Pike, Frankfort, SG100009537

MARYLAND

Kent County

St. Dennis Roman Catholic Church Complex, 153 North Main Street (SR 213); Jct. of SR 290, Duck Puddle Rd., and Lambson Forest Rd., Galena, SG100009525

MASSACHUSETTS

Bristol County

Robinson Building, 37–41 Union St., Attleboro, SG100009506

Middlesex County

R. H. Long Company Factory, 59 Fountain St., Framingham, SG100009507

Nobscot Union Chapel, 871 Edgell Road, Framingham, SG100009508

MINNESOTA

Cass County

United States Forest Service, Remer District Ranger Station, (Federal Relief Construction in Minnesota, 1933–1943 MPS (AD)), 307 Main Street East, Remer, MP100009469

Hackensack Conservation Building, (Federal Relief Construction in Minnesota, 1933–1943 MPS (AD)), 101 Fleischer Ave., Hackensack, MP100009470

St. Louis County

Finnish Apostolic Lutheran Church of Embarrass, 5103 Highway 21, Embarass, SG100009477

NEBRASKA

Douglas County

South Omaha Main Street Historic District (Boundary Increase) (Additional Documentation), (Streetcar-Era Commercial Development in Omaha, Nebraska MPS), 5012–5020 S 24th St.; 4801–4927 S 25th St.; 2415 M St.; 2406–2425 N St.; 2424–2425 O St., Omaha, MP100009518

Seward County

Ella Eager House, 915 Walnut St., Beaver Crossing, SG100009512

NEW MEXICO

Bernalillo County

La Luz del Oeste, Loop One NW, Albuquerque, SG100009493

Medical Arts Historic District, (Central Albuquerque MPS), 711, 717, and 801 Encino Place NE and 1010 Las Lomas Boulevard NE, Albuquerque, MP100009505

OHIO

Clark County

Springfield Country Club, 2315 Signal Hill Rd., Springfield, SG100009480

Franklin County

Eastgate Apartments Historic District, 455–461 (odd) N Nelson Rd., 492–508 (even) Sunbury Rd., 1864–2112 (even) Maryland Ave., Columbus, SG100009503

OREGON

Lane County

Springfield High School, 525 Mill Street, Springfield, SG100009475

PENNSYLVANIA

Lebanon County

Schaefferstown Historic District, Roughly bounded by SR 501; Oak Street; Locust Street; Schaefferstown Cemetery; High Street; Fountain Park; the second blocks of S Market, S Lancaster, and S Carpenter streets and the rear parcel lines of properties on the south side of Heidelberg Avenue, Schaefferstown, SG100009511

SOUTH DAKOTA

Jerauld County

Zion Emmanuel Lutheran Church, 320 Oak Ave., Lane, SG100009483

TENNESSEE

Williamson County

Harlinsdale Farm (Boundary Increase), (Historic Family Farms in Middle Tennessee MPS), 315 Franklin Rd., Franklin, BC100009500

TEXAS

Austin County

Austin County Courthouse, 1 East Main St., Bellville, SG100009510

Dallas County

Bryan Tower, 2001 Bryan St., Dallas, SG100009495

Hunt County

Greenville Masonic Lodge No. 335 A.F. & A.M., 2615 Stonewall St., Greenville, SG100009494

Travis County

Baker School, 3908 Ave. B, Austin, SG100009490

Wichita County

First Wichita National Bank, 719 Scott Ave., Wichita Falls, SG100009496

UTAH

Uintah County

Dine-A-Ville Dinosaur, 905 E Main Street, Vernal, SG100009526

VIRGINIA

Augusta County

Long Meadow, 464 Long Meadow Road, Fishersville, SG100009530

Charlottesville INDEPENDENT CITY

Charlottesville Downtown Mall Historic District, Main Street from Water Street to East 7th Street and pedestrianized sections of 1st Street, East 2nd Street, East 3rd Street, and East 5th Street, Charlottesville, SG100009471

Northampton County

Cape Charles Rosenwald School, (Rosenwald Schools in Virginia MPS), 1500 Old Cape Charles Road, Cape Charles, MP100009536

Northumberland County

Julius Rosenwald High School, (Rosenwald Schools in Virginia MPS), 19602 Northumberland Highway, Reedville, MP100009479

Richmond INDEPENDENT CITY

High-Rise for the Elderly, 1202 N 151 Street, Richmond, SG100009501

Rockingham County

Elkton Historic District, Generally bounded by C Street and Gibbons Avenue to the north, North Stuart Avenue to the east, Wirt and Water Street to the south, and Shenandoah Avenue and 1st Street to the west, Elkton, SG100009529

WISCONSIN

Door County

Sunshine Shipwreck (Scow Schooner), (Great Lakes Shipwreck Sites of Wisconsin MPS), 1.1 miles southeast of the entrance of North Bay, Door County in Lake Michigan, Liberty Grove vicinity, MP100009481

La Crosse County

Christ Evangelical Lutheran Church of Burr Oak, 9113 State Highway 108, Farmington, SG100009482

Portage County

Sisters of St. Joseph Complex, 1300 Maria Drive, Stevens Point, SG100009476

A request for removal has been made for the following resource(s):

MINNESOTA

Wadena County

Peterson-Biddick Seed and Feed Company, 102 SE Aldrich Ave., Wadena, OT88003227

TENNESSEE

Rutherford County

Collier-Lane-Crichlow House, 500 N Spring St., Murfreesboro, OT78002629

An additional documentation has been received for the following resource(s):

KENTUCKY

Boone County

Dinsmore, James, House (Boundary Increase), (Boone County, Kentucky MPS), 5655 Burlington Pike, Burlington vicinity, AD05001307

NEBRASKA

Douglas County

South Omaha Main Street Historic District (Boundary Increase), Roughly S 24th St. between M and O Sts., Omaha, AD88002828

NORTH CAROLINA

Craven County

New Bern Historic District (Boundary Increase), Roughly 2 blks. of N Craven, blk. on Pasteur St., roughly along Bern, West, Cedar Sts. and Trent Court, New Bern, AD03000965

VIRGINIA

Richmond INDEPENDENT CITY

Hermitage Road Warehouse Historic District, Bounded by Hermitage & Overbrook Rds., Sherwood Ave., I–95, Richmond (Independent City), AD14000302

Nomination(s) submitted by Federal Preservation Officers:

The State Historic Preservation Officer reviewed the following nomination(s) and responded to the Federal Preservation Officer within 45 days of receipt of the nomination(s) and supports listing the properties in the National Register of Historic Places.

CALIFORNIA

Humboldt County

Falk Archaeological District, Address Restricted, Eureka, SG100009504

DISTRICT OF COLUMBIA

District of Columbia

Benjamin Ogle Tayloe House, 723 Madison Place NW (formerly 21 Madison Place NW), Washington, SG100009491

MINNESOTA

Ramsey County

Mni Owe Sni/Coldwater Spring, Address Restricted, St. Paul vicinity, SG100009497

WYOMING

Sublette County

Big Sandy Lodge, 1050 Mud Lake Road, Boulder, SG100009516

Authority: Section 60.13 of 36 CFR part 60

Dated: October 2, 2023.

Sherry A. Frear,

Chief, National Register of Historic Places/National Historic Landmarks Program.

[FR Doc. 2023–22476 Filed 10–10–23; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1373]

Certain Electronic Devices, Including Smartphones, Computers, Tablet Computers, and Components Thereof; Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on September 1, 2023, under section 337 of the Tariff Act of 1930, as amended, on behalf of InterDigital, Inc., InterDigital VC Holdings and InterDigital Patent Holdings, Inc., of Wilmington, Delaware; and InterDigital Madison Patent Holdings SAS of France. The complaint, as supplemented, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain electronic devices, including smartphones, computers, tablet computers, and components thereof by reason of the infringement of certain claims of U.S. Patent No. 10,250,877 (''the '877 patent''); U.S. Patent No. 8,674,859 (''the '859 patent''); U.S. Patent No. 9,674,556 (''the '556 patent''); U.S. Patent No. 9,173,054 (''the '054 patent''); and U.S. Patent No. 8,737,933 (''the '933 patent''). The complaint further alleges that an industry in the United States exists, or is in the process of being established, as required by the applicable Federal Statute. The complainant requests that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov*. For help accessing EDIS, please email *EDIS3Help@usitc.gov*. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov*.

FOR FURTHER INFORMATION CONTACT: Pathenia M. Proctor, The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

SUPPLEMENTARY INFORMATION:

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2023).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on October 4, 2023, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 1, 4, 7, and 8 of the '877 patent; claims 10 and 15 of the '859 patent; claims 1, 3–5, 7 and 8 of the '566 patent; claims 1 and 23 of the '933 patent; and claims 1 and 23 of the '054 patent, and whether an industry in the United States exists or is in the process of being established as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is ''smartphones, computers, tablet computers, and components thereof'';

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are:

InterDigital, Inc., 200 Bellevue Parkway, Suite 300, Wilmington, DE 19809

InterDigital VC Holdings, Inc., 200 Bellevue Parkway, Suite 300, Wilmington, DE 19809

InterDigital Patent Holdings, Inc., 200 Bellevue Parkway, Suite 300, Wilmington, DE 19809

InterDigital Madison Patent Holdings SAS, 3 Rue Du Colonel Moll, Paris, France 75017

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Lenovo Group Limited, 23rd Floor, Lincoln House, Taikoo Place, 979 King's Road, Quarry Bay, Hong Kong SAR

Lenovo (United States) Inc., 8001 Development Dr., Morrisville, North Carolina 27560

Motorola Mobility LLC, 222 W Merchandise Mart Plaza, Suite 1800, Chicago, Illinois 60654

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW, Suite 401, Washington, DC 20436; and

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainants of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: October 5, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–22467 Filed 10–10–23; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Current Population Survey—Basic Labor Force

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Bureau of Labor Statistics (BLS)-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 November 13, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Nicole Bouchet by telephone at 202–693–0213, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The labor force data gathered through the Current Population Survey (CPS) are provided to users in the greatest detail possible, consistent with the demographic information obtained in the survey. In brief, the labor force data can be broken down by sex, age, race, ethnicity, marital status, family composition, educational level, certification and licensing status, disability status, and various other characteristics. Through such breakdowns, one can focus on the employment situation of specific population groups as well as on the general trends in employment and unemployment. Moreover, the survey yields data on the characteristics of people who have stopped looking for work because they believe no jobs are available, also referred to as discouraged workers. Information of this type can be obtained only through demographically-oriented surveys such as the CPS. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on May 30, 2023 (88 FRN 34543).

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–BLS.

Title of Collection: Current Population Survey—Basic Labor Force.

OMB Control Number: 1220–1000.

Affected Public: Individuals or Households.

Total Estimated Number of Respondents: 42,500.

Total Estimated Number of Responses: 510,000.

Total Estimated Annual Time Burden: 68,850 hours.

Total Estimated Annual Other Costs Burden: $0.

Authority: 44 U.S.C. 3507(a)(1)(D).

Nicole Bouchet,

Acting Departmental Clearance Officer.

[FR Doc. 2023–22435 Filed 10–10–23; 8:45 am]

BILLING CODE 4510–24–P

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0001]

Sunshine Act Meetings

TIME AND DATE: Weeks of October 9, 16, 23, 30, November 6, 13, 2023. The schedule for Commission meetings is subject to change on short notice. The NRC Commission Meeting Schedule can be found on the internet at: *https://www.nrc.gov/public-involve/public-meetings/schedule.html.*

PLACE: The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.,* braille, large print), please notify Anne Silk, NRC Disability Program Specialist, at 301–287–0745, by videophone at 240–428–3217, or by email at *Anne.Silk@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

STATUS: Public.

Members of the public may request to receive the information in these notices electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555, at 301–415–1969, or by email at *Betty.Thweatt@nrc.gov.*

MATTERS TO BE CONSIDERED:

Week of October 9, 2023

There are no meetings scheduled for the week of October 9, 2023.

Week of October 16, 2023—Tentative

Thursday, October 19, 2023

9:00 a.m. Hearing on Construction Permit for Kairos Hermes Non-Power Test Reactor: Section 189a of the Atomic Energy Act Proceeding (Public Meeting); (Contact: Matthew Hiser: 301–415–2454; Tami Dozier: 301–415–2272)

Additional Information: The meeting will be held in the Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland. The public is invited to attend the Commission's meeting in person or watch live via webcast at the Web address—*https://video.nrc.gov/.*

Week of October 23, 2023—Tentative

There are no meetings scheduled for the week of October 23, 2023.

Week of October 30, 2023—Tentative

Thursday, November 2, 2023

9:00 a.m. Strategic Programmatic Overview of the Operating Reactors and New Reactors Business Lines (Public Meeting); (Contact: Jennie Rankin: 301–415–1530)

Additional Information: The meeting will be held in the Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland. The public is invited to attend the Commission's meeting in person or watch live via webcast at the Web address—*https://video.nrc.gov/.*

Week of November 6, 2023—Tentative

There are no meetings scheduled for the week of November 6, 2023.

Week of November 13, 2023—Tentative

Thursday, November 16, 2023

9:00 a.m. Briefing on Region I Activities and External Engagement (Public Meeting); (Contact: Wesley Held: 301–287–3591)

Additional Information: The meeting will be held at the Market and Broad Conference Room, 475 Allendale Rd., Suite 102, King of Prussia, Pennsylvania. The public is invited to attend the Commission's meeting in person or watch live via webcast at the Web address—*https://video.nrc.gov/.*

CONTACT PERSON FOR MORE INFORMATION: For more information or to verify the status of meetings, contact Wesley Held at 301–287–3591 or via email at *Wesley.Held@nrc.gov.*

The NRC is holding the meetings under the authority of the Government in the Sunshine Act, 5 U.S.C. 552b.

Dated: October 6, 2023.

For the Nuclear Regulatory Commission.

Wesley W. Held,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2023–22585 Filed 10–6–23; 4:15 pm]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2022–90; CP2021–43]

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:* October 11, 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

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).:* CP2022–90; *Filing Title:* USPS Notice of Amendment to Priority Mail & First-Class Package Service Contract 220, Filed Under Seal; *Filing Acceptance Date:* October 3, 2023; *Filing Authority:* 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* October 11, 2023.

2. *Docket No(s).:* CP2021–43; *Filing Title:* USPS Notice of Amendment to Parcel Select Contract 44, Filed Under Seal; *Filing Acceptance Date:* October 3, 2023; *Filing Authority:* 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* October 11, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2023–22438 Filed 10–10–23; 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).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98684; File No. SR–CboeBZX–2023–075]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule Regarding Rebate Tiers

October 4, 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 29, 2023, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') 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 Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') proposes to amend its Fee Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule applicable to its equities trading platform (''BZX Equities'') by (1) discontinuing Step-Up Tier 1; and (2) adopting a new Cross Asset Tier. The Exchange proposes to implement these changes effective October 2, 2023.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues that do not have similar self-regulatory responsibilities under the Securities Exchange Act of 1934 (the ''Act''), to which market participants may direct their order flow. Based on publicly available information,[3] no single registered equities exchange has more than 14% of the market share. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. The Exchange in particular operates a ''Maker-Taker'' model whereby it pays rebates to members that add liquidity and assesses fees to those that remove liquidity. The Exchange's Fee Schedule sets forth the standard rebates and rates applied per share for orders that provide and remove liquidity, respectively. Currently, for orders in securities priced at or above $1.00, the Exchange provides a standard rebate of $0.00160 per share for orders that add liquidity and assesses a fee of $0.0030 per share for orders that remove liquidity.[4] For orders in securities priced below $1.00, the Exchange provides a standard rebate of $0.00009 per share for orders that add liquidity and assesses a fee of 0.30% of the total dollar value for orders that remove liquidity.[5] Additionally, in response to the competitive environment, the Exchange also offers tiered pricing which provides Members opportunities to qualify for higher rebates or reduced fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria.

Under footnote 2 of the Fee Schedule, the Exchange currently offers various Step-Up Tiers that provide enhanced rebates for orders yielding fee codes B,[6] V[7] and Y[8] where a Member reaches certain add volume-based criteria, including ''growing'' its volume over a certain baseline month. The Exchange now proposes to discontinue Step-Up Tier 1 as the Exchange no longer wishes to, nor is required to, maintain such tier. More specifically, the proposed change removes this tier as the Exchange would rather redirect future resources and funding into other programs and tiers intended to incentivize increased order flow.

The Exchange also proposes to introduce a new Cross Asset Tier under footnote 2, which is designed to incentivize Members to achieve certain levels of participation on both the Exchange's equities and options platform (''BZX Options''). The proposed criteria is as follows:

- Cross Asset Tier 1 provides a rebate of $0.0033 per share for securities priced above $1.00 for qualifying orders (*i.e.,* orders yielding fee codes B, V or Y) where (1) Member has a Step-Up ADAV[9] from June 2023 ≥ 7,000,000; and (2) Member has a Customer ADAV[10] on BZX Options ≥ 10,000.

The proposed Cross Asset Tier is intended to provide an additional manner to incentive Members to add displayed liquidity on the Exchange while also increasing participation on BZX Options. The Exchange believes the addition of the Cross Asset Tier will incentivize Members to grow their volume on the Exchange, thereby contributing to a deeper and more liquid market, which benefits all market participants and provides greater execution opportunities on the Exchange.

Additionally, the Exchange notes that the proposed Cross Asset Tier will

[3] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (September 22, 2023), available at *https://www.cboe.com/us/equities/_statistics/.*

[4] *See* BZX Equities Fee Schedule, Standard Rates.

[5] *Id.*

[6] Fee code B is appended to orders that add liquidity to BZX in Tape B securities.

[7] Fee code V is appended to orders that add liquidity to BZX in Tape A securities.

[8] Fee code Y is appended to orders that add liquidity to BZX in Tape C securities.

[9] Step-Up ADAV means ADAV in the relevant baseline month subtracted from current ADAV. ADAV means average daily volume calculated as the number of shares added per day. ADAV is calculated on a monthly basis.

[10] Customer ADAV means average daily volume calculated as the number of contracts added for the account of a Priority Customer as defined in BZX Rule 16.1. ADAV is calculated on a monthly basis. *See* BZX Options Fee Schedule, Definitions.

expire no later than December 31, 2023, which the Exchange will indicate on the Exchange's fee schedule. Step-Up Tiers in general are designed to provide Members with additional opportunities to receive enhanced rebates by increasing their order flow to the Exchange, which further contributes to a deeper, more liquid market and provides even more execution opportunities for active market participants. Like other Step-Up Tiers on the Exchange,[11] the proposed Cross Asset Tier is designed to give members an additional opportunity to receive an enhanced rebate for orders meeting the applicable criteria. Increased overall order flow benefits all Members by contributing towards a robust and well-balanced market ecosystem.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[12] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5) [13] 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) [14] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers as well as section 6(b)(4) [15] as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities.

As described above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The Exchange believes that its proposal to introduce a Cross Asset Tier reflects a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all Members. Additionally, the Exchange notes that relative volume-based incentives and discounts have been widely adopted by exchanges,[16] including the Exchange,[17] and are reasonable, equitable and non-discriminatory because they are open to all Members on an equal basis and provide additional benefits or discounts that are reasonably related to (i) the value to an exchange's market quality and (ii) associated higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns. Competing equity exchanges offer similar tiered pricing structures, including schedules of rebates and fees that apply based upon members achieving certain volume and/or growth thresholds, as well as assess similar fees or rebates for similar types of orders, to that of the Exchange.[18]

In particular, the Exchange believes its proposal to introduce a Cross Asset Tier is reasonable because the revised tier will be available to all Members and provide all Members with an additional opportunity to receive an enhanced rebate. The Exchange further believes the proposed Cross Asset Tier will provide a reasonable means to encourage liquidity adding displayed orders in Members' order flow to the Exchange and to incentivize Members to continue to provide liquidity adding volume to the Exchange by offering them an additional opportunity to receive an enhanced rebate on qualifying orders. An overall increase in activity would deepen the Exchange's liquidity pool, offers additional cost savings, support the quality of price discovery, promote market transparency and improve market quality, for all investors.

The Exchange believes that the proposed Cross Asset Tier represents an equitable allocation of fees and rebates and is not unfairly discriminatory because all Members will be eligible for the proposed tier and have the opportunity to meet the tier's criteria and receive the corresponding enhanced rebate if such criteria is met. To the extent a Member participates on BZX Equities but not on BZX Options, the Exchange continues to believe that its proposal represents an equitable allocation of fees and rebates and is not unfairly discriminatory with respect to such Member based on the overall benefit to the Exchange resulting from the success of its options platform. Particularly, the Exchange believes that additional such success allows the Exchange to continue to provide and potentially expand its existing incentive programs to the benefit of all participants on the Exchange, regardless of whether they participate on BZX Options or not. Without having a view of activity on other markets and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would definitely result in any Members qualifying the new proposed tiers. While the Exchange has no way of predicting with certainty how the proposed changes will impact Member activity, based on the prior months volume, the Exchange anticipates that at least one Member will be able to satisfy the proposed criteria for the proposed Cross Asset Tier. The Exchange also notes that proposed changes will not adversely impact any Member's ability to qualify for enhanced rebates or reduced fees offered under other tiers. Should a Member not meet the proposed new criteria for the proposed Cross Asset Tier, the Member will merely not receive that corresponding enhanced rebate.

Additionally, the Exchange believes that its proposal to eliminate Step-Up Tier 1 is reasonable because the Exchange is not required to maintain this tier or provide Members an opportunity to receive enhanced rebates. The Exchange believes the proposal to eliminate this tier is also equitable and not unfairly discriminatory because it applies to all Members (*i.e.,* the tier will not be available for any Member). The Exchange also notes that the proposed rule change to remove this tier merely results in Members not receiving an enhanced rebate, which, as noted above, the Exchange is not required to offer or maintain. Furthermore, the proposed rule change to eliminate Step-Up Tier 1 enables the Exchange to redirect resources and funding into other programs and tiers intended to incentivize increased order flow.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance

[11] *See* BZX Equities Fee Schedule, Footnote 2, Step-Up Tiers.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] *Id.*

[15] 15 U.S.C. 78f(b)(4).

[16] *See e.g.,* EDGX Equities Fee Schedule, Footnote 1, Add/Remove Volume Tiers.

[17] *See e.g.,* BZX Equities Fee Schedule, Footnote 1, Add/Remove Volume Tiers.

[18] *See e.g.,* MIAX Pearl Options Fee Schedule, Transaction Rebates/Fees; The Nasdaq Options Market LLC (''NOM'') Pricing Schedule, Options 7, Section 2.

of the purposes of the Act. Rather, as discussed above, the Exchange believes that the proposed changes would encourage the submission of additional order flow to a public exchange, thereby promoting market depth, execution incentives and enhanced execution opportunities, as well as price discovery and transparency for all Members. As a result, the Exchange believes that the proposed changes further the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.''

The Exchange believes the proposed rule changes do not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposed Cross Asset Tier will apply to all Members equally in that all Members are eligible for the tier, have a reasonable opportunity to meet the tier's criteria and will receive the enhanced rebate on their qualifying orders if such criteria is met. The Exchange does not believe the proposed changes burden competition, but rather, enhances competition as it is intended to increase the competitiveness of BZX by adopting pricing incentives in order to attract order flow and incentivize participants to increase their participation on the Exchange, providing for additional execution opportunities for market participants and improved price transparency. Additionally, the Exchange believes that the proposed criteria based on total options volume applicable to BZX Options Priority Customers will provide an additional incentive to those Priority Customers to send additional orders to BZX Options, which in turn provides additional liquidity in the market. Greater overall order flow, trading opportunities, and pricing transparency benefits all market participants on the Exchange, as well as its affiliate options exchange, by enhancing market quality and continuing to encourage Members to send orders, thereby contributing towards a robust and well-balanced market ecosystem. The proposed change to discontinue Step-Up Tier 1 will not impose any burden on intramarket competition because the changes apply to all Members uniformly, as in, the tier will not longer be available to any Member.

Next, the Exchange believes the proposed rule changes does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow, including other equities exchanges, off-exchange venues, and alternative trading systems. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single equities exchange has more than 14% of the market share.[19] Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [20] The fact that this market is competitive has also long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . . .''.[21] Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[19] *Supra* note 3.

[20] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[21] *NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act [22] and paragraph (f) of Rule 19b–4 [23] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–CboeBZX–2023–075 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–CboeBZX–2023–075. 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

[22] 15 U.S.C. 78s(b)(3)(A).

[23] 17 CFR 240.19b–4(f).

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–CboeBZX–2023–075 and should be submitted on or before November 1, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–22437 Filed 10–10–23; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[License No. 06/06–0356]

Independent Bankers Capital Fund IV, L.P.; Notice Seeking Exemption Under the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that Independent Bankers Capital Fund IV, L.P., 5949 Sherry Lane, Suite 1472, Dallas, TX 75225, a Federal Licensee under the Small Business Investment Act of 1958, as amended (''Act''), in connection with the financing of a small concern, has sought an exemption under Section 312 of the Act and 13 CFR 107.730 of the Code of Federal Regulations, *Financings which Constitute Conflict of Interest,* Independent Bankers Capital Fund IV, L.P. (''Licensee'') is proposing to provide financing to Central States Bus Sales, Inc. (''Company'') to support its growth.

The proposed transaction is brought within the purview of 13 CFR 107.730 because Diamond State Ventures II, L.P. (''DSV''), an Associate of Licensee as defined in 13 CFR 107.50, holds a 10% or greater equity interest in the Company. By virtue of DSV's equity ownership of the Company, the Company is also considered an Associate of the Licensee.

Therefore, the proposed transaction requires a regulatory exemption pursuant to 13 CFR 107.730. Notice is hereby given that any interested person may submit written comments on the transaction within fifteen days of the date of this publication to the Associate Administrator, Office of Investment and Innovation, U.S. Small Business Administration, 409 Third Street SW, Washington, DC 20416.

Bailey DeVries,

Associate Administrator, Office of Investment and Innovation, U.S. Small Business Administration.

[FR Doc. 2023–22441 Filed 10–10–23; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2017–0133]

Commercial Driver's License (CDL): Application for Exemption Renewal; U.S. Custom Harvesters, Inc.

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of provisional renewal of exemption; request for comments.

SUMMARY: FMCSA announces its decision to provisionally renew a U.S. Custom Harvesters, Inc. (USCHI) exemption from the ''K'' intrastate restriction on commercial driver's licenses (CDLs) for custom harvester drivers operating in interstate commerce for a two-year period, with additional terms and conditions. FMCSA's regulations currently provide an exception to the minimum age requirements for drivers of commercial motor vehicles (CMVs) controlled and operated by a person engaged in interstate custom harvesting. However, under the Agency's CDL regulations, States may include an intrastate-only (or ''K'') restriction for these drivers. This provisional renewal of the exemption continues relief from the CDL provision for two years.

DATES: This renewed exemption is effective October 3, 2023, through October 3, 2025. Comments must be received on or before November 13, 2023.

ADDRESSES: You may submit comments identified by Federal Docket Management System (FDMS) Number FMCSA–2017–0133 by any of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* See the Public Participation and Request for Comments section below for further information.
- *Mail:* Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building, Ground Floor, 1200 New Jersey Avenue SE, between 9 a.m. and 5 p.m. E.T., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Each submission must include the Agency name and the docket number (FMCSA–2017–0133) for this notice. Note that DOT posts all comments received without change to *www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *www.regulations.gov* at any time or visit the ground level of the West Building, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

Privacy Act: In accordance with 49 U.S.C. 31315(b), DOT solicits comments from the public to better inform its exemption process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov.* As described in the system of records notice DOT/ALL 14–FDMS, which can be reviewed at *https://www.transportation.gov/privacy,* the comments are searchable by the name of the submitter.

FOR FURTHER INFORMATION CONTACT: Ms. La Tonya Mimms, Chief, Driver and Carrier Operations Division, Office of Carrier, Driver and Vehicle Safety Standards, FMCSA, at (202) 366–9220 or *latonya.mimms@dot.gov.* If you have questions on viewing or submitting material to the docket, contact Dockets Operations at (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

[24] 17 CFR 200.30–3(a)(12).

Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA–2017–0133), indicate the specific section of this document to which the comment applies, and provide a reason for your suggestions or recommendations. You may submit your comments and material online, by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so the agency can contact you if it has questions regarding your submission.

To submit your comment online, go to *www.regulations.gov,* put the docket number ''FMCSA–2017–0133'' in the keyword box, and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, click the ''Comment'' button, and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party, and then submit. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope. FMCSA will consider all comments and material received during the comment period.

II. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315(b) to grant exemptions from the FMCSRs. FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public with an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted and determines whether granting the exemption would likely maintain a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305(a)). The Agency must publish its decision in the **Federal Register** (49 CFR 381.315(b)). If granted, the notice will identify the name of the person or class of persons receiving the exemption and the regulatory provision from which that party is exempt, the effective period, and all terms and conditions of the exemption (49 CFR 381.315(c)(1)). If the exemption is denied, the notice will explain the reason for the denial (49 CFR 381.315(c)(2)). The exemption may be renewed (49 CFR 381.300(b)).

III. Background

USCHI describes the operations of its member companies as supplying equipment and labor to assist farmers with harvesting during their busiest seasons and provides the following summary of the nature of these operations:

> Typically, there are two different classes of operations, grain harvesting and forage harvesting. A grain harvester uses combines to harvest wheat, corn, barley, canola, sunflowers, soybeans, and grain sorghum, among others. These crop products are transported to an elevator or on-farm storage, where the crop is stored and later transported elsewhere to be processed into products for public use. A forage harvester uses a chopper to harvest whole-plant crops such as corn, sorghum, milo, triticale, and alfalfa. These crops are used for silage to feed livestock in dairies and feedlots. Some operators harvest crops such as cotton that require other specialized equipment. Custom harvesters travel from State to State and can spend from a few days to several months cutting crops for one farmer.

Customer harvesters frequently employ drivers younger than 21 years of age, who are issued CDLs with a ''K'' restriction that makes the license valid only for operations within the issuing state (49 CFR 383.23(a)(2) and 49 CFR 383.153(a)(10)(vii)). Under an exception in place since 1971, the 21-year-old age requirement, however, does not apply to a CMV driver who drives a CMV controlled and operated by a person engaged in custom-harvesting operations, provided that certain conditions are met. (49 CFR 391.2). Those drivers are therefore allowed to drive in interstate custom harvesting operations notwithstanding the ''K'' restriction on their licenses.

USCHI states that even though CMV drivers engaged in custom harvesting are excepted from the 21-year-old requirement, they are frequently cited during roadside inspections because of the presence of the ''K'' restriction on their license. USCHI states that this issue impacts the safety records of drivers and employers.

On October 3, 2018, FMCSA granted USCHI's original exemption request, providing relief from the requirements of 49 CFR 383.23(a)(2) and 49 CFR 383.153(a)(10)(vii) for a period of five years (expiring October 3, 3023). FMCSA noted that although it was granting the exemption, the exemption did not require any special action or processing by the state driver licensing agencies, who will continue to place the ''K'' restriction when called for, but enforcement officers will disregard it in situations involving drivers who can demonstrate eligibility for the custom harvester exemption. (83 FR 49977, 49978).

USCHI asks the Agency to renew its exemption for another five-year period, subject to terms and conditions, to allow law enforcement officers to determine that the driver is operating in custom harvester operations. For example, USCHI proposes that the driver be required to provide at least three methods of verification while *en route.* A copy of USCHI's request for an exemption renewal is available for review in the docket for this notice.

IV. Equivalent Level of Safety

FMCSA is not aware of any evidence showing that allowing the exemption concerning the intrastate-only ''K'' restriction, has resulted in any degradation in safety. Interstate operations for non-CDL custom harvester drivers younger than 21 are allowed pursuant to 49 CFR 391.2(a), and intrastate operations for CDL custom harvester drivers under the age of 21 can be accomplished under 49 CFR 383.23(a)(2) and 383.153(a)(10)(vii). The requested exemption allows interstate CDL custom harvester drivers under the age of 21, which mirror what these drivers are allowed to do in intrastate custom harvester operations.

The Agency notes that, likely through miscommunications and misunderstandings between the Agency, USCHI and its membership, certain crashes involving the drivers operating under the exemption were not reported to the Agency during the first 5-year exemption. FMCSA's review of USCHI members' data indicates there have been crashes which could be considered preventable. The Agency obtained 14 police crash reports involving custom harvester operators under the age of 21. However, given the 5-year period of the exemption, and a lack of information on the age peer group within the agricultural driver population, there is insufficient information to conclude that the exemption has resulted in a degradation of safety.

FMCSA therefore concludes that provisionally extending the exemption for two years and enhancing the terms and conditions to assist the Agency's oversight of the exemption will likely maintain a level of safety that is equivalent to, or greater than, the level of safety that would be achieved without the exemption. During the two-year period of the provisionally extended exemption, in addition to

enhancing the terms and conditions of the exemption, FMCSA will initiate a data analysis project to examine the safety performance of custom harvester drivers under the age of 21, in comparison to other drivers in the agriculture sector of the motor carrier industry. The data collection period will occur during the fall of 2023, after which FMCSA will begin analyzing the data. The Agency currently has violation data on motor carriers that utilize the transportation of agricultural commodities exception to the hours-of-service rules, and the new study will assist the Agency in conducting a more in-depth analysis of their safety performance as a group and the safety performance of the subset of custom harvester drivers under the age of 21. This information will aid in assessing the safety impacts of the USCHI exemption prior to the expiration of the two-year provisional renewal.

V. Exemption Decision

A. Grant of Two-Year Exemption

FMCSA provisionally renews the exemption for a period of two years, subject to the new terms and conditions of this decision and the absence of public comments and data that would cause the Agency to terminate the exemption under Sec. V.E. below. The exemption from the ''K'' intrastate restriction on CDLs held by custom harvester drivers operating in interstate commerce is otherwise effective October 3, 2023, through October 3, 2025, at 11:59 p.m. local time, unless renewed or rescinded.

B. Applicability of Exemption

Custom Harvester Drivers

Custom harvester drivers will be able to display this exemption notice to help explain that when operating in that capacity, they are permitted to operate outside the state issuing their CDL even though the license has a ''K'' (intrastate only) restriction.

Enforcement Officers

This exemption notice will explain to law enforcement officers that 49 CFR 391.2(a) authorizes custom harvester drivers to operate in interstate commerce even though they are under 21 years of age. The notice will explain that a ''K'' restriction on these drivers' CDLs does not limit them from driving outside the license-issuing state when they are operating as custom harvesters in accordance with 49 CFR 391.2(a).

State Driver Licensing Agencies

This exemption requires no action or inaction on the part of the state driver licensing agencies. They will continue to issue CDLs with a ''K'' restriction to drivers under the age of 21.

C. Terms and Conditions

Requirements for the First 90 Days of Provisional Two-Year Renewal

For the first 90 days of this provisional two-year renewal of the exemption, motor carriers and drivers are subject to the following terms and conditions:

(1) Drivers for custom harvesters operating in interstate commerce shall be exempt from any intrastate-only ''K'' restriction on their CDLs when operating under the provisions of this exemption.

(2) Drivers must have a copy of this notice in their possession while operating under the terms of the exemption. The exemption document must be presented to law enforcement officials upon request.

(3) Drivers to be included in this exemption are identified in 49 CFR 391.2 as those operating a CMV to transport farm machinery, supplies, or both, to or from a farm for custom harvesting operations on a farm; or transport custom-harvested crops to storage or market.

(4) To ensure that the driver is authentically operating as a custom harvester, he or she should be able to provide at least three of the following methods of verification:

(a) The driver may have on hand a valid custom harvesting document such as a current-date agricultural commodity scale sheet, a current-date custom harvesting load sheet, an official company document stating the company's purpose, etc.;

(b) The CMV may have license plates specific to custom harvesting, or the verbiage ''Harvesting'' may be part of the business signage on the vehicle;

(c) The CMV may be designed to haul a harvested agricultural commodity or equipment for harvesting or be a support vehicle for custom-harvesting operations, such as a service truck;

(d) The CMV may be hauling a harvested agricultural commodity or equipment for the purpose of custom harvesting;

(e) The CMV may have a newly harvested commodity or remnants on board;

(f) The driver will be able to provide a verifiable location of the current harvesting operation or delivery location for a harvested commodity.

Requirements After the First 90 Days of the Provisional Renewal

After the first 90 days of this exemption notice, motor carriers and drivers are subject to the following terms and conditions:

(1) Drivers for custom harvesters operating in interstate commerce shall be exempt from any intrastate-only ''K'' restriction on their CDLs when operating under the provisions of this exemption.

(2) Drivers must have a copy of this notice in their possession while operating under the terms of the exemption. The exemption document must be presented to law enforcement officials upon request.

(3) Drivers to be included in this exemption are identified in 49 CFR 391.2 as those operating a CMV to transport farm machinery, supplies, or both, to or from a farm for custom harvesting operations on a farm; or transport custom-harvested crops to storage or market.

(4) The USCHI must provide FMCSA with a list of motor carrier USDOT numbers that are engaged in custom farm operations. The driver must be working for a motor carrier with a USDOT number identified in the most current list provided to FMCSA by USCHI.

Requirements for Notification to FMCSA

Within 30 days of this notice, the USCHI must provide FMCSA with the USDOT numbers of the motor carriers that will be operating under this exemption. The USCHI must notify FMCSA within five business days of any crash (as defined in 49 CFR 390.5), involving any of the drivers operating under the terms of the exemption. The notification must include the following information:

(a) Identity of Exemption: ''USCHI Renewal,''

(b) Name of the custom harvester employer and USDOT number,

(c) Date of the crash,

(d) Origin and intended destination of the USCHI driver's trip and the distance (in miles) of the crash from the driver's home terminal,

(e) Driver's name, license number, and age,

(f) Vehicle number and State license number,

(g) Number of individuals suffering physical injury (including fatalities),

(h) Number of fatalities,

(i) The police-reported circumstances of the crash,

(j) Whether the driver was cited for violation of any traffic laws or motor carrier safety regulations,

(k) The driver's total driving time and total on-duty time period prior to the accident,

(l) Information about what safety training, if any, was provided to the

under-21 years of age farm custom operator driver after the driver obtained a CDL, and

(m) A scanned copy of the police accident report.

Reports filed under this provision shall bee-mailed to *MCPSD@DOT.GOV.*

D. Preemption

In accordance with 49 U.S.C. 31315(d), as implemented by 49 CFR 381.600, during the period this exemption is in effect, no state shall enforce any law or regulation applicable to interstate commerce that conflicts with or is inconsistent with this exemption with respect to a firm or person operating under the exemption. States may, but are not required to, adopt the same exemption with respect to operations in intrastate commerce.

E. Termination

The exemption will be rescinded if: (1) the USCHI, motor carriers, and drivers operating under the exemption fail to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objects of 49 U.S.C. 31136(e) and 31315.

Should FMCSA receive notice of any potential adverse safety impacts, FMCSA will take all steps necessary to protect the public interest, including revocation or restriction of the exemption if necessary. FMCSA may immediately revoke or restrict the exemption for failure to comply with its terms and conditions.

VI. Request for Comments

In accordance with 49 U.S.C. 31315(b), FMCSA requests public comment from all interested parties on USCHI's application for exemption renewal. All comments received before the close of business on the comment closing date indicated at the beginning of this notice will be considered and will be available for examination in the docket at the location listed under the **ADDRESSES** section of this notice. Comments received after the comment closing date will be filed in the public docket and will be considered to the extent practicable. In addition to late comments, FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should continue to examine the public docket for new material.

Robin Hutcheson,

Administrator.

[FR Doc. 2023–22442 Filed 10–10–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Internal Revenue Service Advisory Council; Meeting

AGENCY: Internal Revenue Service, Department of Treasury.

ACTION: Notice of meeting.

SUMMARY: The Internal Revenue Service Advisory Council will hold a public meeting.

DATES: The meeting will be held Thursday, November 9, 2023.

ADDRESSES: The meeting will be held in person.

FOR FURTHER INFORMATION CONTACT: Ms. Anna Brown, Office of National Public Liaison, at 202–317–6564 or send an email to *PublicLiaison@irs.gov.*

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to 5 U.S.C. 10(a)(2) of the Federal Advisory Committee Act, that a public meeting of the Internal Revenue Service Advisory Council (IRSAC) will be held on Thursday, November 9, 2023, from 9:00 a.m. to 1:00 p.m. EST.

The meeting will be held in person at 1111 Constitution Ave. NW, Washington, DC. To register, members of the public may contact Ms. Anna Brown at 202–317–6564 or send an email to *PublicLiaison@irs.gov.* Attendees are encouraged to arrive at the IRS visitor center at 1111 Constitution Ave. NW, 30 minutes before the meeting begins.

Issues to be discussed may include, but are not limited to: *Budget Shortfalls Need to be Addressed with Lawmakers; Section 6050W Guidance Needed for Filers of Form 1099–K; Corrections of State Information on Information Returns Should be Included in the Combined Federal/State Filing (CF/SF) Program; Section 302 Escrow and Certification Procedure; Increase Use of Pre-Filing Agreements and Other Tax Certainly Programs; Accelerate Issuance of Section 174 Guidance; Timely Obtain EINs to Comply with the Corporate Transparency Act Requirements; Accelerate Issuance of IRS Form 6166, Certificate of Residency; Acceptance of Tax Payments in Cryptocurrency; Impact on Taxpayers of Modifying Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return; Form 1099–K Reporting; Modifying Form 2290, Heavy Highway Vehicle Use Tax Return; IRS Paid Preparer Due Diligence Penalties; Field Collections Customer Service; Recommendations on Self-Correction Guidance for Employee Plans; Recommendations for the Non-Bank Trustee Program; Recommendations for More Effective Engagement Between the IRS and Exempt Organizations; Recommendations for Effective Engagement for Section 218 and 218A Agreements; Recommendations for Increasing the Tax Reporting Threshold for Slot Machine Jackpot Winnings; Prior Year DIY Product; Notices and Communication; Forms Modernization;* and *Modernizing the ITIN Process.* Last-minute agenda changes may preclude advance notice.

Should you wish the IRSAC to consider a written statement germane to the Council's work, file the statement by sending an email to *PublicLiaison@irs.gov* by November 7, 2023.

Dated: October 4, 2023.

John A. Lipold,

Designated Federal Official, Office of National Public Liaison, Internal Revenue Service.

[FR Doc. 2023–22436 Filed 10–10–23; 8:45 am]

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FEDERAL REGISTER

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Part II

Securities and Exchange Commission

17 CFR Parts 230, 232, 239, Et al.
Investment Company Names; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230, 232, 239, 270 and 274

[Release No. 33–11238; 34–98438; IC–35000; File No. S7–16–22]

RIN 3235–AM72

Investment Company Names

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is amending the rule under the Investment Company Act of 1940 (''Investment Company Act'' or ''Act'') that addresses certain broad categories of investment company names that are likely to mislead investors about an investment company's investments and risks. The amendments to this rule are designed to increase investor protection by improving, and broadening the scope of, the requirement for certain funds to adopt a policy to invest at least 80 percent of the value of their assets in accordance with the investment focus that the fund's name suggests, updating the rule's notice requirements, and establishing recordkeeping requirements. The Commission is also adopting enhanced prospectus disclosure requirements for terminology used in fund names, and additional requirements for funds to report information on Form N–PORT regarding compliance with the names-related regulatory requirements.

DATES: This rule is effective December 11, 2023.

FOR FURTHER INFORMATION CONTACT: Blair Burnett, Mykaila DeLesDernier, Pamela Ellis, Senior Counsels; Bradley Gude, Branch Chief; Amanda Hollander Wagner, Senior Special Counsel, or Brian McLaughlin Johnson, Assistant Director, at (202) 551–6792, Investment Company Regulation Office, Division of Investment Management, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–8549.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to 17 CFR 270.35d–1 (''rule 35d–1'') under the Investment Company Act; amendments to Form N–1A [referenced in 17 CFR 239.15A and 17 CFR 274.11A], Form N–2 [referenced in 17 CFR 239.14 and 17 CFR 274.11a–1], Form N–8B–2 [referenced in 17 CFR 274.12], and Form S–6 [referenced in 17 CFR 239.16] under the Investment Company Act and the Securities Act of 1933 (''Securities Act'') [15 U.S.C. 77a *et seq.*]; amendments to Form N–PORT [referenced in 17 CFR 274.150] under the Investment Company Act; amendments to 17 CFR 232.11 (''rule 11 of Regulation S–T'') and 17 CFR 232.405 (''rule 405 of Regulation S–T'') under the Securities Exchange Act of 1934 (''Exchange Act'') [15 U.S.C. 78a *et seq.*]; amendments to 17 CFR 230.485 (''rule 485'') under the Securities Act; and amendments to 17 CFR 230.497 (''rule 497'') under the Securities Act.

Table of Contents

I. Introduction and Background

The Commission is adopting rule and form amendments that are designed to modernize and enhance the protections that rule 35d-1 under the Investment Company Act, the ''names rule,'' provides. This rule addresses the names of registered investment companies and business development companies (''BDCs'') that the Commission defines as materially misleading or deceptive.[1] The amendments the Commission is adopting update the rule and other names-related regulatory requirements to improve the protections that the rule provides, and to address changes in the fund industry in the approximately 20 years since the rule was adopted.

In May 2022, the Commission proposed rule and form amendments that would update the regulatory requirements associated with funds' names.[2] The proposed amendments included an expansion of the names rule's scope, improvements to the requirements for funds' investment policies adopted under the names rule (including, among other things, specific requirements addressing temporary departures from these policies' requirements), updated notice requirements, and new recordkeeping requirements. The proposed amendments also effectively would

[1] This release refers to registered investment companies and BDCs collectively as ''funds.''

[2] *See* Investment Company Names, Investment Company Act Release No. 34593 (May 25, 2022) [87 FR 36594 (June 17, 2022)] (''Proposing Release'' or the ''2022 Proposal''). The Commission voted to issue the Proposing Release on May 25, 2022. The release was posted on the Commission website that day, and comment letters were received beginning the following day. The comment period closed on August 16, 2022. We have considered all comments received since May 25, 2022.

have required that terms in a fund's name be consistent with those terms' plain English meaning or established industry use, and addressed materially deceptive and misleading use of environmental, social, or governance (''ESG'') terminology in fund names. Finally, the 2022 Proposal included amendments that would require a fund to define the terms used in its name in its prospectus, and amendments to Form N–PORT to add several new names-rule-related reporting items.

The Commission received comment letters on the 2022 Proposal from a variety of commenters, including funds, law firms, investor advocacy groups, environmental advocacy groups, professional and trade associations, public policy research institutes, academics, and interested individuals.[3] Many commenters expressed support for the names rule generally, and the overall goals of improving and clarifying the regulatory framework related to fund names, with some commenters recognizing that the names rule has not been revisited since its implementation in 2001.[4] Comments on specific aspects of the proposed amendments, however, were mixed. While some commenters generally supported the proposed scope expansion, as well as the amendments addressing the operation of investment policies adopted under the names rule, many others expressed concerns with these aspects of the proposal or suggested certain modifications.[5] Comments on the proposed prospectus disclosure requirements were generally supportive, but comments on the proposed new Form N–PORT reporting items were mixed, with some largely objecting to these requirements or suggesting modifications and others arguing that the proposed new reporting items would help promote transparency and accountability.[6]

After considering the comments on the 2022 Proposal and as discussed in more detail below, we are adopting amendments to the names rule, with some modifications based on the comments we received.

A. Regulatory Context

Congress provided the Commission with rulemaking authority to address materially deceptive or misleading fund names, recognizing the concern that investors may focus on a fund's name to determine its investments and risks.[7] The names rule, in turn, responds to this concern by helping to ensure that investors' assets in funds are invested in accordance with investors' reasonable expectations based on the fund's name.

The role of the names rule remains important and distinct from other disclosure requirements. A fund's name is not meant to supplant other required fund disclosure, and a name cannot communicate everything about a fund's investments, risks, and other features. The Commission has historically stated that investors should not rely on an investment company's name as the sole source of information about a company's investments and risks.[8] We continue to encourage investors to look beyond a fund's name to other information, such as disclosure included in a fund's registration statement, to obtain a complete understanding of a fund's investment objective, policies, strategies, and risks, as several commenters suggested.[9] A fund's name, however, is unique in several respects. It is typically the first piece of information that investors receive about a fund.[10] Fund names offer important signaling for investors in assessing their investment options.[11] Relatedly, incentives exist for asset managers to include terminology in fund names that is designed to attract investor assets.[12]

Section 35(d) of the Act prohibits a registered investment company from adopting as part of its name or title any word or words that the Commission finds are materially deceptive or misleading.[13] This section of the Act further authorizes the Commission to define such names or titles as are materially deceptive or misleading. The Commission adopted the names rule in 2001 in exercise of this authority.[14]

The current names rule generally requires that if a fund's name suggests a focus in a particular type of investment, or in investments in a particular industry or geographic focus, the fund must adopt a policy to invest at least 80% of the value of its assets in the type of investment, or in investments in the industry, country, or geographic region suggested by its name.[15] Under the current rule, a fund generally may elect to make its 80% investment policy a fundamental policy (*i.e.,* a policy that may not be changed without shareholder approval) or instead provide shareholders notice at least 60 days prior to any change in the 80% investment policy.[16] An 80% investment policy relating to a tax-

[3] The comment letters on the Proposing Release are available at *https://www.sec.gov/comments/s7-16-22/s71622.htm.*

[4] *See, e.g.,* Comment Letter of Better Markets (Aug. 16, 2022) (''Better Markets Comment Letter''); Comment Letter of the Consumer Federation of America (Aug. 16, 2022) (''Consumer Federation of America Comment Letter'') (each expressing support for the Commission's efforts to modernize the names rule, stating, respectively, that the rule has not been revisited since 2001, and it is ''well past time'' for the Commission to revisit and update the names rule); *see also* Comment Letter of the CFA Institute (Aug. 22, 2022) (''CFA Institute Comment Letter''); Comment Letter of the Teachers Insurance and Annuity Association of American and Nuveen, LLC (Aug. 16, 2022) (''TIAA-Nuveen Comment Letter'').

[5] *See infra* discussion at sections II.A.1–II.A.4.

[6] *See infra* discussion at sections II.B and II.E.

[7] 15 U.S.C. 80a–34(d); Public Law 104–290, 208, 110 Stat. 3416, 3432 (1996).; *see also* S. Rep. No. 293, 104th Cong., 2d Sess. 8–9 (1996).

[8] *See* Investment Company Names, Investment Company Act Release No. 24828 (Jan. 17, 2001) [66 FR 8509 (Feb. 1, 2001)] (''2001 Names Rule Adopting Release'') at nn.4–5 and accompanying text.

[9] *See, e.g.,* Comment Letter of Massachusetts Financial Services Company (Aug. 16, 2022) (''MFS Comment Letter''); Comment Letter of Capital Research and Management Company (Aug. 16, 2022) (''Capital Group Comment Letter''); Comment Letter of the Cato Institute (Aug. 12, 2022) (''Cato Institute Comment Letter'').

[10] *See* Comment Letter of the North American Securities Administrators Association, Inc. (Aug. 16, 2022) (''NASAA Comment Letter''); *see also* Comment Letter of the Public Investors Advocate Bar Association (Aug. 15, 2022) (''PIABA Comment Letter'') (stating that retail investors frequently base their purchase of funds solely upon the name of the fund and ''do little to investigate'' the portfolio holdings or the specific strategy of a fund beyond relying on the fund's name).

[11] *See* Comment Letter of U.S. SIF: The Forum for Sustainable and Responsible Investment (Aug. 16, 2022) (''U.S. SIF Comment Letter'').

[12] *See* Proposing Release, *supra* footnote 2, at n.6; *see also, e.g.,* Comment Letter of the Center for American Progress (Aug. 16, 2022) (''Center for American Progress Comment Letter'') (stating that the current investing environment creates strong incentives for investment companies to name funds in ways that will attract investors). *But see* Comment Letter of Benjamin Zycher, Senior Fellow, American Enterprise Institute (Nov. 1, 2022) (''Zycher Comment Letter'') (arguing that ''the implicit argument that firms or funds have incentives to mislead or to adopt deceptive names is not correct'' because funds' reputations for honesty are in funds' long-term interests).

[13] 15 U.S.C. 80a–34(d). BDCs, which are not registered investment companies, are subject to the requirements of section 35(d) pursuant to section 59 of the Act [15 U.S.C. 80a–58].

[14] *See* 2001 Names Rule Adopting Release, *supra* footnote 8.

[15] The rule imposes a similar requirement for funds that have names suggesting that a fund's distributions are exempt from federal income tax or from both federal and state income tax (''tax-exempt funds'').

[16] Under the Act, a fund may not deviate from a fundamental policy unless it has been authorized by the vote of a majority of its outstanding shareholders. 15 U.S.C. 80a–13(a)(3). In this release, we refer to a policy that a fund must adopt under the names rule as an ''80% investment policy'' and the fund's investments invested in accordance with this policy, the fund's ''80% basket.'' We are adopting a parallel definition of ''80% basket'' in the final amendments to the names rule, and when referring to the final amendments, references to a fund's ''80% basket'' refer to this definition. *See* final rule 35d–1(g) (defining ''eighty percent (80%) basket''); *see also* proposed rule 35d–1(g)(1) (defining ''80% basket,'' but otherwise identical to definition in final rule).

exempt fund, however, must be a fundamental policy.

Currently, a fund is required to invest in accordance with its 80% investment policy ''under normal circumstances,'' and a fund must apply its policy at the time the fund invests its assets. If, subsequent to an investment, the fund's assets are no longer invested in accordance with the policy, the fund's future investments must be made in a manner that will bring it into compliance. The current rule also includes certain requirements for the notices that funds must send prior to a change in an 80% investment policy that is not a fundamental policy.

In adopting the names rule, the Commission made clear that it is not a safe harbor for materially deceptive or misleading names.[17] The prohibitions of section 35(d) and the anti-fraud provisions of the Federal securities laws regarding disclosures to investors continue to apply to funds notwithstanding their compliance with the names rule.[18] In addition, a fund must adopt and implement written compliance policies and procedures reasonably designed to prevent violations of the Federal securities laws generally, which—both currently, and following the Commission's adoption of amendments to the names rule—would include section 35(d) and the names rule.[19]

B. Developments and Analysis Informing Final Rule Amendments

The names rule has not been amended since its adoption in 2001. In past years, the Commission and staff have received input about the operation of the names rule, as well as areas for potential improvement, through a variety of venues. The Commission published a Request for Comment on Fund Names in March 2020.[20] The 2020 Request for Comment sought public comment on the framework for addressing funds' names, particularly in light of market and other developments since the rule's adoption. The Commission received broad comments in response to the 2020 Request for Comment and, as described above, in response to the 2022 Proposal. In addition, staff in the Commission's Division of Investment Management, particularly the Division's Disclosure Review and Accounting Office, receive input from funds on names rule compliance issues regularly, for example during the course of staff's review of fund registration statements.

Commenters generally recognized that investors view a fund's name as an important piece of information that communicates the fund's objectives.[21] Several commenters expressed that asset managers have an incentive to create fund names that are designed to attract investors.[22] Many commenters, including funds and others, expressed their general agreement that the names rule provides important investor protections and that the rule has been largely effective in addressing misleading and deceptive fund names.[23] Commenters expressed support for a requirement, such as the rule's 80% investment policy provision, that requires a fund's underlying investments to correspond with the focus its name suggests in light of reasonable investor expectations.[24] One, for example, with respect to funds' use of ESG related terminology in their names, stated that a naming requirement where ''the underlying strategy and data must significantly support the name'' is a ''basic consumer protection.'' [25]

Some commenters expressed that certain changes to the names rule would be beneficial to ensure that the rule continues to serve its investor protection purposes. Some of these commenters expressed the view that the current scope of the rule does not cover all instances in which fund names create the reasonable expectation that a fund will invest in a certain way.[26] Some also expressed concern that the current rule's ''under normal circumstances'' standard increases the risk that a fund's investments will not be consistent with its name over an extended period and that investors will be misled.[27] Commenters also suggested other, more technical updates to the names rule, such as addressing how funds that use derivatives calculate compliance with their 80% investment policies, and updating the rule's notice provision to reflect technological changes over the past two decades.[28]

In considering updates to the names rule, both the Commission and commenters have taken into account developments in the fund industry since the rule was originally adopted. Registered investment companies manage considerably more assets today than they did in 2001 (with this amount nearly quadrupling), and the number of registered investment companies has also increased—by close to 20%—in the two decades following the names rule's adoption.[29] Similarly, over this time

[17] *See* 2001 Names Rule Adopting Release, *supra* footnote 8, at paragraph accompanying n.16; *see also* Proposing Release, *supra* footnote 2, at nn.13–15 and accompanying text.

[18] *See* Proposing Release, *supra* footnote 2, at n.14 and accompanying text.

[19] *See id.* at nn.16–17 and accompanying text (also addressing the requirement for fund compliance officers to discuss any material compliance matter involving the names rule in annual reports to the board on the operation of funds' compliance policies and procedures).

[20] *See* Request for Comments on Fund Names, Investment Company Act Release No. 33809 (Mar. 2, 2020) [85 FR 13221 (Mar. 6, 2020)] (''2020 Request for Comment''); *see also* Proposing Release, *supra* footnote 2, at section I.B (describing the input commenters provided in response to the 2020 Request for Comment).

[21] *See, e.g.,* Comment Letter of the Asset Management Group of the Securities Industry and Financial Markets Association (Aug. 16, 2022) (''SIFMA AMG Comment Letter''); NASAA Comment Letter; Consumer Federation of America Comment Letter; Comment Letter of Wellington Management Company (Aug. 16, 2022) (''Wellington Comment Letter''); Comment Letter of Adriana Z. Robertson and Jill E. Fisch (Apr. 20, 2023) (''Robertson-Fisch Comment Letter''); *see also* PIABA Comment Letter (asserting fund names are particularly important for 401(k) plan investments, which employers make available from a pre-determined list of options and comprise the entirety of retirement savings for many Americans).

[22] *See, e.g.,* Consumer Federation of America Comment Letter; Center for American Progress Comment Letter; CFA Institute Comment Letter.

[23] *See* Proposing Release, *supra* footnote 2, at n.20 and accompanying text; *see also, e.g.,* Comment Letter of Invesco Ltd. (Aug. 16, 2022) (''Invesco Comment Letter'') (''Since its adoption in 2001, the Names Rule has provided an effective regulatory framework for ensuring that fund names are not materially deceptive or misleading and has served to help investors understand what they can expect when they invest in a fund.''); Comment Letter of the Investment Company Institute (Aug. 16, 2022) (''ICI Comment Letter I'') The Investment Company Institute also submitted a separate comment letter dated December 6, 2022 (''ICI Comment Letter II''), a comment letter dated May 22, 2023 (''ICI Comment Letter III''), and a comment letter dated July 31, 2023 (''ICI Comment Letter IV''). Unless otherwise indicated, these letters are referred to collectively as if they were a single letter (''ICI Comment Letter'').

[24] *See, e.g.,* Comment Letter of T. Rowe Price (Aug. 16, 2022) (''T. Rowe Comment Letter'') (discussing effectiveness of current 80% investment policy requirement in aligning fund names with investor expectations); CFA Institute Comment Letter (stating that the terms used in fund names should reflect the fund's ''investment objective, strategies, and types of securities held'' and that the current names rule ''provide[s] a level of assurance to investors'').

[25] *See* Comment Letter of Amalgamated Financial Corp. (Aug. 16, 2022) (''Amalgamated Comment Letter'').

[26] *See, e.g.,* Consumer Federation of America Comment Letter (stating that ''significant gaps and loopholes'' exist in the current rule); Center for American Progress Comment Letter; *see also infra* section IV.D (estimating that approximately 62% of funds have names that implicate the current 80% investment policy requirement).

[27] *See, e.g.,* NASAA Comment Letter; Comment Letter of the Environmental Defense Fund (Aug. 16, 2022) (''Environmental Defense Fund Comment Letter'').

[28] *See* Proposing Release, *supra* footnote 2, at section I.B; *see also, e.g.,* ICI Comment Letter; Comment Letter of J.P. Morgan Asset Management (Aug. 16, 2022) (''J.P. Morgan Asset Management Comment Letter'').

[29] *See* Investment Company Institute, 2022 Fact Book (2022) (''2022 ICI Fact Book''), *available at https://www.icifactbook.org/pdf/2022_factbook.pdf.* In 2001, there were 8,860 registered open-end and closed-end management investment companies, representing approximately $7.15 trillion in assets under management. In 2021, there were 10,450

period, it has become more likely that retail investors access the markets through registered investment companies than through direct ownership of stocks and bonds.[30] Although the increase in the number of registered investment companies is modest compared to the increase in registered investment companies' assets under management, the number of funds tells only part of the story about the breadth of fund investment options currently available. The range of fund investment strategies has become notably more diverse over the past two decades.[31]

For example, the number of equity mutual funds and exchange-traded funds (''ETFs'') that are sector funds (*e.g.,* consumer, financial, utilities) increased by nearly 70% from 2001 to 2021.[32] Mutual fund and ETF assets in ''thematic'' strategies have surged over the past three years, with data from Morningstar Direct identifying a record 589 thematic mutual funds and ETFs debuting globally in 2021.[33] As of December 2022, Morningstar data categorized 334 domestic funds (including mutual funds, ETFs, and registered closed-end funds) as thematic funds, comprising 4 ''broad themes'' (broad thematic, physical world, social, and technology), 27 ''themes'' (*e.g.,* artificial intelligence and big data, food, space, and wellness), and 150 ''subthemes'' (*e.g.,* health innovation, next gen auto, millennials and ''Generation Z,'' cannabis, robotics, and travel/tourism).[34] While fund managers and others understand certain of these thematic names to be included in the current scope of the names rule, there can be questions about whether certain thematic terms suggest a focus in a particular type of investment, or in investments in a particular industry or group of industries. As fund managers have incentives to include ''buzzwords'' in their names to attract assets, and the current market for funds includes a substantially broader variety of names suggesting a particular focus than two decades ago, a rule providing specific requirements to address deceptive and misleading fund names for any fund name that suggests a particular investment focus is even more relevant now than it was when it was adopted.[35]

Funds that consider ESG factors in their investment strategies comprise a thematic area that entails unique considerations, and that involves the use of terminology that may be especially powerful in fund names to attract investors. The use of ESG or similar terminology (such as ''sustainable,'' ''green,'' or ''socially responsible'') in fund names may present particular investor protection concerns for several reasons. Investor interest in—and funds that offer—ESG strategies have rapidly increased in recent years.[36] Asset managers have created and marketed funds that consider ESG factors in their selection process, and these funds can attract significant interest and stand out to investors by using ESG and related terms in their names. Approaches to ESG investing vary, however, and funds that consider ESG factors have strategies that vary in the extent to which ESG factors are considered versus other factors. The breadth of ESG-related terms, as well as evolving investor expectations around terms like ''sustainable'' or ''socially responsible,'' compound the possibility of investor confusion and potential ''greenwashing'' in fund names.[37]

In consideration of the broad public input the Commission has received on fund names, our analysis of this input, the Commission and staff's experience with the names rule over the past two decades, developments in the fund industry, and the growth of the fund industry and families' investments in funds during this time period, we are adopting amendments to the names rule (and related disclosure and reporting requirements) to modernize the rule and to enhance the investor protections it currently provides. First, it is in investors' interests to align the rule's scope and requirements better with the policies and purposes underlying the rule. The Commission has stated that the 80% investment policy requirement ''will provide an investor greater assurance that a [fund's] investments will be consistent with its name.'' [38] This requirement addresses circumstances in which a fund's name may be materially deceptive or misleading, in exercise of the Commission's rulemaking authority under section 35(d). The amendments we are adopting address fund names that are not currently within the scope of the rule, or where the current scope of the rule has created interpretive issues.[39] These names may entail a

registered open-end and closed-end management investment companies, representing approximately $28.2 trillion in assets under management. *See also* Fund Industry Overview at *infra* section IV.C.1 (discussing fund industry statistics as of Dec. 2022).

[30] *See* Federal Reserve Bulletin, Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances (Sept. 2020), *available at https://www.federalreserve.gov/publications/files/scf20.pdf;* Federal Reserve Bulletin, Recent Changes in U.S. Family Finances: Evidence from the 1998 and 2001 Survey of Consumer Finances, *available at https://www.federalreserve.gov/econres/files/2001_bull0103.pdf.* The percentage of U.S. families holding stocks and bonds directly decreased from 24.9% in 1992 to 16.3% in 2019. The percentage of U.S. families holding pooled investment funds and retirement accounts (including individual retirement accounts, Keogh accounts, and certain employer-sponsored accounts such as 401(k) and 403(b) accounts) increased from 33.3% in 1992 to 59.5% in 2019. Mutual funds made up a significant portion of defined contribution plan assets (58%) and IRA assets (45%) at year-end 2021. In addition, the share of defined contribution plan assets held in mutual funds has grown over the past two decades, from 44% at year-end 2001 to 58% at year-end 2021. *See* 2022 ICI Fact Book.

[31] *See* Proposing Release, *supra* footnote 2, at nn.21–22 at accompanying text.

[32] *See* 2022 ICI Fact Book, *supra* footnote 29. In 2001, there were 452 sector equity mutual funds and ETFs; in 2021, there were 757.

[33] *See* Sonya Swink, *Thematic Assets Have Surged—And Are Here to Stay,* Ignites (Dec. 22, 2022), *available at https://www.ignites.com/c/3870954/500734/thematic_assets_have_surged_here_stay?referrer_module=issueHeadline&module_order=1.* These strategies are dominated by technology-related themes, such as internet, blockchain, cloud computing, and cybersecurity (based on staff analysis of data obtained from Morningstar Direct as of Dec. 15, 2022).

[34] *Id.*

[35] *See supra* footnote 12; *see also* NASAA Comment Letter (discussing the application of the names rule to names suggesting a focus on ''trendy 'thematic areas,' . . . including cybersecurity, blockchain/digital assets, and artificial intelligence'').

[36] *See* Proposing Release, *supra* footnote 2, at n.120 and accompanying text. *See also, e.g.,* Letter from Morningstar to Chair Gary Gensler (June 9, 2021) attaching, *Sustainable Funds U.S. Landscape Report—More funds, more flows, and impressive returns in 2020,* Morningstar Manager Research (Feb. 10, 2021), *available at https://www.sec.gov/comments/climate-disclosure/cll12-8899329-241650.pdf; ESG in 2021 So Far: An Update,* M. Gerber, G. Norman, and S. Toms, Harvard Law School Forum on Corporate Governance (Sept. 18, 2021), *available at http://corpgov.law.harvard.edu/2021/09/18/esg-in-2021-so-far-an-update/; ESG assets may hit $53 trillion by 2025, a third of global AUM,* Bloomberg Intelligence (Feb. 23, 2021), *available at https://www.bloomberg.com/professional/blog/esg-assets-may-hit-53-trillion-by-2025-a-third-of-global-aum/;* Amalgamated Comment Letter, NASAA Comment Letter, U.S. SIF Comment Letter, CFA Institute Comment Letter (all discussing investor interest in funds with ESG strategies and names).

[37] ''Greenwashing'' involves the risk that funds marketing ESG strategies may exaggerate their ESG practices or the extent to which their investment products take into account ESG factors. *See, e.g.,* Comment Letter of Public Citizen (Aug. 15, 2022) (''Public Citizen Comment Letter'') (discussing evolving investor expectations around ESG terms). *But see* Robertson-Fisch Comment Letter (''interrogating the concept of greenwashing'' and comparing the portfolios of funds with ESG terminology in their names to the portfolios of ''sister funds''—''the non-ESG fund in the same fund family most comparable to the ESG fund''—with the authors concluding that little evidence of greenwashing exists).

[38] *See* 2001 Names Rule Adopting Release, *supra* footnote 8.

[39] For example, the Commission has previously taken the position that fund names that incorporate terms such as ''growth'' and ''value'' connote an investment objective, strategy, or policy (*i.e.,* ''investment strategies'') and are therefore not within the scope of the 80% investment policy

Continued

capacity to deceive or mislead because they suggest a particular investment focus, which in turn offers an important signal, or entry point, to investors that are researching their investment options.[40] For these names—like the names currently within the rule's scope—the 80% investment policy requirement would provide investors greater assurance that these funds' investments are consistent with the manner in which a fund defines the terms in its name, which must be consistent with plain English or established industry use and disclosed in its prospectus. We therefore anticipate that including these names in the names rule's scope will bring more discipline to fund naming practices and more meaningful names that convey the funds' investment focuses, while allowing funds the flexibility to ascribe reasonable definitions for the terms used in their names.[41] That is, the decision to include terms in a fund's name that suggest an investment focus, including a focus in investments that have or whose issuers have particular characteristics, will now require the fund to adopt an 80% investment policy and to define the terms used in its name.[42]

Similarly, these amendments are designed to promote greater specificity in the operation of funds' 80% investment policies to enhance investor protection by helping to ensure that funds' names are not misleading as their portfolios may shift over time—either because of inadvertent portfolio ''drift'' or intentional departures from the 80% requirement.[43] When an investor chooses to invest in a fund, that person has made an intentional decision to invest in, for example, the type of asset class, industry, or sector in which the fund's name suggests an investment focus. That investor has a reasonable expectation that the fund's investments will generally remain focused in the area that the fund's name indicates.[44] We appreciate, however, that a naming rule that requires unwavering adherence to a particular investment threshold risks harming funds and investors.[45] This rigidity ultimately could result in investor harm if portfolio managers were not permitted to depart from their 80% investment policy for a limited time to manage their funds appropriately in response to changing circumstances.[46] The amended rule enhances investor protection by requiring funds to conduct at least quarterly reviews of their portfolio investments for consistency with the 80% investment policy requirement, and by adopting time frames to remedy departures from 80% that seek to balance investors' reasonable expectations with appropriate flexibility for advisers, consistent with their fiduciary duty, to manage funds' portfolios.

Our disclosure and reporting framework can provide additional tools, in connection with technological developments over the past two decades, to augment investors' and other market participants' understanding of fund names and to increase transparency of how a fund's investment portfolio reflects the investment focus that its name suggests. In the years since the names rule was adopted, the Commission has adopted requirements to modernize reporting requirements for registered investment companies, which build on significant advances in the technology that can be used to report and analyze information—namely, the use of structured data language.[47] We recognize that there are many types of fund names for which understanding additional detail about how name terms are defined, and about the types of investments that the term describes, would provide greater clarity to an investor about the fund's investment focus. This may be helpful if, for example, fund names that incorporate terms that may reflect new themes or technologies become more prevalent. The final rules' enhanced prospectus disclosure and reporting provisions, which require information to be disclosed in structured data language, are designed to address this goal.

Finally, we are incorporating certain updates to the names rule to address industry and technological developments over the past two decades, and to address names-rule-related recordkeeping.

C. Overview of the Final Rules

1. Final Rules' Principal Elements

We are adopting amendments to the names rule, as well as related disclosure and reporting requirements, in consideration of the issues discussed above.

- *Expansion of Scope.* We are adopting, substantially as proposed, amendments to the names rule that expand the rule's 80% investment policy requirement beyond its current scope, to apply to any fund name with terms suggesting that the fund focuses in investments that have, or investments whose issuers have, particular characteristics. This coverage will include, for example, fund names with terms such as ''growth'' or ''value,'' or terms indicating that the fund's investment decisions incorporate one or more ESG factors. These names will be added to the names that are currently within the scope of the 80% investment policy requirement—that is, generally, fund names that suggest a focus in a particular type of investment, or investments in a particular industry or geographic focus, and fund names suggesting that a fund's distributions are tax-exempt.
- *Temporary Departures from the 80% Investment Requirement.* In a change from the proposal, under which funds would have been permitted to depart from the fund's 80% investment policy only under certain specified circumstances, the final amendments retain the names rule's current requirements for a fund to invest in accordance with its 80% investment policy ''under normal circumstances'' (the ''80% investment requirement''), and for the 80% investment requirement to apply at the time a fund invests its

requirement. This has resulted in some fund names being excluded from this requirement because the name contains a term suggesting an investment strategy, even if the name also suggests an investment focus to investors. *See* Proposing Release, *supra* footnote 2, at paragraph accompanying n.23; *see also infra* section II.A.1.

[40] *See* In the Matter of the Private Investment Fund for Governmental Personnel, Inc., Investment Company Act Release No. 2474 (Jan. 18, 1957) (the Commission has historically expressed that, in considering whether a name is deceptive or misleading, ''[a]ctual deception of investors need not be shown, it is sufficient if the name of the company is found to have a tendency or capacity to deceive or mislead'').

[41] *See* NASAA Comment Letter; *see also* CFA Institute Comment Letter. *But see, e.g., infra* footnote 75 and accompanying text.

[42] *See infra* sections II.A.1 and II.B.

[43] *See, e.g.,* Consumer Federation of America Comment Letter (discussing the risk of funds changing their portfolios such that the portfolios are no longer accurately reflected by the funds' names).

[44] *See, e.g.,* Center for American Progress Comment Letter (stating that investors' expectations and investment practices often assume that investments in a fund will remain consistent with the name over the longer term, and investors who wish to change their own mix of investments typically do so by changing funds).

[45] *See, e.g.,* ICI Comment Letter; J.P. Morgan Asset Management Comment Letter; Comment Letter of Dimensional Fund Advisors LP (Aug. 16, 2022) (''Dimensional Comment Letter''); Comment Letter of Dechert LLP (Aug. 16, 2022) (''Dechert Comment Letter''); *see also infra* section II.A.2.

[46] *See, e.g.,* SIFMA AMG Comment Letter; T. Rowe Comment Letter.

[47] Investment Company Reporting Modernization, Investment Company Act Release No. 32314 (Oct. 13, 2016) [81 FR 81870 (Nov. 18, 2016)] (''Investment Company Reporting Modernization Adopting Release''); *see also* Amendments to the Timing Requirements for Filing Reports on Form N–PORT, Investment Company Act Release No. 33384 (Feb. 27, 2019) [84 FR 7980 (Mar. 6, 2019)]; Proposing Release, *supra* footnote 2, at n.115 and accompanying text (generally discussing rules requiring funds registering on Forms N–1A and N–2 to submit certain information using Inline XBRL format).

assets. Also, in a change from the proposal, the final amendments add a new provision that requires a fund to review its portfolio assets' inclusion in its ''80% basket'' at least quarterly.[48] Like the proposal, the final amendments include specific time frames—generally 90 days, as opposed to 30 days as proposed—for getting back into compliance if a fund departs from the 80% requirement as a result of drift or in other-than-normal circumstances.

• *Derivatives.* Consistent with the proposal, the final amendments generally require funds to use a derivatives instrument's notional amount to determine the fund's compliance with its 80% investment policy, with certain adjustments. In a change from the proposal, the final amendments include a limited modification to this approach that would exclude certain currency hedges from the names rule compliance calculation. As proposed, we are also amending the names rule to address the derivatives instruments that a fund may include in its 80% basket.

• *Unlisted Registered Closed-End Funds and BDCs.* Consistent with the proposal, the final amendments generally prohibit an unlisted registered closed-end fund or BDC that is required to adopt an 80% investment policy from changing that policy without a shareholder vote. In a modification from the proposal, the final amendments permit these funds to change their 80% investment policies without such a vote if: (1) the fund conducts a tender or repurchase offer with at least 60 days' prior notice of the policy change, (2) that offer is not oversubscribed, and (3) the fund purchases shares at their net asset value.[49]

• *Enhanced Prospectus Disclosure.* Substantially as proposed, we are adopting amendments to funds' prospectus disclosure requirements that will require a fund to define the terms used in its name, including the criteria the fund uses to select the investments that the term describes.

• *Plain English Requirements for Terms Used in Fund Names.* The final amendments to the names rule, as proposed, effectively require that any terms used in the fund's name that suggest either an investment focus, or that the fund's distributions are tax-exempt, must be consistent with those terms' plain English meaning or established industry use.

• *Form N–PORT Reporting Requirements.* Consistent with the proposal, we are adopting amendments to Form N–PORT for funds to report the value of the fund's 80% basket, and whether an investment is included in the fund's 80% basket. In a change from the proposal, the final amendments also include a new reporting item to include the definition(s) of terms used in the fund's name. Funds will have to report this information for the third month of every quarter, instead of for each month as proposed.

• *Recordkeeping.* Consistent with the proposal (but with conforming changes to address the final rules' approach to temporary departures from the 80% investment requirement), the final rules include recordkeeping provisions related to a fund's compliance with the rule's requirements. The final rules do not, however, include the proposed requirement for funds that do not adopt an 80% investment policy to maintain a record of their analysis that such a policy is not required.

2. Other Aspects of the Proposal

We are not taking action on the proposed approach regarding the use of ESG terms in the names of ESG ''integration funds'' at this time. Under the proposed approach, the names of ESG ''integration funds'' would have been defined as materially deceptive and misleading if the name includes terms indicating that the fund's investment decisions incorporate one or more ESG factors.[50] Under the proposal, integration funds were described as funds that consider one or more ESG factors alongside other, non-ESG factors in the fund's investment decisions, but those ESG factors are generally no more significant than other factors in the investment selection process, such that ESG factors may not be determinative in deciding to include or exclude any particular investment in the portfolio. Such funds may select investments because those investments would meet other criteria applied by the fund's adviser (*e.g.,* investments selected on the basis of macroeconomic trends or company-specific factors like price-to-earnings ratio). This description of integration funds in the names rule proposal mirrored the definition of an integration fund in the Commission's ESG Disclosure Proposal.[51]

The proposed approach to integration funds in the names rule was designed to target misleading fund names by making clear that it would be materially misleading for a fund for which ESG factors are generally no more significant than other factors in the investment selection process to include ESG terminology in its name. The proposed approach would have addressed the Commission's concern that such funds have the potential to overstate the importance of ESG factors in the fund's investment selection process.[52]

Commenters offered mixed feedback on the names rule's proposed approach to integration fund names. Some commenters that supported the proposed approach stated that it would help prevent investors from believing that ESG factors play a more significant role than they actually do in the investment process—*i.e.,* protect investors from greenwashing.[53] Other commenters, however, questioned the Commission's proposed approach, stating that the proposed approach could act as a disservice to investors because, for example, it could result in investors believing that integration funds do not consider ESG factors when they actually do, or that the proposed approach could hinder innovation.[54] Because the proposed provision in the names rule mirrored the separate proposed definition of an integration fund in the ESG Disclosure Proposal, we are continuing to consider comments and are not adopting the proposed approach to integration fund names at this time. As discussed above, however, the final amendments' expanded scope of the 80% investment policy requirement includes fund names with terms suggesting that the fund focuses in investments that have, or investments whose issuers have, particular characteristics—including terms

[48] *See* final rule 35d–1(g) (defining ''80% basket'' generally as investments that are invested in accordance with the investment focus that the fund's name suggests).

[49] *See infra* footnote 292 (discussing the use of net asset value in the event of a tender offer, as well as a repurchase offer).

[50] Proposed rule 35d–1(d).

[51] *See* Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices, Investment Company Act Release No. 34594 (May 25, 2022) [87 FR 36654 (June 17, 2022)] (''ESG Disclosure Proposal''), at section II.A.1.

[52] *See* Proposing Release, *supra* footnote 2, at section II.D.

[53] *See, e.g.,* Comment Letter of Ceres (Aug. 16, 2022) (''Ceres Comment Letter''); Consumer Federation of America Comment Letter; Comment Letter of Evergreen Action (Aug. 15, 2022) (''Evergreen Action Comment Letter'').

[54] *See, e.g.,* Cato Institute Comment Letter; Comment Letter of Mutual Fund Directors Forum (Aug. 16, 2022) (''MFDF Comment Letter'') (suggesting that the marketplace has been dynamic in developing different approaches to bringing an ESG lens to various investment strategies, and that the proposed rule, as the commenter understood it to largely limit the use of ESG terms in fund names to funds that use inclusionary or exclusionary screens (as well as to funds that employ impact or proxy-voting strategies), risks hindering further innovation in the fund space as ESG strategies continue to evolve); Comment Letter of Minerva Analytics (Aug. 16, 2022) (''Minerva Comment Letter'').

indicating that the fund's investment decisions incorporate one or more ESG factors.[55]

II. Discussion

A. 80% Investment Policy Requirement

1. Names Suggesting an Investment Focus

Consistent with the proposal, we are adopting amendments that broaden the scope of the names rule's 80% investment policy requirement to apply also to fund names that include terms suggesting that the fund focuses in investments that have, or whose issuers have, particular characteristics.[56] These amendments will apply in addition to the existing 80% investment policy requirement for funds whose name suggests a focus in a particular type of investment, industry, country, or geographic region, or those whose name suggests certain tax treatment. The purpose of the names rule is to prevent fund names from misrepresenting the fund's investments and risks.[57] The expanded scope of the final amendments furthers this objective by ensuring that a fund's investment activity is consistent with the investment focus its name communicates.

a) General Discussion

The Commission proposed to expand the 80% investment policy requirement to apply to fund names that include terms suggesting that the fund focuses in investments that have, or whose issuers have, particular characteristics, whether or not such terms connote an investment strategy. In response to the proposal, commenters expressed that the names rule, as currently constituted, fails to capture a large segment of funds because the rule makes a distinction between terms that reference a type of investment and an investment strategy.[58] These commenters supported the proposed scope expansion, asserting that terms in fund names that reference an investment strategy often communicate to investors an investment focus, thus creating a reasonable expectation among investors that the fund will hold investments that support that focus.[59] These commenters suggested that expanding the scope of the rule to include any term in a fund's name that communicates an investment focus, whether or not that term references an investment strategy, is necessary to modernize the rule and is a logical step to help ensure that investment companies cannot circumvent the intent of the rule when naming funds.[60] Some commenters also asserted that the proposed expansion of the scope would bring more ''discipline and clarity'' to fund naming practices and, in turn, help investors make more informed investment decisions.[61] In particular, many commenters asserted that the expanded scope would improve the ability of investors to discern between funds in the ESG investment industry and better protect investors looking for exposure to ESG investments.[62] In addition, one commenter suggested that the Commission provide more clarity on whether the expanded scope would cover names suggesting a focus on ''thematic'' areas.'' [63]

In contrast, many commenters objected to the proposal because, in their view, the expansion of the 80% investment policy requirement would lead to interpretive challenges and added compliance costs for fund advisers without providing commensurate benefit to investors.[64] In particular, they stated that the expanded scope incorporates a vague standard that is more subjective than the current scope of the names rule which, in contrast with the proposal, they believed applies a more objective and intuitive framework that sufficiently ensures that fund assets are invested in accordance with reasonable expectations based on a fund's name.[65] They questioned whether the names included in the expanded scope effectively communicate any real investment focus to investors, absent further information about a fund's objectives.[66] Because these names are vague, they asserted, investors would still need to review a fund's disclosures to understand how the investment strategy is executed for these newly included terms, limiting the value of the rule.[67] These commenters contended that the proposed expansion of the 80% investment policy requirement has limited investor protection benefits because it overemphasizes the importance of a fund's name, and thus disincentivizes investors from looking beyond the name to review information in fund prospectuses and related disclosures.[68] In addition, several commenters questioned whether the Commission adequately articulated how terms that would be included in the proposed scope have led to investor confusion, deception, or harm such that they should be subject to the rule.[69]

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[55] *See supra* section I.C.1; *see also* final rule 35d–1(a)(2).

[56] As used in this release, consistent with rule 35d–1(a)(2), ''investment focus'' means a focus in a particular type of investment or investments, a particular industry or group of industries, particular countries or geographic regions, or investments that have, or whose issuers have, particular characteristics.

[57] *See* Proposing Release, *supra* footnote 2, at n.5 and accompanying text.

[58] *See, e.g.,* Consumer Federation of America Comment Letter; Center for American Progress Comment Letter; NASAA Comment Letter; *see also* Proposing Release, *supra* footnote 2, at n.23 and accompanying text (discussing that the Commission has historically taken the position that fund names that incorporate terms that connote an investment objective, strategy, or policy are not within the scope of the 80% investment policy requirement).

[59] *See, e.g.,* NASAA Comment Letter; Comment Letter of Principles for Responsible Investment (Aug. 16, 2022); (''PRI Comment Letter''); Comment Letter of Soundboard Governance (Aug. 16, 2022) (''Soundboard Governance Comment Letter'') (focusing particularly on the inclusion of ESG-related terms in the proposed scope expansion).

[60] *See, e.g.,* Consumer Federation of America Comment Letter; Center for American Progress Comment Letter.

[61] *See* NASAA Comment Letter; Better Markets Comment Letter; Consumer Federation of America Comment Letter.

[62] *See, e.g.,* Comment Letter of Sierra Club (Aug. 16, 2022) (''Sierra Club Comment Letter''); Better Markets Comment Letter; Evergreen Action Comment Letter.

[63] *See* NASAA Comment Letter (expressing that funds with names that suggest a focus on ''trendy'' thematic areas in particular should be required to adopt an 80% investment policy and stating that investors, funds, and regulators would ''be well served by greater clarity'' on whether the proposed expansion would thematic fund names); *see also* Comment Letter of Seward & Kissel LLP (Aug. 16, 2022) (''Seward & Kissel Comment Letter'') (stating that that the tension between words suggesting a ''type of investment'' versus those suggesting an ''investment strategy'' has resulted in the [names rule] being inconsistently applied, especially with respect to funds using thematic strategies.'').

[64] *See, e.g.,* Comment Letter of Stradley Ronon (Aug. 16, 2022) (''Stradley Comment Letter''); SIFMA AMG Comment Letter; TIAA-Nuveen Comment Letter; Comment Letter of Calamos Investments (Aug. 16, 2022) (''Calamos Comment Letter'').

[65] *See, e.g.,* Calamos Comment Letter; Invesco Comment Letter; Comment Letter of Federated Hermes, Inc. (Aug. 16, 2022) (''Federated Hermes Comment Letter''); MFS Comment Letter; Comment Letter of Nationwide Funds Group (Aug. 16, 2022) (''Nationwide Comment Letter''); Robertson-Fisch Comment Letter (discussing these points in the context of ESG funds); T. Rowe Comment Letter; *see also* PRI Comment Letter (supporting the proposed scope expansion, but requesting that the Commission provide a definition of ''characteristics'' in the proposed language expanding the scope).

[66] *See, e.g.,* MFS Comment Letter; ICI Comment Letter; Capital Group Comment Letter; Cato Institute Comment Letter.

[67] *See* SIFMA AMG Comment Letter; ICI Comment Letter (comparing the uniformity of an 80% investment policy for funds with ''equity'' in their name to the potential inconsistency in 80% investment policies for funds with ''growth'' in their name).

[68] *See, e.g.,* MFS Comment Letter; Capital Group Comment Letter; Cato Institute Comment Letter.

[69] *See, e.g.,* Comment Letter of WisdomTree Asset Management (Aug. 16, 2022) (''WisdomTree Comment Letter''); SIFMA AMG Comment Letter; Invesco Comment Letter; Dechert Comment Letter. Commenters also pointed to the lack of enforcement cases charging rule 35d–1 or shareholder suits in

Commenters also suggested that this vagueness would result in the costs of implementation of the proposed amendments being high relative to what they stated would be minimal value to investors. Commenters stated that interpretive issues relating to the proposed scope's vagueness would result in a number of adverse consequences, including inconsistent application of the 80% investment policy requirement, uncertainty in determining whether a term suggests a particular investment focus, and, where a fund has adopted an 80% investment policy, whether a particular investment is consistent with that policy.[70] Commenters also suggested that it would be challenging to establish automated compliance monitoring solutions for terms in fund names where subjective criteria are part of the decision-making process.[71] As a result, commenters expressed that funds would need either to require portfolio managers to adhere to specific rigid criteria, stifling innovative investment strategies, or to engage in some level of manual review, significantly increasing the complexity and compliance burdens for funds.[72] Commenters also raised concerns that, for funds that would be within the scope of the 80% investment policy requirement, a portfolio manager's expectations with respect to investments that would qualify for inclusion in the 80% basket may ultimately prove wrong or change over time, which could make compliance with the names rule challenging.[73]

Relatedly, commenters expressed the concern that the expanded scope could lead to retroactive second-guessing of portfolio managers' designations of investments by Commission staff.[74] To avoid these implementation problems, commenters suggested funds may use broader, more generic names that convey less information to investors in order to avoid adopting an 80% investment policy.[75]

Many commenters expressed particular concern with the inclusion of the terms ''growth'' and ''value'' in the proposed scope.[76] Commenters asserted that there are no precise definitions or standardized criteria used to classify these types of investments.[77] Rather, commenters expressed that portfolio managers have unique qualitative and quantitative criteria that they evaluate when selecting growth or value investments, some of which rely on more subjective determinations that may vary among portfolio managers.[78] A few commenters suggested that investors invest in certain growth or value funds because they believe in a manager's unique analysis and conclusions for selecting investments.[79] Some commenters expressed that requiring growth or value funds to define terms in their name and disclose the criteria used to select investments would lead to more rigidity in investment selection, resulting in less flexibility for managers to implement investment strategies that traditionally have been managed with more nuance.[80]

To avoid these interpretative challenges and compliance burdens, a number of commenters suggested narrowing the scope of the final rule to that of the current rule or to exclude terms that do not readily reduce to measurable characteristics, and for which evaluations, opinions, and views reasonably may vary.[81] Separately, some commenters urged the Commission to require enhanced disclosure in a fund's registration statement when its name indicates an investment strategy, rather than expanding the scope to mandate an 80% investment policy for these funds.[82] Several commenters expressed that investor access to disclosures and information about funds is widespread and easily accessible, making an investor's need to rely on a fund name to evaluate the fund's strategy less necessary than when the Commission adopted the names rule.[83]

After considering comments, we are adopting, substantially as proposed, amendments that expand the rule's 80% investment policy requirement to apply to any fund with terms in its name that suggest that the fund focuses in investments that have, or investments whose issuers have, particular characteristics. We recognize that some commenters expressed concerns about perceived vagueness associated with the ''particular characteristics'' language in the proposed rule.[84] The amended rule provides, as proposed, an illustrative parenthetical that is designed to give non-exclusive examples of terms that suggest that the fund focuses in investments that have, or whose issuers have, particular characteristics. The parenthetical provides as examples the terms ''growth'' or ''value,'' or terms indicating that the fund's investment decisions incorporate one or more ESG factors.[85] We are not defining the term ''particular characteristics'' in the rule, as suggested by a commenter, because we believe that this term will be

this area as a reason to not expand the scope. *See, e.g.,* Nationwide Comment Letter; Capital Group Comment Letter; ICI Comment Letter IV.

[70] *See, e.g.,* ICI Comment Letter; SIFMA AMG Comment Letter; Invesco Comment Letter; Dechert Comment Letter; Comment Letter of Fidelity Management & Research Company LLC (Aug. 16, 2022) (''Fidelity Comment Letter''); Ceres Comment Letter.

[71] *See, e.g.,* ICI Comment Letter; T. Rowe Comment Letter; SIFMA AMG Comment Letter; Invesco Comment Letter. Scalable and automatic compliance monitoring systems typically rely on third-party data providers to tag investments but such providers could vary their classification of investments and may not use the same classification as the fund. *See, e.g.,* Comment Letter of Freeman Capital Management (July 24, 2022) (''Freeman Capital Management Comment Letter''); Invesco Comment Letter; T. Rowe Comment Letter.

[72] *See, e.g.,* Dechert Comment Letter; Invesco Comment Letter; TIAA-Nuveen Comment Letter; J.P. Morgan Asset Management Comment Letter; T. Rowe Comment Letter; Wellington Comment Letter; ICI Comment Letter; Invesco Comment Letter; Freeman Capital Management Comment Letter.

[73] *See, e.g.,* SIFMA AMG Comment Letter; Fidelity Comment Letter; J.P. Morgan Asset Management Comment Letter; Stradley Comment Letter (stating that '''equity' and 'fixed income' investments do not change their categorization due to market declines, cycles or volatility, as compared to a value stock, that, if subjected to only objective criteria, can and does migrate from one category to another'').

[74] *See, e.g.,* ICI Comment Letter; Federated Hermes Comment Letter; J.P. Morgan Asset Management Comment Letter.

[75] *See, e.g.,* Dechert Comment Letter; ICI Comment Letter (asserting that the proposed amendments could also incentivize longer, more complex fund names that seek to capture the full range of investments reflected in a fund's investment strategy).

[76] *See, e.g.,* ICI Comment Letter; Dechert Comment Letter; T. Rowe Comment Letter.

[77] *See, e.g.,* Fidelity Comment Letter; Nationwide Comment Letter; Stradley Comment Letter.

[78] *See, e.g.,* Wellington Comment Letter; MFS Comment Letter; ICI Comment Letter.

[79] *See* Stradley Comment Letter; SIFMA AMG Comment Letter.

[80] *See, e.g.,* Wellington Comment Letter; Nationwide Comment Letter; Stradley Comment Letter.

[81] *See, e.g.,* ICI Comment Letter; Invesco Comment Letter; Federated Hermes Comment Letter; Dechert Comment Letter; TIAA-Nuveen Comment Letter; *see also* Calamos Comment Letter (asserting that, if the expanded scope is adopted, the Commission should consider excluding existing funds from the rule's requirements because compliance may be costly and have unanticipated effects for existing funds that are not currently subject to the rule).

[82] SIFMA AMG Comment Letter; Invesco Comment Letter; Comment Letter of Calvert Research and Management (Aug. 16, 2022) (''Calvert Comment Letter''); CFA Institute Comment Letter (recommending that when a fund's name suggests an investment focus, the investment focus must be consistent with the key factors in the principal investment strategies that are disclosed in the fund's registration statement). *See also* ICI Comment Letter IV (asserting that the proposed amendments are unnecessary because existing prospectus disclosure requirements and other regulatory obligations, such as rules 482 and 156 under the Securities Act of 1933 and FINRA Rule 2210, provide a sufficient framework to ensure that fund communications are clear and not misleading).

[83] *See* SIFMA AMG Comment Letter; Dechert Comment Letter; T. Rowe Comment Letter.

[84] *See, e.g.,* Stradley Comment Letter; TIAA-Nuveen Comment Letter; Cato Institute Comment Letter.

[85] *See infra* sections II.A.1.d) and II.D.

adequately understood to mean any feature, quality, or attribute.[86] We are adopting this approach, rather than an approach that provides an enumerated list of terms included in the expanded scope, in light of the broad diversity of fund investment strategies and fund names, and to ensure that the rule remains evergreen. Based on our understanding of the fund industry and current practice, however, we anticipate that the primary types of names that the expanded scope will cover will be names that include the terms ''growth'' and ''value,'' terms with ESG- or sustainability-related characteristics, or terms that reference a thematic investment focus.

We recognize that many commenters opposed expanding the scope of the rule, and the inclusion of terms such as ''growth'' and ''value'' in particular. While we appreciate these commenters' concerns, it is important to balance these concerns with the investor protection goals that underlie the names rule and section 35(d) of the Investment Company Act. Although there have been limited Commission enforcement cases citing section 35(d) of the Act, Commission and staff's experience with the names rule over the past two decades and developments in the fund industry during this time period, including the increase in fund assets under management and the proliferation of diverse fund strategies, lead us to modernize and enhance the names rule to further the investor protection goals of section 35(d).[87]

We are adopting amendments that do not distinguish between a type of investment and an investment strategy because a fund name might connote a particular investment focus and result in reasonable investor expectations regardless of whether the fund's name describes a strategy as opposed to a type of investment. We understand that funds typically include certain terms in their name to communicate an investment focus and to appeal to investors choosing among available investment options.[88] As some commenters believed, the names included in the expanded scope can serve as the initial bases upon which investors make investment decisions and create reasonable expectations that funds that use those terms will focus on investments and issuers that have the specified characteristics that a fund's name suggests.[89] For example, terms like ''growth'' and ''value'' create reasonable expectations among investors that funds with those terms in their name will invest predominantly in companies that exhibit ''growth'' or ''value'' characteristics. By expanding the scope of the 80% investment requirement to include these names, the final amendments will help ensure that these types of funds have portfolios that reflect the investment focus their name suggests. Further, the expanded scope in the final amendments will reduce the existing inconsistencies in the application of the rule by eliminating the need for fund managers to determine whether their name references a type of investment or an investment strategy.

The Commission staff has observed an increase in filings by funds that use ''thematic'' terms in their name.[90] We understand that fund managers and others would consider certain of these thematic names to be included in the current scope of the names rule. For instance, certain terms may be viewed as clearly suggesting a focus in a type of industry or group of industries (*e.g.,* terms suggesting a focus in cybersecurity, health and wellness, or travel and tourism).[91] There could be reasonable questions, however, about whether other thematic terms suggest a focus in a particular type of investment, or in investments in a particular industry or group of industries. This could occur, for example, because a thematic term may be narrower or more expansive than an ''industry'' may be commonly understood (*e.g.,* drones, ''smart cities,'' metaverse, ''big data''). And there are certain thematic terms that we believe most practitioners would not consider to suggest a focus in a type of investment, or a focus in a particular industry or group of industries (*e.g.,* terms suggesting demographic characteristics such as ''millennial'' or ''Gen Z,'' or political, economic, or historical themes such as ''biothreat,'' ''gig economy,'' ''meme stocks,'' or ''post-Corona''). The effect of the scope of the final amendments is that, to the extent a fund uses a term in its name that suggests an investment focus, including any term that references a thematic investment focus, the fund will be required to adopt an 80% investment policy, which in turn will help ensure it will invest in accordance with the investment focus its name suggests.

We understand that certain terms used in fund names may have more objective or standardized criteria than other terms. For instance the term ''equity'' generally has a more standardized definition, whether based on plain English principles or established industry use, compared to terms like ''growth'' and ''value.'' However, not all names that fall within the scope of the current rule have precise definitions or standardized, objective criteria. For instance, for fund names that reference a particular region or country, it is often not immediately apparent based on the terms in a fund's name whether the fund invests in issuers that are domiciled in the specific region, have a large presence in the region, or have some other nexus to the region. An investor may generally understand what constitutes ''Latin America,'' and seek out a ''Latin American'' fund, but different portfolio managers may apply different definitions of what specifically ''Latin America'' means in practice for their fund because definitions of ''Latin America,'' using plain English or industry use of the term, can reasonably differ.

This variation is evident based on the principal investment strategies disclosed in fund prospectuses. For example, a ''Latin America'' fund offered by one adviser has an 80% investment policy to invest in securities of issuers that derive at least 50% of revenue from Latin American markets (defined to include Spanish-speaking islands in the Caribbean), without consideration of the issuers' domicile, headquarters, or primary trading market. In contrast, another ''Latin America'' fund managed by a different adviser has a policy to invest at least 80% in securities of issuers that are domiciled in Latin America (defined to exclude Mexico and Caribbean islands), that derive significant revenues from Latin America, or the securities trade on

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[86] *See supra* footnote 65.

[87] *See infra* at footnote 494 and accompanying text (asserting that the lack of Commission enforcement actions citing section 35(d) of the Act is evidence that the general framework of the rule is effective, not that further enhancements to the rule are unnecessary).

[88] For example, funds have increasingly chosen names that include terms that reference popular industry themes, business sectors, or investment strategies. *See supra* footnote 33 and accompanying text (discussing the increase in filings over the last few years by funds with names that reference popular industry themes and business sectors, providing some evidence that investors are attracted to these fund names). *See also supra* footnote 36 (suggesting that ESG terminology in fund names is effective in attracting inflows).

[89] *See* NASAA Comment Letter; Consumer Federation of America Comment Letter; PIABA Comment Letter.

[90] *See supra* footnote 33 and accompanying text.

[91] In cases where certain terms that suggest a focus in a type of industry have been coupled with the word ''strategy,'' some funds have argued that the name suggests a focus in an investment strategy and not a type of investment, and therefore should not be within the scope of the 80% investment policy requirement. As discussed above, the expansion of the scope of the 80% investment policy requirement includes terms suggesting that the fund focuses in investments that have, or whose issuers have, particular characteristics, whether or not such terms connote an investment strategy.

exchanges located in Latin America. Each of these examples is consistent with the plain English or industry use of the term and demonstrates the flexibility the final amendments will provide to fund managers in developing definitions of the terms used in a fund's name. Moreover, given the proliferation of the diversity of fund investment strategies and fund names since the rule was originally adopted, retaining the current rule's scope or excluding terms that do not always neatly reduce to measurable characteristics, as suggested by commenters, would undermine the investor protection purposes of the rule.

The final rule also is not as rigid as many commenters seem to contend when, for example, they suggested that a rule that requires pre-determined definitions of certain terms could lead to retroactive second-guessing by Commission staff and result in funds adopting more generic names or could create incentives for longer, more complex names. The amended rule provides fund managers with flexibility to ascribe reasonable definitions for the terms used in a fund's name and flexibility to determine the specific criteria the fund uses to select the investments that the term describes.[92] We understand that different funds and various third-party data providers may use different definitions for the same term in order to best reflect a particular investment strategy. The amended rule is designed for funds to retain reasonable discretion in establishing their 80% investment policies, which allows funds to implement nuanced and innovative investment strategies.[93] We also appreciate, for many terms, there will be various reasonable means of implementing an 80% investment policy that incorporates a definition or understanding of terminology that differs from another fund whose name incorporates the same terminology. For example, different funds may have ''growth'' in their name, and each of these funds may have portfolio managers who have different approaches to selecting investments that have growth characteristics. In such circumstances, two funds would naturally have different policies that reflect their portfolio managers' distinct approaches to growth investing. In this example, each of these funds would describe to investors how it defines ''growth,'' provided the definitions are consistent with the term's plain English meaning or established industry use, and then invest 80% of their investments in accordance with their description.[94]

In addition, we understand that the expansion of the rule's scope will involve operational costs for many funds, particularly those that are not currently subject to the rule.[95] In a modification from the proposal, however, the amended rule will no longer require a fund to re-assess its portfolio investments continuously to determine compliance with its 80% investment policy, but will instead require reassessment of each portfolio investment on an at-least quarterly basis.[96] This modification will address concerns commenters raised related to cost burdens associated with the proposed scope expansion, to the extent that those concerns largely related to the costs of continuous monitoring and assessment of a fund's 80% investment policy.[97] Moreover, considering that not all terms that fall within the scope of the current rule have standardized and objective definitions (*e.g.,* ''Latin America'' funds as discussed above), existing compliance monitoring for these funds likely necessitates some form of manual review to ensure that investments are consistent with the manner in which the fund defines a given term. The assessment that funds would have to undertake to ensure that portfolio investments are consistent with their 80% investment policies under the final rules would entail this same aspect of current fund practices.[98]

The final amendments' approach, which combines an expanded 80% investment policy requirement with additional disclosure and reporting requirements, reflects that certain terms used in a fund's name can simultaneously communicate an investment focus while also reflecting nuance that should be further discerned after reviewing the fund's prospectus disclosure.[99] The Commission has historically encouraged investors to look beyond a fund's name and to review a fund's underlying disclosures to gather information about the fund's investment activity and objectives, and we continue to encourage this.[100] We understand that such disclosures are easily accessible for most investors and that the current regulatory framework is designed to help ensure that fund disclosures, marketing materials, and other communications are clear, informative, and not misleading. We agree, however, with commenters who stated that, despite this accessibility, fund names can play a critical role in investment decisions. Congress provided the Commission with rulemaking authority to address materially deceptive or misleading fund names, recognizing the concern that investors may focus on a fund's name and what it communicates about the fund's investments and risks despite the information included in fund prospectuses and related disclosures.[101] Accordingly, the final amendments require funds that use terms that communicate an investment focus to adopt an 80% investment policy, in furtherance of the investor protection objectives of the names rule, to provide greater assurance that a fund's investments will be consistent with its name.

Separately, a few commenters questioned the Commission's authority to adopt the proposed amendments under section 35(d) of the Investment Company Act.[102] For instance, one commenter asserted that the Commission lacks authority to adopt the amendments, as ''[t]here is a significant difference between a name based on investors' reasonable expectations and a name that is materially deceptive or misleading.'' [103] Another commenter suggested that neither the current rule nor the proposed amendments are

[92] *See infra* section II.C. This flexibility also means a fund would not be required to include proprietary information in its 80% investment policy. *See* Stradley Comment Letter (asserting that providing meaningful distinctions among funds may require over-disclosing the criteria used to select investments, which investment advisers may be hesitant to provide to avoid giving away proprietary information).

[93] As a result of this flexibility, we disagree with commenters that asserted that the expanded scope would effectively penalize funds that invest in a security that initially displays particular characteristics but where those characteristics evolve over time. *See supra* footnote 73. However, to the extent that a fund identifies as part of the final rule's quarterly review requirement that the characteristics of an existing investment in the fund's portfolio are inconsistent with the fund's 80% investment policy as a result of, for example, market declines, cycles, or volatility, the fund must address this in accordance with the rule's requirements for temporary departures from the 80% investment requirement. *See infra* footnote 185 and accompanying paragraph; *see also* section II.E.1.

[94] *See also infra* paragraph accompanying footnotes 153–154; *infra* paragraph accompanying footnotes 357–358.

[95] *See infra* sections IV and V.

[96] *See infra* section II.A.2.

[97] *See infra* section IV.D.2.

[98] *See infra* section II.A.2.a) (discussing compliance monitoring and portfolio investment assessment and re-assessment requirements under the final amendments and how these requirements compare to current names rule requirements).

[99] *See infra* sections II.B and II.E.

[100] *See supra* footnote 9.

[101] *See supra* footnote 7.

[102] *See, e.g.,* ICI Comment Letter; Stradley Comment Letter; Seward & Kissel Comment Letter.

[103] ICI Comment Letter I; *see also* ICI Comment Letter IV (asserting that ''the Commission lacks authority to adopt the [proposed amendments] under [section 35(d)]'' because the proposed amendments are ''too vague and ambiguous,'' and do not satisfy the ''materiality'' requirement in section 35(d)).

consistent with the authority that section 35(d) grants, as neither incorporates a finding by the Commission that a particular and identified word or words are materially deceptive or misleading.[104] Lastly, one commenter asserted that the proposed amendments would have associated costs and burdens, and suggested that Congress did not intend for section 35(d) to authorize the Commission to impose significant burdens that would have a material economic impact on funds and their investors.[105]

We disagree with the views expressed by these commenters. Congress, in enacting amended section 35(d) of the Act, reaffirmed its concern that investors may focus on a fund's name to determine the fund's investments and risks, and recognized that investor protection would be improved by giving the Commission rulemaking authority to define materially deceptive or misleading fund names.[106] Before this amendment, the Commission was required to ''declare by order that a particular name was misleading and, if necessary, obtain a federal court order prohibiting further use of the name.'' [107] In light of this ''cumbersome process,'' [108] Congress gave the Commission the power to act by ''rule, regulation, or order.'' [109] Congress further gave the Commission the authority to ''*define* such names or titles as are materially deceptive or misleading,'' not ''list'' or another similar word, and whether any ''word or words'' are materially deceptive or misleading is a determination that necessarily is made with reference to additional facts and circumstances.[110]

Relying on this authority, the Commission in 2001 adopted the names rule to ''address certain investment company names that are likely to mislead an investor about a company's investment emphasis,'' which would ''guard against the use of misleading investment company names,'' ''provide an investor greater assurance that the company's investments will be consistent with its name,'' and ''reduce confusion.'' [111] Similarly here, the Commission in adopting rule amendments is exercising its authority under section 35(d) to ''define,'' ''by rule,'' ''such names or titles as are materially deceptive or misleading'' and is doing so based on consideration of the broad public input the Commission has received on fund names, our analysis of this input, the Commission and staff's experience with the names rule over the past two decades, and developments in the fund industry during this time period.[112] In the years since the Commission has adopted the names rule, it has observed certain general trends—specifically as discussed above, a significant broadening of fund investment options currently available, the growth of fund assets in sector funds and thematic strategies, and a growth in investor interest in funds with ESG strategies—that have caused us to believe that targeted action in this area is necessary.[113]

Although we acknowledge that the final amendments may impose additional costs and burdens relative to the current rule, we have made changes to the proposed amendments that have the result of mitigating the burdens associated with the final amendments compared to the proposal. The costs and burdens associated with the final amendments are carefully considered by the Commission, and such costs and burdens are justified given the investor protection objectives that underlie section 35(d) and that would be achieved through the amendments.

Further, another commenter asserted that application of the proposed amendments to terms that suggest investments with particular characteristics would violate the First Amendment, as this ''operates as a restriction on funds' ability to speak through their names.'' [114] We disagree that this aspect of the amendments violates the First Amendment. As we have explained elsewhere in this release, as Congress recognized by adopting section 35(d), fund names can provide important information to investors regarding the nature of the fund and therefore the nature of their potential investment. And names that do not necessarily fall under the existing rule can create reasonable investor expectations by suggesting a particular investment focus. The amendments adopted today will help align fund names and investor expectations by applying the 80% requirement to all names that suggest a particular investment focus, reducing the extent to which funds can choose names that are materially misleading or deceptive. Rather than barring the use of any particular name, the amendment imposes certain requirements when the name a fund has selected communicates specific and important information about the fund. Further, the amendments allow funds the flexibility to ascribe reasonable definitions for the terms used in their names.[115] The amendments are therefore appropriately tailored to serve Congress's significant interest in preventing investors from being deceived or misled.[116]

b) Names That Do Not Suggest an Investment Focus

The 2022 Proposal acknowledged that there would continue to be fund names that would not require the fund to adopt an 80% investment policy because the names would not connote an investment focus.[117] In particular, the Commission stated that terms in a fund's name that reference characteristics of the fund's portfolio as a whole, such as a name indicating the fund seeks to achieve a certain portfolio ''duration'' or that the fund is ''balanced,'' would not require the fund to adopt an 80% investment policy.[118] The Commission stated that in such cases a term may indicate a fund's objectives without communicating to investors the specific type of investments, or the particular characteristics of investments, that the

[104] Seward & Kissel Comment Letter (stating that ''[w]e think the appropriate reading of Section 35(d) is that . . . funds subject to the prohibitions of the statute (and any regulations adopted thereunder) could provide, through the notice and comment process, comments on the specific ''word or words'' proposed by the Commission to be deemed materially deceptive or misleading'').

[105] SIFMA AMG Comment Letter; *see also* Calamos Comment Letter.

[106] 2001 Names Rule Adopting Release, *supra* footnote 8, at section I.

[107] *See id.* at text proceeding footnote 3.

[108] S. Rep. No. 293, 104th Cong., 2d Sess. 8–9 (1996) (''Enforcing the Act entails a cumbersome process—the Commission must first find, and declare by order, that a fund's name is deceptive or misleading, and then bring an action in federal court to enjoin the use of the name'').

[109] 15 U.S.C. 80a–34(d).

[110] *Id.* (emphasis added); *see also* 80a–34(a) & (b) (making it unlawful for certain persons to ''represent or imply'' that a security is guaranteed or approved by the U.S. government or a bank, but not listing every specific statement that would do so).

[111] *See id.*

[112] *See supra* section I.B; *see also, e.g.,* Environmental Defense Fund Comment Letter; Comment Letter of Sierra Club (Aug. 16, 2022) (''Sierra Club Comment Letter''); Ceres Comment Letter (all discussing the proposed amendments as within the Commission's authority to define materially deceptive and misleading names under section 35(d) of the Act).

[113] *See supra* footnote 33 and accompanying text.

[114] ICI Comment Letter IV.

[115] *See supra* footnote 92 and accompanying text.

[116] For similar reasons, we disagree with the commenter who asserted that certain proposed reporting requirements on Form N–PORT violate the First Amendment. ICI Comment Letter IV. These requirements do not require reporting of ''subjective information on which investment managers may appropriately disagree,'' (*id.*) but instead provide important information to investors regarding whether and how a fund's investments align with reasonable expectations created by the fund's name and 80% investment policy.

[117] *See* Proposing Release, *supra* footnote 2, at n.49 and accompanying text.

[118] *Id.*

fund will acquire.[119] Commenters generally agreed that such terms would not require an 80% investment policy under the proposal and that this treatment was appropriate.[120]

Many commenters, however, sought additional clarity on terms—such as ''growth'' and ''value''—that commenters stated can reference either the characteristics of a fund's investments or the intended result of a fund's portfolio investments in the aggregate.[121] One commenter focused in particular on ESG ''uplift'' funds, where the fund begins with a given universe of investments and does not add new investments to this universe but systematically over-or underweights investments within the given universe based on ESG criteria, with the objective of achieving a more favorable ESG profile at an aggregate fund level as compared to the benchmark or investment universe, within a specific tracking error target.[122] The fund is investing on a relative basis at the portfolio level, rather than focusing its investment in companies that objectively exhibit strong ESG characteristics, and includes terms in the fund's name intended to communicate this investment approach to investors (such as ESG ''Aware''). Commenters also expressed concern with the proposal's discussion of maturity-related terms that describe certain bond funds' holdings.[123] These commenters agreed with the Commission that the term duration should not require an 80% investment policy because it refers to a portfolio-wide analysis; however, they further asserted that terms like ''intermediate-term (or similar) bond'' are likewise used by funds and understood by investors similarly to refer to the portfolio's duration (*i.e.,* the portfolio's sensitivity to interest rate changes). Commenters also suggested that terms like ''global'' and ''international'' should continue to be outside of the scope of the 80% investment policy requirement because these terms reference the portfolio as a whole.[124]

Conversely, several commenters urged that certain terms may not connote particular characteristics of a fund's portfolio investments, but nonetheless should require an 80% investment policy when those terms clearly communicate that the fund is managed in a particular way (*e.g.,* terms like ''balanced,'' ''hedged,'' and ''managed risk'').[125] Relatedly, one commenter suggested that the rule should explicitly subject funds with allocation designations in their name (*e.g.,* 60/40 Target Allocation Fund) to the 80% investment policy requirement.[126]

After considering comments, we continue to recognize that there are certain terms that do not communicate to investors the particular characteristics of investments that will make up the fund's portfolio and for which an 80% investment policy will not be required. Such names include, for instance, names that suggest a portfolio-wide result to be achieved, such as ''real return,'' ''balanced,'' or ''managed risk,'' names that reference a particular investment technique, such as ''long/short'' or ''hedged,'' and names that reference asset allocation determinations that evolve over time, such as a retirement target date or ''sector rotation'' funds.''[127] In each of these examples, the fund's name communicates information to investors about the overall characteristics of the fund's portfolio, rather than particular investments in the portfolio, and therefore will not necessitate an 80% investment policy under the amended rule. Likewise, terms like ''intermediate term (or similar),'' in describing a ''bond'' fund, also will not require an 80% investment policy under the final amendments in addition to the 80% investment policy that would be required due to the fund's use of ''bond'' in its name in this example. We do not view these types of names as being distinct from names that describe portfolio-wide characteristics, such as names that describe portfolio duration. Additionally, names including the terms ''global'' and ''international,'' without an additional term that suggests an investment focus such as ''fixed income'' or ''growth,'' will not require an 80% investment policy under the final rule. These terms describe a fund's approach to constructing a portfolio, but do not communicate the composition of the fund's portfolio with any particularity (unlike, say, ''Japan'' or ''Europe'') and therefore on their own suggest no particular investment focus.[128] Therefore, requiring such funds to adopt an 80% investment policy would produce fewer investor protection benefits relative to names that communicate to investors the particular characteristics of investments that will compose the fund's portfolio. Names with terms that do not communicate the particular characteristics of investments composing the fund's portfolio will continue to be subject to section 35(d)'s prohibition on materially misleading or deceptive names.[129] Funds with these names likewise will continue to be

[119] Regardless of whether a fund is required to adopt an 80% investment policy under the rule, a fund must, consistent with rule 38a-1, adopt and implement written policies and procedures reasonably designed to prevent violations of the Federal securities laws, which includes section 35(d). *Id.* at n.50 and accompanying text.

[120] *See, e.g.,* J.P. Morgan Asset Management Comment Letter; Fidelity Comment Letter; ICI Comment Letter; SIFMA AMG Comment Letter.

[121] *See, e.g.,* TIAA-Nuveen Comment Letter; Calamos Comment Letter; T. Rowe Comment Letter; WisdomTree Comment Letter; ICI Comment Letter (stating that ''[t]erms that could refer to either a particular investment or the portfolio as a whole are *per se* not misleading or deceptive because they do not create an affirmative impression in one way or another'').

[122] *See* Comment Letter of BlackRock, Inc. (Dec. 19, 2022) (''BlackRock Comment Letter''); *see also* Robertson-Fisch Comment Letter (discussing ESG ''tilt'' strategies).

[123] *See* ICI Comment Letter; SIFMA AMG Comment Letter; Invesco Comment Letter.

[124] *See, e.g.,* Dechert Comment Letter; ICI Comment Letter; Invesco Comment Letter; Seward & Kissel Comment Letter.

[125] *See* Dogwhistle Comment Letter; PIABA Comment Letter (also recommending that the rule prohibit the use of terms of well-known organizations, affinity groups, or the reference to a specific population of investors (*e.g.,* ''veterans'' or ''municipal employees'') in fund names). *See also* Consumer Federation of America Comment Letter (additionally recommending that the rule should prevent single-state tax exempt funds from investing substantially in securities issued by another municipality). The Commission did not propose amendments that addressed the scope of tax-exempt funds whose names require them to adopt an 80% investment policy, or the investments that would be included in a fund's 80% basket under such policy, nor do the final amendments address these points. *But see infra* footnote 155.

[126] *See* Better Markets Comment Letter.

[127] A target date fund's name communicates an investment approach to investors, but does not communicate the composition of the fund's portfolio at any particular point in time, as the fund's investments will change over time in accordance with the fund's glide path. Similarly, ''sector rotation'' funds seek to shift their portfolio in and out of sectors over time as the economy moves through the different phases of a business cycle. In each of these cases, an 80% investment policy would not be appropriate for the fund because the fund's name connotes portfolio-wide asset allocation determinations that evolve continuously over time.

[128] Similarly, funds that use terms in their name that indicate that the fund uses a negative or exclusionary screening process for investments (*e.g.,* ''fossil fuel-free'') may not require an 80% investment policy because such terms generally provide insight into what is precluded from the fund's portfolio, but these terms do not communicate to investors the particular investment focus of the fund's portfolio. In any case, a fund with a name like ''fossil fuel-free'' that indicates the fund will not invest at all in fossil fuels in this example will be materially deceptive or misleading for purposes of section 35(d) if the fund invests in companies that are not fossil fuel-free as defined by the fund in its prospectus (*e.g.,* issuers with fossil fuel reserves).

[129] For instance, terms used in fund names that reference well-known organizations, affinity groups, or that reference a specific population of investors may not communicate the particular characteristics of investments composing the fund's portfolio and therefore may not require an 80% investment policy under the amended rule. Such funds, however, will continue to be subject to section 35(d)'s prohibition on materially misleading or deceptive names.

subject to the anti-fraud provisions of the Federal securities laws regarding disclosures to investors.

In response to commenters seeking additional clarity about the terms growth and value, we understand, based on staff review of fund disclosure, that it is not typical in current practice for growth and value funds to implement their strategies on a portfolio-wide basis, as opposed to a selection process based on the growth or value characteristics of the fund's component portfolio investments. If terms in a fund's name can reasonably be understood to reference either the characteristics of a fund's individual investments or the intended result of a fund's portfolio investments in the aggregate, the fund will be required to adopt an 80% investment policy, consistent with the proposal. We disagree with the commenter who asserted that such terms are *per se* not misleading.[130] It would be confusing to investors if the same term in a fund's name required an 80% investment policy in some cases and not in others. In addition, the rule provides funds sufficient flexibility to design and implement an 80% investment policy in these circumstances. We do not agree that the ESG uplift strategies identified by one commenter require an 80% investment policy, however, because the particular strategies identified by the commenter are solely executed on a relative basis at the portfolio level, as described in more detail above, *and* include terms in the fund's name associated with this investment strategy to signal this different approach to investors.[131]

c) Investments Included in a Fund's 80% Basket

Regarding the application of the proposed amendments, the Commission stated in the 2022 Proposal that when determining whether a particular asset is invested in accordance with the investment focus that the fund's name suggests (*i.e.,* qualifies for inclusion in a fund's 80% basket), there must be a meaningful nexus between the given investment and the investment focus suggested by the name.[132] The Commission discussed that a fund may define the terms used in its name in a reasonable way, allowing for flexibility in determining whether a nexus exists between a given security and the focus the fund's name suggests. For instance, the Commission stated it would be reasonable for a fund to determine a sufficient nexus between certain securities and a given industry if the securities are issued by companies that derive more than 50% of their revenue or income from, or own significant assets in, the industry. However, the Commission also explained that the use of text analytics to assign issuers to industries based on the frequency of particular terms in an issuer's disclosures was not, in and of itself, sufficient to create a reasonable nexus.

Commenters expressed that a 50% revenue test is not always the most appropriate way to determine whether a company is part of a given industry, particularly for new companies and nascent industries and business sectors.[133] These commenters urged the Commission to clarify the reasonableness standard as it applies to designating investments in a fund's 80% basket, urging that advisers need the flexibility to evaluate investments based on a totality of criteria beyond revenue tests. Some commenters asserted that funds with certain business or industry-adjacent investment strategies face particular difficulties adopting an 80% investment policy because their investments often vary in terms of industries, capitalization ranges, revenue sources, asset classes, geographies, and other key characteristics, making it challenging to pinpoint confidently a reasonable nexus between the fund's investments and the investment focus suggested by its name.[134] Moreover, one commenter expressed particular concern with the proposal's discussion of the processing of text analytics, suggesting that the tool is a useful method for facilitating forward-looking analysis of companies and industries.[135] Separately, two commenters suggested that the Commission should permit fund managers to use forward-looking assessments or future-based methodologies to analyze investments when determining whether they fit in a given industry or sector, on the condition that such funds use a modifying indicator like ''emergent'' or ''future'' in their names to signal to investors that their analysis of investments is not completely based on current characteristics of the issuer.[136]

We appreciate commenters' concerns regarding potential challenges in determining whether a particular asset is invested in accordance with the investment focus that the fund's name suggests, particularly with respect to thematic investment strategies. Consistent with the 2022 Proposal, the plain English and established industry use requirements in the final amendments are intended to provide flexibility for funds to determine what qualifies as a reasonable nexus between a security and a given investment focus.[137] Similar to the Commission's discussion in the Proposing Release regarding the application of the final amendments, it would generally be reasonable for a fund to determine that a sufficient nexus exists between certain securities and a given industry if the securities are issued by companies that derive more than 50% of their revenue or income from, or own significant assets in, the industry. There also may be instances where the percentage could be smaller, such as where a large company is a dominant firm in a given industry (*e.g.,* the firm is an acknowledged leader in the industry). Further, the use of text analytics to assign issuers to industries based on the frequency of particular terms in an issuer's disclosures is not, in and of itself, sufficient to create a reasonable nexus because it is not reasonable to conclude that an issuer is in a given industry solely because the issuer's disclosure documents frequently include words associated with the industry.[138] These examples are not meant to serve as an exhaustive list of acceptable methods of qualification in a fund's 80% basket. Given the breadth of fund names and strategies, it is not possible to provide an enumerated list of circumstances in which a nexus exists between a security and an industry or a particular investment focus.

Further, as raised by commenters, advisers may offer funds with strategies that seek exposure to long-term investment opportunities or that seek to identify issuers that are likely to generate significant amounts of revenue from certain industries or business sectors in the future. As commenters expressed, it may be challenging for these types of funds to find a reasonable

[130] ICI Comment Letter.

[131] BlackRock Comment Letter.

[132] *See generally* for this discussion Proposing Release, *supra* footnote 2, at nn.51–52 and accompanying text.

[133] *See, e.g.,* SIFMA AMG Comment Letter; BlackRock Comment Letter; Seward & Kissel Comment Letter; WisdomTree Comment Letter.

[134] *See, e.g.,* ICI Comment Letter; Dechert Comment Letter; Minerva Comment Letter.

[135] SIFMA AMG Comment Letter.

[136] *See* SIFMA AMG Comment Letter; BlackRock Comment Letter.

[137] *See* final rule 35d–1(a); *see also infra* section II.C.

[138] The advent and growth of advanced technologies have made increasing use of natural language processing that can significantly enhance the scale and scope of text analytics. Funds may be able to use these types of technologies to aid a determination that a nexus exists between a given security and the focus that a fund's name suggests that involves analysis going beyond the frequency with which a word or phrase appears in a document.

nexus between their investments and a given investment focus based on current characteristics of the issuer. In these circumstances, funds may signal to investors, through the use of ''emergent,'' ''future,'' or some other similar term in the fund's name, that the fund considers some future-based methodology when assessing whether a nexus exists between a given security and the investment focus suggested by the fund's name (*e.g.,* ''XYZ Emergent 3D Printing Technology Fund''). More generally, we recognize that overall context is important in how an investor interprets a fund's name. For instance, descriptive terms such as ''aggressive,'' ''conservative,'' or ''strategic,'' when paired with another term that is covered by the scope of the rule can modify an investor's expectations with respect to the fund's investment focus. The rule is designed to give fund managers reasonable discretion to define terms in a fund's name, and to allocate investments reasonably into the 80% basket in accordance with the investment focus the name conveys, which can be dependent on the context of the terms in a name. In particular, the final amended rule requires that terms within a fund's name must be consistent with the plain English meaning or established industry use. We are including these provisions in the final amended rule to provide fund managers with sufficient flexibility.

Separately, as discussed in the 2022 Proposal, when a fund's name includes terms suggesting an investment focus that has multiple elements, the fund's 80% investment policy must address all of the elements in the name (as all of the elements would be reflected in the investment focus that the fund's name suggests).[139] The Commission noted, however, that a fund can take a reasonable approach in specifying how the fund's investments will incorporate each element. Commenters expressed broad support for the Commission's approach, asserting that it retains the appropriate level of flexibility for advisers to determine how best to allocate investments under an 80% investment policy.[140] Where a fund's name suggests an investment focus that has multiple elements, the fund's 80% investment policy must address each of those elements. For instance, a fund with a name that references two or more distinct investment focuses (*e.g.,* ''XYZ Technology and Growth Fund'') could have an investment policy that provides that each security included in the 80% basket must be in both the technology sector and meet the fund's growth criteria. Alternatively, such a fund could instead have an investment policy that provides that 80% of the value of the fund's assets will be invested in a mix of technology investments and growth investments, with some technology investments, some growth investments, and some investments in both of these categories, with no minimum or maximum investment requirements specified for either category. In addition, any fund that has a name that suggests an investment focus would be required to adopt an 80% investment policy even if the fund's name also contains a term that does not suggest an investment focus. For example, the ''XYZ Technology and Real Return Fund'' would be required to adopt an 80% investment policy to invest 80% of the value of its assets in the technology sector despite the phrase ''real return'' also appearing in the name.

Moreover, it would generally be reasonable for a fund of funds or other acquiring fund to include the entire value of its investment in an appropriate acquired fund when calculating compliance with the 80% investment requirement without looking through to the acquired fund's underlying investments. For example, a fund of funds with the name ''XYZ Industrials Fund'' with an 80% investment policy to invest in the industrials sector could count the entire value of its investments in the ''ABC Automotive Fund'' when calculating compliance with the 80% investment requirement, provided that the ABC Automotive Fund has an 80% investment policy to invest in its subsection of the industrials sector. It would not be reasonable, however, for an acquiring fund in these circumstances to ignore situations where the acquiring fund knows that an underlying fund is not investing consistent with the acquiring fund's investment focus.[141] In such cases, the acquiring fund should take actions to address this departure as it otherwise would to resolve a temporary departure from the 80% requirement under the final amendments.

d) ESG-Related Terms

Consistent with the proposal, the final amendments will apply the requirement to adopt an 80% investment policy to fund names that suggest an investment focus, including names with terms indicating that the fund's investment decisions incorporate one or more ESG factors.[142] Many commenters supported the inclusion of ESG terms in the expanded scope.[143] Some of these commenters expressed concerns related to ''greenwashing'' among funds that have, or purport to have, ESG- or sustainability-related characteristics.[144] Many of these commenters asserted that given the developing market interest in, and regulatory and public scrutiny of, funds that incorporate ESG factors in their investment objectives, to the extent a fund uses an ESG-related term in its name, the fund should be required to adopt an 80% investment policy that ensures it will invest in accordance with the investment focus its name suggests.[145]

Conversely, several commenters opposed including names with ESG terms in the expanded scope of the 80% investment policy requirement.[146] Many of these commenters expressed similar concerns to those discussed above opposing the expanded scope in general, including potential interpretive issues resulting from the perceived subjectivity of certain ESG-related terms, and potential increased compliance burdens.[147] Some commenters also articulated concerns that are unique to funds that use ESG terms. For instance, several commenters expressed that the Commission's ESG Disclosure Proposal would be better suited to address investor understanding of ESG considerations than the proposed names rule scope

[139] *See* Proposing Release, *supra* footnote 2, at nn.50–51 and accompanying text; *see also* final rule 35d–1(a)(2) (this provision reflects that a fund's name may include multiple ''terms'' suggesting that the fund focuses its investments in a particular way).

[140] Fidelity Comment Letter; CFA Institute Comment Letter; Seward & Kissel Comment Letter.

[141] An acquiring fund is not required to continuously monitor the investments of the underlying fund for purposes of compliance with the amended names rule. For example, the XYZ Industrials Fund may rely on the ABC Automotive Fund to comply with the ABC Automotive Fund's 80% policy.

[142] *See* final rule 35d–1(a)(2).

[143] *See, e.g.,* U.S. SIF Comment Letter; SIFMA AMG Comment Letter; Sierra Club Comment Letter; Public Citizen Comment Letter; Comment Letter of Bonwood Social Investment (Aug. 16, 2022) (''Bonwood Comment Letter'').

[144] *See* NASAA Comment Letter; J.P. Morgan Asset Management Comment Letter; U.S. SIF Comment Letter; Comment Letter of LTSE Services, Inc. (Aug. 16, 2022) (''LTSE Comment Letter''); CFA Institute Comment Letter.

[145] *Id.*

[146] *See, e.g.,* ICI Comment Letter; Calvert Comment Letter; Cato Institute Comment Letter; Invesco Comment Letter; Robertson-Fisch Comment Letter.

[147] *See, e.g.,* TIAA-Nuveen Comment Letter; Calvert Comment Letter; ICI Comment Letter, Robertson-Fisch Comment Letter. *See generally supra* section II.A.1.a) (responding to concerns from commenters related to interpretive challenges and compliance costs connected to the proposed expansion of the 80% investment policy).

expansion.[148] These commenters generally expressed more support for a disclosure-based framework rather than a mandated 80% investment policy for fund names that communicate an ESG focus. In addition, a few commenters expressed that certain terms, depending on the context, may not be solely used for ESG investment strategies (*e.g.,* ''sustainable'' or ''impact''), or when read together may provide a different meaning than when presented individually (*e.g.,* ''XYZ Sustainable Growth Fund'').[149]

We recognize that ''ESG'' and similar terms are expansive, incorporating three broad categories of interest (environmental, social, and governance issues) for investors and asset managers, with differing levels of focus on each particular issue, and different perspectives on what attributes of an issuer or investment fit within this terminology.[150] The breadth of ESG-related terms, as well as evolving investor expectations around terms like ''sustainable'' or ''socially responsible,'' compound the possibility of investor confusion and potential ''greenwashing'' in fund names.[151] Moreover, concerns regarding materially deceptive and misleading fund names are particularly important for funds that incorporate ESG factors in their investment decisions because, unlike many other non-ESG investment strategies, some ESG-related strategies are not well-established or commonly understood to the investing public.[152] ESG terms in fund names communicate to investors that the fund will invest in issuers that have particular characteristics, like other terms that are covered by the expanded scope. Accordingly, there is not a principled basis to treat ESG terms differently than other terms that have the potential to be materially deceptive and misleading, as suggested by a few commenters that requested a purely disclosure-based framework for funds that use ESG terms in their name. The final amendments thus require funds that use ESG terms in their name to adopt an 80% investment policy.

We recognize, as with fund names that do not include ESG terms, that the general context of a name with terminology that could connote an ESG focus is critical in how an investor interprets such a name.[153] For instance, a name such as ''XYZ Sustainable Growth Fund'' could reasonably be interpreted as a fund that employs a strategy that seeks growth that is sustainable over time (*i.e.,* growth that will be maintained at a certain level), or a fund that incorporates ESG factors into its decision making. In this example, the fund would require an 80% investment policy regardless, but the fund manager has discretion to reasonably define the terms in the fund's name, and to allocate investments into the 80% basket in accordance with the investment focus the name suggests.[154]

2. Temporary Departures From the 80% Investment Requirement

The final rules we are adopting permit temporary departures from the 80% investment requirement by allowing a fund temporarily to invest less than the required 80% of the value of the fund's assets in accordance with the investment focus or tax treatment its name suggests.[155] Under the final amendments, we are retaining the current rule's requirement that a fund must determine at the time that it invests whether the investment is in the fund's 80% basket (''time-of-investment test'').[156] We are adopting a new requirement that, at least quarterly, funds subject to the 80% investment requirement must review the fund's portfolio investments to determine whether the fund's investments continue to be consistent with the fund's 80% investment policy.[157] Funds must comply with the 80% investment requirement ''under normal circumstances,'' leaving to funds the determination of what constitutes something other than a normal circumstance. If, subsequent to an investment, the 80% investment requirement is no longer met, the fund's future investments (that is, any portfolio assets it acquires) must be made in a manner that will bring the fund into compliance with that requirement within the time period specified in the rule.

A fund may, in other-than-normal circumstances, choose to invest in a manner that is not consistent with the fund's 80% investment requirement for a limited period of time.[158] The final amendments include specific time frames—generally 90 consecutive days, as opposed to 30 days as proposed—for getting back into compliance if a fund departs from the 80% requirement, either intentionally in other-than-normal circumstances, or as identified by the fund as a part of its quarterly review or otherwise. Funds are permitted under the final rules to temporarily depart from the 80% investment requirement in connection with a reorganization (for which the final rule does not specify a required time frame for accompanying temporary departures) or a fund launch (departure not to exceed the period of 180 consecutive days) or when a notice of a change in a fund's policy in certain circumstances has been provided to fund shareholders.[159]

Under the proposed amendments, funds would have been permitted to depart from the fund's 80% investment policy only under certain specified circumstances.[160] When a fund departed under the specified circumstances, the proposed amendments would have required funds to come back into compliance with the 80% investment requirement within 30 consecutive days after the initial departure. Departures from names rule compliance for fund launches would not have been permitted to exceed a period of 180 consecutive days. The proposed amendments did not specify a required time frame for temporary departures that were the result of reorganizations or

[148] *See* ICI Comment Letter; TIAA-Nuveen Comment Letter.

[149] *See* ICI Comment Letter; Dechert Comment Letter.

[150] *See* Robertson-Fisch Comment Letter (arguing that because ESG is a ''big tent'' term, the use of ESG terminology in fund names ''does not convey very much information'' to investors).

[151] *See supra* footnote 37 and accompanying discussion.

[152] *See* Center for American Progress Comment Letter (stating that ''[t]here is more variability in investors' understanding of what many ESG terms mean than with terms like ''growth'' or ''global'' because the use of ESG terms is relatively new and their use often is not tied to specific information about their meaning.'').

[153] *See* Robertson-Fisch Comment Letter (discussing different hypothetical ESG-related funds that could deliver very different results to investors, but could be presumably sold under the same name).

[154] *See also supra* footnote 94 and accompanying text; *supra* paragraph accompanying footnote 132.

[155] The amendments to the temporary departure provision are applicable not only to funds whose name suggest a particular investment focus, but also to tax-exempt funds that are required to invest their assets in accordance with the provisions of rule 35d–1(a)(3).

[156] *See* final rule 35d–1(b).

[157] Final rule 35d–1(b)(1)(i).

[158] Final rule 35d–1(b)(1)(ii).

[159] Final rule 35d–1(b)(1)(iii); *see also* rule 35d–1(g) (defining ''launch'' as a period, not to exceed 180 consecutive days, starting from the date the fund commences operations).

[160] Temporary departures under the proposed amendments would have been permitted only: (1) as a result of market fluctuations, or other circumstances, where the temporary departure is not caused by the fund's purchase or sale of a security or the fund's entering into or exiting an investment; (2) to address unusually large cash inflows or unusually large redemptions; (3) to take a position in cash and cash equivalents or government securities to avoid a loss in response to adverse market, economic, political, or other conditions; or (4) to reposition or liquidate a fund's assets in connection with a reorganization, to launch the fund, or when notice of a change in the fund's 80% investment policy has been provided to fund shareholders at least 60 days before the change pursuant to the rule.

where the 60-day notice has been provided to shareholders. In all cases, the proposed amendments would have required that a fund would have to come back into compliance as soon as reasonably practicable.

We received comment letters both supporting and opposing the Commission's proposed approach for temporary departures. Among the primary reasons commenters supported the proposal was their belief that the proposed amendments brought more certainty to the current rule's approach to temporary departures from 80% and would require funds to be more vigilant with respect to their names rule compliance.[161] In particular, several commenters supported the goal of bringing the rule in line with investors' expectations by ensuring that the investments made by the fund remain consistent with the fund's name and the investor's investment preferences over the long-term life of the fund.[162]

The Commission, however, did receive many comments requesting that we reconsider the proposed approach to temporary departures. The Proposing Release sought to permit appropriate flexibility to depart temporarily from the 80% investment requirement in particular, time-limited circumstances when doing so would be beneficial to the fund and its shareholders, while providing additional parameters designed to prevent a fund from investing inconsistently with its 80% investment policy for an extended period of time.[163] Commenters, as discussed in the next section, raised concerns that the proposed amendments were overly prescriptive, lacked flexibility, and were too limited in the amount of time funds would have to bring their investments back into compliance. In response to comments received, we are adopting an approach that modifies the proposed amendments, which seeks to balance the concerns raised by commenters and the goals of the proposal.

a) Time-of-Investment Test and Quarterly Review

Under the final amendments, as under the current names rule, a fund is required to determine at the time it invests whether the security is appropriately included in the fund's 80% basket.[164] This ''time-of-investment test'' was originally adopted to avoid requiring a fund to rebalance its investments if the fund's portfolio were no longer invested in accordance with the fund's 80% investment policy as a result of, for example, market movements or an influx of cash from new investors (''drift'').[165] The proposal would have removed the time-of-investment test and instead would have required that a fund remedy drift within 30 days of the initial departure. In effect, the proposed rule would have required that funds engage in continual compliance testing to reassess the characteristics of investments in the fund's 80% basket—or even daily testing and reassessment for those funds making investments each trading day—to ensure that they observe and correct any drift quickly in order to comply with the proposed requirement that the fund come back into compliance with the names rule within 30 days.

In response to comments we received, and as discussed in more detail below, we are not adopting a requirement for continual or daily monitoring to reassess the characteristics of the investments in the fund's 80% basket and are instead maintaining a time-of-investment test in the names rule. Under the final amendments, funds will instead be required to reassess their portfolio assets' inclusion in the fund's 80% basket at least quarterly. This change means that portfolio investments that are included in the 80% basket at the time of investment will continue to be considered to be consistent with the fund's 80% investment policy unless the fund identifies otherwise as part of its required quarterly reassessments, or outside of its required quarterly reassessments identifies that these investments' characteristics are inconsistent with the fund's 80% investment policy. This approach to assessing the characteristics of portfolio investments in the 80% basket, however, does not change the requirement for funds to maintain at least 80% of the value of their assets in 80% basket assets (as determined at the time of investment), unless the fund departs temporarily from 80% in accordance with the final amendments. As an example, when a fund acquires Investment A, the fund must assess the characteristics of that investment when the purchase is made to determine whether it should be included in the 80% basket. When a fund acquires a new investment, Investment B, the fund must assess the characteristics of Investment B when it invests to determine whether it should be included in the 80% basket. When determining whether 80% of the fund's assets are invested in the 80% basket when Investment B is made, the fund must consider the value of Investment A, but would not have to re-assess the characteristics of Investment A. Each quarter, the fund must re-assess the characteristics of Investments A and B for consistency with the fund's 80% investment policy.

We received many comments supporting the retention of the time-of-investment test and urging the Commission not to adopt an approach that would require continual compliance monitoring.[166] Several commenters stated that the time-of-investment test is a standard that is used in other portfolio compliance tests under the Investment Company Act and that consistency with how fund holdings are measured across Investment Company Act rules would therefore be a preferable approach in the context of the names rule.[167] The proposed approach, which would have removed the time-of-investment test, would instead have effectively required that fund managers reassess portfolio investments' characteristics for consistency with the fund's 80% investment policy every time the fund makes a new investment, and to take corrective action almost immediately upon identifying any departure from 80%. The time-of-investment test affords some flexibility to fund managers by focusing on whether an asset is consistent with the fund's 80% investment policy at the time of investment, rather than requiring ongoing reassessments. In addition, commenters expressed concern that limitations on fund manager discretion prevent investors from having access to actively-managed funds that are subject

[161] *See, e.g.,* NASAA Comment Letter; PRI Comment Letter; Consumer Federation of America Comment Letter; Environmental Defense Fund Comment Letter.

[162] *See, e.g.,* Consumer Federation of America Comment Letter; Center for American Progress Comment Letter; NASAA Comment Letter.

[163] *See* Proposing Release, *supra* footnote 2, at paragraph following n.35.

[164] *See* final rule 35d–1(b).

[165] *See* 2001 Names Rule Adopting Release, *supra* footnote 8, at n.32 and accompanying text; *see also* Investment Company Names, Investment Company Act Release No. 22530 (Feb. 27, 1997) [62 FR 10955 (Mar. 10, 1997)], at n.28 and accompanying text.

[166] *See, e.g.,* ICI Comment Letter; Calamos Comment Letter; Seward & Kissel Comment Letter; Fidelity Comment Letter; Dechert Comment Letter; T. Rowe Comment Letter; Nationwide Comment Letter; Cato Institute Comment Letter; Stradley Comment Letter; Dimensional Comment Letter; WisdomTree Comment Letter; MFS Comment Letter; Invesco Comment Letter; Capital Group Comment Letter.

[167] For example, commenters pointed to time of acquisition tests in the 1940 Act, including, section 5 the anti-pyramiding provisions of section 12(d)(1) [15 U.S.C. 80a–12(d)(1)] and the limitations on investments in securities-related issuers in section 12(d)(3) [15 U.S.C. 80a–12(d)(3)]. *See, e.g.,* ICI Comment Letter; Dechert Comment Letter; Seward & Kissel Comment Letter; Fidelity Comment Letter; Calamos Comment Letter; Nationwide Comment Letter.

to the names rule.[168] Commenters also supported retaining the time-of-investment test so that in the event that a fund's portfolio inadvertently drifts out of compliance with the 80% investment requirement because the characteristics of portfolio investments change, the fund would not be forced to sell a security that was originally purchased in compliance with the names rule in order to come back into compliance within a specific time frame (as proposed, generally 30 days).[169] Commenters were concerned the proposed approach would potentially force sales or purchases of portfolio assets at inopportune times with the potential to intensify the market conditions that prompted these transactions in the first place.[170]

Commenters also stated that there would be substantial burden on funds, their sponsors, and their administrators to implement a continual or daily program for re-assessing portfolio investments for names rules compliance purposes.[171] Commenters argued that the burden of implementing a continual monitoring program is not warranted given the asserted lack of identified significant harm to investors from portfolio drift and the burden of creating and maintaining such a program.[172] These commenters stated that the burdens associated with a continual monitoring program would be particularly high because assessing portfolio investments' consistency with a fund's 80% investment policy is not necessarily straightforward, particularly given the expanded scope of the names rule, which would include terms that are not readily quantifiable.[173] For example, commenters stated that some of the information that a fund would need to monitor whether a particular investment should be included in a fund's 80% basket may include metrics measured over a period of time that may be longer than the period of a single day.[174] Some funds, for instance, may adopt investment strategies that involve a multi-year concept that commenters stated cannot be assessed on a single day.[175] Commenters therefore urged the Commission to adopt a rule that would provide some discretion to determine whether a particular investment, evaluated over a period of time, is consistent with the fund's 80% policy.[176] Similarly, commenters raised concerns about continually monitoring compliance with respect to certain securities, such as growth or value investments, where the name characteristics could change frequently.[177] For example, securities may be bought that have characteristics meeting a particular fund's standards for inclusion in the fund's 80% basket at the time of purchase, but these characteristics may change from day to day. Commenters stated that assessing these securities' characteristics continually would require operational and compliance build-outs that would be substantial.[178]

After considering comments, we are retaining the current rule's time-of-investment test that requires a fund to determine, for purposes of names rule compliance, whether an investment is within the fund's 80% basket at the time of investment. While the time-of-investment test must be conducted only at the time that the investment is made, the final rule incorporates a process for periodic reassessment of fund investments in order to ensure that that the fund is invested consistent with the focus the fund's name suggests. Rather than adopting a rule that effectively would require daily or continual compliance monitoring, the final rule requires that a fund review its portfolio investments on an at-least quarterly basis to determine whether it continues to comply with the 80% investment requirement.

The time-of-investment standard affords to the portfolio manager more flexibility than the proposed amendments, as we acknowledge that there may be certain fluctuations in a fund's portfolio and within the 80% basket that naturally occur over time, and that may not be outside of investors' reasonable expectations. For example, a mid-cap equity fund may hold securities that at the time of investment qualified under the fund's 80% investment policy as mid-cap, but that may temporarily move into the large-cap category and back again. We understand that this type of drift is a natural fluctuation in a portfolio, as certain characteristics of securities' may not be static. We also appreciate that, for certain funds that are subject to the 80% investment requirement, this drift may occur relatively frequently, and so a standard that would require daily or continual compliance monitoring could be particularly burdensome and require very frequent portfolio re-balancing.[179] While we recognize that drift may occur and that portfolio managers should have discretion in managing their portfolio in the best interest of the fund, we are adopting a quarterly review requirement to help ensure portfolio adjustments so that drift does not go unchecked. This quarterly time frame will require a fund to address drift more quickly, which in turn will help ensure greater consistency between the fund's investments and the focus its name suggests, as compared to a review period based on a longer periodic time frame (for example, an annual testing requirement as one commenter suggested).[180]

The combination of a time-of-investment test with a minimum quarterly review requirement balances the dynamic nature of funds' portfolio securities with compliance with the fund's 80% investment policy. The required time frame for review is consistent with the final rules' quarterly Form N–PORT reporting requirement, which requires funds (except in the case of money-market funds and BDCs) to report on Form N–PORT the value of the fund's 80% basket as well as each investment that is included in the fund's 80% basket.[181] The required minimum quarterly review helps ensure that funds are reviewing their portfolios for names rule compliance on a periodic basis so that instances of drift can be identified without the burden of assessing each investment's inclusion in the 80% basket every day. The final amendments are designed to balance the costs associated with monitoring fund investments' inclusion in the 80% basket with the harm to investors that could result if a fund were permitted a longer time frame for reviewing its

[168] *See* Dechert Comment Letter; ICI Comment Letter.

[169] *See, e.g.,* Stradley Comment Letter; ICI Comment Letter; Dechert Comment Letter; Seward & Kissel Comment Letter; Fidelity Comment Letter; Calamos Comment Letter; Nationwide Comment Letter.

[170] *See, e.g.,* ICI Comment Letter; Dechert Comment Letter.

[171] *See, e.g.,* ICI Comment Letter; Dechert Comment Letter; Seward & Kissel Comment Letter; WisdomTree Comment Letter.

[172] *See, e.g.,* Seward & Kissel Comment Letter, Nationwide Comment Letter; Fidelity Comment Letter. *But see* Dogwhistle Comment letter (suggesting an annual compliance testing requirement and that daily compliance testing is too frequent, but a time-of-investment test is not appropriate).

[173] *See, e.g.,* SIFMA AMG Comment Letter; J.P. Morgan Asset Management Comment Letter; ICI Comment Letter; Dechert Comment Letter; Wellington Comment Letter.

[174] *See, e.g.,* ICI Comment Letter; Wellington Comment Letter; Capital Group Comment Letter; SIFMA AMG Comment Letter.

[175] *See, e.g.,* ICI Comment Letter; Wellington Comment Letter; Capital Group Comment Letter; SIFMA Comment Letter.

[176] *See id.*

[177] *See, e.g.,* ICI Comment Letter; Seward & Kissel Comment Letter; WisdomTree Comment Letter.

[178] *See, e.g.,* ICI Comment Letter; Dechert Comment Letter; Seward & Kissel Comment Letter; WisdomTree Comment Letter.

[179] *See, e.g.,* SIFMA Comment Letter; J.P. Morgan Asset Management Comment Letter.

[180] *See* Dogwhistle Comment Letter.

[181] *See infra* section II.E.

portfolio.[182] The time-of-investment test coupled with a quarterly portfolio review is designed to ensure that a fund's name more accurately communicates to investors important information about the fund's investments while providing funds with appropriate flexibility within a time-limited period.

One commenter also articulated concerns that are unique to funds that use the term ''tax-exempt'' in their name.[183] This commenter requested clarification on how tax-exempt funds that apply the income test under the names rule should measure compliance with the 80% investment policy requirement under the proposed amendments.[184] Specifically, this commenter urged the Commission to confirm that compliance with the income test would be based solely on income that the fund distributes. The final rule requires that a fund review its portfolio at least quarterly to determine whether it continues to comply with the 80% investment requirement. Accordingly, a tax-exempt fund applying the income test will be required to assess its portfolio on an at-least quarterly basis to determine whether the fund's assets are invested so that at least 80% of the income that it distributes will be exempt from federal income tax or from both federal and state income tax.

b) Investing Consistent With 80% Investment Policy ''Under Normal Circumstances''

The final amendments, like the current names rule, require a fund to invest in accordance with its 80% investments policy ''under normal circumstances.'' That is, under the final amendments, a fund's 80% policy applies under normal circumstances, but funds may depart from the fund's investment policy in other-than-normal circumstances. The proposed rule would have, in place of the rule's current standard that a fund's 80% investment policy apply ''under normal circumstances,'' included specific exceptions that address circumstances where departures would be permitted.[185] Unlike the proposal, funds have flexibility under the final amendments to determine what constitutes other-than-normal circumstances where the fund could depart intentionally from the 80% requirement (for example, the reasons for departures that the proposed amendments included, or other circumstances where market conditions or fund operations are other-than-normal).[186] Under the final amendments, departure from the fund's 80% policy in other-than-normal circumstances is time-limited to 90 consecutive days from the initial departure, whereas the proposal would have required a fund to be back in compliance generally within 30 days.

The Commission received some comments supporting the proposed approach to change the current rule's ''under normal circumstances'' standard in favor of a more prescriptive approach. Commenters stated that the current standard has led to more uncertainty and less consistency in how fund investments correspond to a fund's name than the proposed approach would over extended periods of time.[187] Conversely, the Commission also received many comment letters opposing the proposed approach of permitting departure from the 80% investment requirement only under the circumstances that the proposed amendments specified.[188] Commenters stated that the proposed approach was overly prescriptive and would unnecessarily curb the ability of a fund's portfolio manager to act in the best interest of the fund.[189] For example, in an effort to bring a fund back into compliance within the proposed 30-day period, fund managers may feel compelled either to divest or purchase an investment that may not be strategically in the best interest of the fund. In addition, a commenter argued that the Proposing Release did not cite evidence that the ''under normal circumstances standard'' has been abused or has resulted in the use of materially deceptive or misleading names.[190] Commenters also argued that while the proposed amendments would permit departures from the 80% requirement only in the circumstances that the amendments specified, unforeseeable circumstances that the amendments did not contemplate—and that any enumerated list of circumstances could not contemplate in an evergreen way—may present reasons for departing that could be appropriate in the interests of the fund and consistent with the goals of the names rule.[191]

Fund managers are fiduciaries to the funds they manage. Commenters advocated that, as such, portfolio managers should have discretion in determining when a fund needs to depart from its 80% investment policy. Some commenters supported retaining the current rule's ''under normal circumstances'' standard in order to give portfolio managers flexibility to act in the best interest of the fund and its shareholders, which can include temporarily departing from the fund's 80% investment policy.[192] In addition, some commenters stated that they believe that some investors may prefer investing in funds where the portfolio manager has discretion to depart from the investment focus denoted by the fund's name when the portfolio manager

[182] *See infra* section IV.D.2.

[183] ICI Comment Letter III. The commenter also suggested that tax-exempt funds using an income test be permitted to count taxable market discount toward their 80% baskets. The treatment of such taxable market discount is outside the scope of this rulemaking, as it was not addressed in the proposal, and, therefore, not addressed in the final amendments.

[184] The names rule currently allows, and the final amendments will continue to allow, a fund with ''tax-exempt'' in its name to adopt either an asset test or an income test to satisfy its 80% investment policy requirement. The income test requires that a fund invest its assets so that at least 80% of the income that it distributes will be exempt from federal income tax or from both federal and state income tax. *See* final rule 35d–1(a)(3)(i)(B).

[185] Under the proposed rule, temporary departures would have been permitted only: (1) as a result of market fluctuations, or other circumstances where the temporary departure is not caused by the fund's purchase or sale of a security or the fund's entering into or exiting an investment; (2) to address unusually large cash inflows or unusually large redemptions; (3) to take a position in cash and cash equivalents or government securities to avoid losses in response to adverse market, economic, political, or other conditions; or (4) to reposition or liquidate a fund's assets in connection with a reorganization, to launch the fund, or when notice of a change in the fund's 80% investment policy has been provided to fund shareholders at least 60 days before the change pursuant to the rule. *See* proposed rule 35d–1(b).

[186] *See supra* footnote 160.

[187] *See, e.g.,* NASAA Comment Letter; Environmental Defense Fund Comment Letter.

[188] *See, e.g.,* ICI Comment Letter; SIFMA AMG Comment Letter; J.P. Morgan Asset Management Comment Letter; CFA Institute Comment Letter; Comment Letter of U.S. Chamber of Commerce Center for Capital Markets Competitiveness (Aug. 12, 2022) (''USCOC Comment Letter''); Dimensional Comment Letter; WisdomTree Comment Letter; Calamos Comment Letter; MFDF Comment Letter; MFS Comment Letter; Capital Group Comment letter; Seward & Kissel Comment Letter; Fidelity Comment Letter; Comment Letter of Nasdaq, Inc. (Aug. 16, 2022) (''Nasdaq Comment Letter''); Dechert Comment Letter; T. Rowe Comment Letter; Nationwide Comment Letter; Cato Institute Comment Letter.

[189] *See, e.g.,* ICI Comment Letter; SIFMA AMG Comment Letter; J.P. Morgan Asset Management Comment Letter; Dimensional Comment Letter; MFS Comment Letter; Capital Group Comment letter; Fidelity Comment Letter; Dechert Comment Letter; T. Rowe Comment Letter; Calamos Comment Letter; Nationwide Comment Letter.

[190] *See* Cato Institute Comment Letter.

[191] *See, e.g.,* SIFMA AMG Comment Letter; Dechert Comment Letter; Fidelity Comment Letter.

[192] *See, e.g.,* ICI Comment Letter; SIFMA AMG Comment Letter; Dechert Comment Letter; CFA Institute Comment Letter; Stradley Comment Letter; USCOC Comment Letter; Cato Institute Comment Letter; Dimensional Comment Letter; Federated Comment Letter; T. Rowe Comment Letter; WisdomTree Comment Letter.

believes the departure is in the best interest of the fund.[193]

Commenters suggested alternatives to the proposed approach, stating that if the Commission adopts a prescriptive list of permissible circumstances under which a fund may depart from the 80% policy, the list should be expanded, for example to permit departure for repositioning fund assets in connection with changes of sub-advisers and/or portfolio managers, and in periods leading up to material strategy changes.[194] These commenters suggested the inclusion of a ''catch-all'' provision, as well, permitting any departures the portfolio manager believes are reasonable. Commenters also provided alternatives that would permit additional drift beyond the circumstances that the proposed amendments specified, so long as the fund provided additional disclosure for the reasons why the fund may drift.[195] Another suggested an alternative included allowing funds that use the term ''managed'' in their name to have greater flexibility to depart from the fund's 80% investment policy.[196]

After considering comments, we are adopting amendments that retain the current ''under normal circumstances'' provision. While we are retaining the current ''under normal circumstances'' standard, we are also adopting new limitations on how long a fund may depart from 80% under this provision, discussed below, which addresses the concerns raised by commenters that the current standard allows for investments not consistent with the fund's name over extended periods of time.[197] Retaining the current ''under normal circumstances'' provision is designed to provide fund managers with flexibility to manage their portfolios while requiring that funds normally invest 80% of their assets consistent with their 80% investment policy.[198]

We acknowledge that there could be circumstances when it is in the best interest of the fund and its investors for the portfolio manager to have discretion to depart from the fund's 80% investment policy. This interest must be balanced, however, with the need for a fund's name to convey accurately to investors the underlying investments that correspond with the focus the fund's name suggests. Rather than require additional disclosure that acknowledges drift or to provide a separate standard for funds that include the term ''managed'' in their name, we are adopting a requirement to invest in accordance with the 80% requirement ''under normal circumstances,'' combined with a set time frame to come back to 80%, to balance these concerns. We are adopting, therefore, a limit on the length of time that a fund may depart in other-than-normal circumstances to 90 consecutive days after the initial departure.

Although we are not adopting the proposed approach of delineating the circumstances in which a fund may depart intentionally from the 80% requirement, an intentional departure must be in other than ''normal'' circumstances, which could include but is not limited to the circumstances included in the proposed approach. These circumstances could include temporary departures that occur as a result of market fluctuations, index rebalancing, cash flows/inflows, or temporary defensive positions, among others.[199] These circumstances do not, however, represent the extent of events or circumstances where a fund, in considering its obligations under the names rule and the prohibitions of section 35(d), may determine that other-than-normal circumstances exist, warranting a departure from 80%. The final rules' approach provides flexibility to depart under circumstances that may not have been included in the proposal's delineated reasons for departures. Although the question of whether circumstances are ''normal'' is based on the facts and circumstances, if a fund were to deviate in purportedly other-than-normal circumstances serially or frequently, this may suggest that in fact those circumstances are ''normal'' and otherwise raise questions about the appropriateness of the fund's name under section 35(d) if the fund's portfolio is not invested consistent with its name for prolonged periods of time.[200] When a fund deviates from the 80% investment requirement due to other-than-normal circumstances, as we discuss below, the fund is required to maintain a record documenting the date of the departure and the reason for the departure.[201]

c) Time to Come Back Into Compliance

The final amendments require that funds come back into compliance with the 80% investment requirement as soon as reasonably practicable in the case of drift (*i.e.,* where the fund identifies that its investments are not consistent with this requirement under the names rule, for example, as a result of inadvertent drift identified as part of the fund's quarterly review).[202] In all circumstances, a fund must come back into compliance within 90 consecutive days, as measured from the time that the fund identifies a departure from the 80% investment policy (as part of its quarterly review or otherwise), or the time the fund initially departs, in other-than-normal circumstances, from the 80% investment policy.[203] Under the final amendments, consistent with the current rule, where a fund identifies that the 80% requirement is no longer met, the fund must make all future investments in a manner that will bring the fund into compliance with the fund's 80% investment policy. The Commission proposed to require funds to come back into compliance with the 80% investment policy within 30 days from the initial departure from 80%. We are modifying the proposed approach to respond to concerns raised by commenters.

The Commission received some support for the proposed period for funds to come back into compliance.[204] The Commission received many comments, however, arguing that a 30-day period was not an appropriate time limit on departures.[205] While some

[193] *See, e.g.,* SIFMA AMG Comment Letter; Dechert Comment Letter; Nationwide Comment Letter; T. Rowe Comment Letter; MFS Comment Letter; JP Morgan Asset Management Comment Letter.

[194] *See, e.g.,* ICI Comment Letter; Dechert Comment Letter; SIFMA AMG Comment Letter.

[195] *See, e.g.,* Capital Group Comment Letter; Nationwide Comment Letter.

[196] *See, e.g.,* ICI Comment Letter and SIFMA AMG Comment Letter.

[197] Prolonged drift could result in fund names that have a tendency or capacity or deceive or mislead, regardless of whether such drift has resulted in actual deception of investors. *See, e.g.,* Cato Institute Comment Letter; *see also supra* footnote 40.

[198] *See* 2001 Names Rule Adopting Release, *supra* footnote 8, at nn.37–40 and accompanying text.

[199] *See* 2001 Names Rule Adopting Release, *supra* footnote 8, at text preceding footnote 39 (''[The ''under normal circumstances'' standard] will permit investment companies to take ''temporary defensive positions'' to avoid losses in response to adverse market, economic, political, or other conditions.'').

[200] *See infra* section II.A.5 text accompanying footnotes 318–321.

[201] *See infra* section II.F (discussing the requirement under the final amendments for funds to maintain records documenting the reasons for each departure).

[202] Final rule 35d–1(b).

[203] *Id.* Although the temporal limits in the final amendments start from the time that a departure is identified, a fund may not avoid coming into timely compliance, if the fund failed to identify departures because the fund did not perform the required quarterly review, or if the fund failed to perform quarterly reviews that are reasonably designed to identify departures.

[204] *See, e.g.,* PRI Comment Letter.

[205] *See, e.g.,* SIFMA AMG Comment Letter; ICI Comment Letter; CFA Institute Comment Letter; Dechert Comment Letter; Cato Institute Comment Letter; WisdomTree Comment Letter; NASAA Comment Letter; MFDF Comment Letter; MFS Comment Letter; J.P. Morgan Asset Management Comment Letter; Seward & Kissel Comment Letter;

commenters stated that a 30-day period may be appropriate for some asset classes or in certain market conditions, these commenters contended that a 30-day period may be too short in certain market conditions or in unanticipated extenuating circumstances.[206] For example, one commenter stated that while a fund may be able to remedy a departure from the 80% investment policy that is the result of unusually large flows within 30 days, a portfolio manager may need more time when divesting securities to accommodate when an index rebalances or where a strategy may need to be reconsidered given exogenous events.[207]

Commenters stated that the proposed 30-day time period may require a fund to make forced purchases and sales at potentially undesirable prices or at inappropriate times.[208] For example, if a small-cap security becomes a mid-cap security and therefore can no longer be included in the small-cap fund's 80% basket, the fund may be required to sell the holding within the proposed 30-day period, even though the portfolio manager believes that it is in the best interest of the fund to hold the security for a longer period.[209] Commenters stated that forced purchases or sales could lead to additional adverse consequences for a fund, including the risks of front running from other market participants, unwanted capital gains or assorted tax efficiency implications, increased transaction costs, reduced diversification, fire sales, homogenization across funds with similar names, and an overall negative impact on fund performance, as well as market liquidity and market stability more largely.[210]

The current names rule effectively requires that funds make all future investments consistent with the fund's 80% policy once the fund identifies that its portfolio is out of compliance with the 80% investment requirement. Some commenters urged the Commission to reconsider the proposed 30-day period and instead maintain the current standard.[211] Additionally, commenters suggested alternative time periods to require funds to come back into compliance with the 80% investment policy, *e.g.,* 180 days.[212]

Several commenters suggested an alternative approach that would require funds to notify their board of directors if the fund falls out of compliance with the 80% investment policy for more than a specified period of time (*e.g.,* 30, 60, or 90 days etc.).[213] Some commenters suggested that after a certain period of time following a departure from 80%, a fund must provide a report to the board detailing how the fund will come back into compliance. Commenters stated that other rules under the Investment Company Act have similar board reporting requirements, which recognize the value of a board's oversight of fund management and the best interest of fund shareholders, and that the names rule may benefit from such a requirement.[214] Under this alternative, commenters stated that they believed that funds would have more flexibility than under the proposed approach and that the board would be in the best position to judge whether a departure is reasonable.[215]

The amendments we are adopting are designed to help ensure that a fund will not stray from the investment focus its name suggests for a protracted period of time, regardless of external events or other circumstances that could affect the fund's portfolio investments. Investors' expectations for funds' investment focuses may not depend on whether market events negatively affect the investments in a fund's portfolio. For example, investments in passively-managed funds, such as index-based mutual funds and ETFs, have increased substantially in the past two decades, indicating that investors seek investment products that permit them to obtain specific types of investment exposure for their portfolios.[216] Although investors may have different expectations regarding how long a fund may drift from the fund's investment focus, a prolonged period of drift would be inconsistent with the investor protection concerns that underlie the names rule and section 35(d) of the Investment Company Act.

Taking these concerns into account, while considering comments received, we are extending the proposed time period that funds have to come back into compliance with the names rule from 30 to 90 consecutive days after the fund either identifies a departure or, in other-than-normal circumstances, departs from the 80% investment requirement. We recognize, as certain commenters raised, that some investors may prefer allowing a fund to depart from its investment focus for longer than 30 days to avoid any losses that the fund may incur to come back into compliance within that time period. The final amendments provide funds with more flexibility and time both to recognize when a fund has drifted out of compliance and to correct the departure. This 90-day review period is also consistent with the quarterly Form N–PORT reporting requirement discussed below. The final amendments require a fund to assess whether the fund's portfolio is in compliance at least quarterly and provide the fund with an additional quarter to rectify any departure from the 80% investment requirement. At some point, however, departures may begin to change the nature of the fund fundamentally, which would undermine investor

Fidelity Comment Letter; Nationwide Comment Letter; Dimensional Comment Letter; Wellington Comment Letter; Capital Group Comment Letter.

[206] *See, e.g.,* ICI Comment Letter; Dechert Comment Letter; Stradley Comment Letter; T. Rowe Comment Letter; MFDF Comment Letter; MFS Comment Letter; Invesco Comment Letter; SIFMA AMG Comment Letter; WisdomTree Comment Letter; Dimensional Comment Letter.

[207] *See* J.P. Morgan Asset Management Comment Letter.

[208] *See, e.g.,* ICI Comment Letter; SIFMA AMG Comment Letter; J.P. Morgan Asset Management Comment Letter; Dechert Comment Letter; Stradley Comment Letter; T. Rowe Comment Letter; USCOC Comment Letter; Cato Institute Comment Letter; Dimensional Comment Letter; Capital Group Comment Letter. Certain of these commenters stated that the 2001 Names Rule Adopting Release stated that funds should not be required to ''sell portfolio holdings that have increased in value'' in order to reattain compliance with their 80% policy. *See, e.g.,* Dechert Comment Letter; ICI Comment Letter.

[209] These circumstances would arise only where, in the given example, the security grew sufficiently to become a mid-cap security, the fund manager preferred to continue to hold the security, and the fund manager had already made similar determinations with respect to other securities which collectively made up 20% of the value of the fund's assets.

[210] *See, e.g.,* Dechert Comment Letter; Stradley Comment Letter; Nationwide Comment Letter; ICI Comment Letter; SIFMA AMG Comment Letter; T. Rowe Comment Letter; Dimensional Comment Letter; Nationwide Comment Letter; Fidelity Comment Letter; WidsomTree Comment Letter; Wellington Comment Letter.

[211] *See, e.g.,* Calamos Comment Letter; Nationwide Comment Letter.

[212] *See, e.g.,* Fidelity Comment Letter.

[213] *See, e.g.,* ICI Comment Letter; Dechert Comment Letter; Stradley Comment Letter; Dimensional Comment Letter; SIFMA AMG Comment Letter; MDFS Comment Letter; MFS Comment Letter; Invesco Comment Letter.

[214] *See* ICI Comment Letter; SIFMA AMG Comment Letter; Dechert Comment Letter; MFS Comment Letter; *see also* Investment Company Liquidity Risk Management Programs, Investment Company Act Release No. 32315 (Oct. 13, 2016) [81 FR 82142 (Nov. 18, 2016)] (''Liquidity Adopting Release'') and Use of Derivatives by Registered Investment Companies and Business Development Companies, Investment Company Act Release No. 34084 (Nov. 2, 2020) [85 FR 83162 (Dec. 21, 2020)] (''Derivatives Adopting Release'').

[215] *See, e.g.,* Dimensional Comment Letter; SIFMA AMG Comment Letter; ICI Comment Letter.

[216] Proposing Release, *supra* footnote 2, at n.61 and accompanying text. As another example, consistency in investment companies' investments with their names and investors' reasonable expectations may be particularly important to retirement plan and other investors who place great emphasis on allocating their investment company holdings in well-defined types of investments, such as stocks, bonds, and money market instruments. *See id.; see also* 2001 Names Rule Adopting Release, *supra* footnote 8, at n.8 and accompanying text.

expectations created by the fund's name. The time limits we are adopting are designed to prevent such a fundamental change without investor notification.

We are not adopting, as suggested by some commenters, a board reporting obligation that would effectively provide additional time to resolve departures from the 80% requirement. Rather, the final approach directly provides funds with additional time, compared to the proposal, both to identify drift in their portfolios and to rectify departures from 80%. The increased flexibility for temporary departures that the final amendments afford to funds, compared to the proposed approach, addresses many of the concerns raised by commenters recommending that we adopt a board reporting obligation instead of setting specified time periods for funds to come back into compliance with the names rule. These comments were generally framed in terms of providing additional flexibility, as opposed to suggesting that a fund's board should have a specific oversight role when a fund departs from 80% for an extended period. The requirement that funds review their portfolios for names rule compliance quarterly in addition to a 90-day period to come back into compliance increases the flexibility of funds to accommodate instances of fund drift and intentional departures. This requirement also still includes a time certain for funds to resolve these departures in recognition of investors' reasonable expectation that a fund's investments will generally remain focused in the area that the fund's name indicates. In addition, a fund can seek exemptive relief from the Commission if the fund believes it would be appropriate and consistent with the protection of investors for the fund to depart for a limited additional period past 90 days. Any request for an exemptive order will be evaluated based on its particular facts and circumstances and must meet the standard under section 6(c) of the Investment Company Act, including that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors.[217] One example of an instance in which a fund might consider seeking relief would be where the fund anticipates resolving the departure, but cannot do so within 90 days and seeks to avoid changing the fund's name only to change it again in a short period of time.

In instances where the fund identifies that its investments are not consistent with this requirement under the names rule (for example, as a result of inadvertent drift identified as part of the fund's quarterly review), we are retaining the requirement that a fund must make all future investments in a manner that will bring the fund back into compliance with the 80% investment policy. We are also adopting, as proposed, the requirement that a fund must come back into compliance ''as soon as reasonably practicable'' (with a 90-day outer limit) because we anticipate that most temporary departures caused by portfolio drift could be remedied in substantially less than 90 days, though this could depend on the specific facts and circumstances.[218]

We recognize that there are certain circumstances under which a fund may be unable to bring its portfolio back into compliance with the fund's 80% investment policy within the required 90-day period. As commenters stated, there may be events that preclude the ability of a fund to make investments or sell assets that would not be in the best interest of the fund but that may be required to come back into compliance with the names rule. If such an event occurred, the fund would need to change its name to better reflect the realities of its portfolio and the fund must provide shareholders with a notice of that change, which would provide information that would allow investors to understand the nature of the fund's portfolio.[219] The final amendments, consistent with the proposal, effectively toll the time for a fund to get back into compliance following a departure from 80% that the rule otherwise would require, if a notice of a change in a fund's policy has been provided to fund shareholders.[220] Once such a notice has been provided to shareholders, shareholders have a period of 60 days to determine whether they would like to redeem their shares before the change in policy takes effect.

(d) Fund Launches and Reorganizations

We are adopting final rule amendments that permit funds to invest less than 80% of their assets in the 80% basket temporarily in order to reposition or liquidate assets in connection with a reorganization or to launch a fund.[221] We are adopting these amendments substantially as proposed. For fund launches, the final amendments provide funds with a temporary period to depart from the 80% investment requirement that is not to exceed 180 consecutive days starting from the day the fund commences operations.[222] The final rule amendments do not limit the time of departures associated with fund reorganizations.

The Commission received comments requesting that we extend the proposed period of time permitted for fund launches from 180 days to a longer period.[223] Commenters stated that certain funds, for example ''alts funds'' or certain illiquid funds, may have a longer ramp-up period that can extend beyond 180 days.[224] One commenter stated that investors in these types of less-liquid funds will understand the nature of the fund they are investing in and understand that coming into compliance with the names rule within 180 days may not be in the interest of the fund.[225] Another commenter stated that it is in the best interest of the fund manager to invest the assets of the fund and to establish the fund as quickly as possible and that a fund manager may reasonably need more than 180 days to come into compliance with the names rule.[226] The Commission received one comment supporting the proposed approach to reorganizations and did not receive comments opposing this aspect of the proposal.[227]

We understand that there may be variability in how long is needed to launch a new fund depending on the types of investments in which the fund seeks to invest. In some instances, it may be in shareholders' interest for funds to take additional time beyond the otherwise-required 90-day temporary departures period to invest in a manner consistent with the fund's 80% investment policy, for example to avoid

[217] *See* Investment Company Act section 6(c) (providing the Commission with authority to conditionally or unconditionally exempt persons, securities or transactions from any provision of the Act if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act).

[218] *See also, e.g.,* J.P. Morgan Asset Management Comment Letter (''Although temporary non-compliance in the ordinary course, such as due to unusually large flows, should be readily fixable in less than 30 days, there are also circumstances in which more flexibility is warranted.''); MFDF Comment Letter (''While we agree that in most circumstances, a fund should be able to return to compliance within 30 days, it is difficult to anticipate every type of market volatility or other extenuating circumstance that might make this difficult to do while still protecting the interests of the fund's shareholders.'').

[219] *See* final rule 35d–1(a)(2)(ii), (b)(1)(iii), (d).

[220] *See* proposed rule 35d–1(b)(iv); final rule 35d–1(b)(1)(iii).

[221] Final rule 35d–1(b)(1)(iii); *see also* final rule 35d–1(g) (defining the term ''launch'').

[222] Final rule 35d–1(g).

[223] *See, e.g.,* SIFMA AMG Comment Letter; USCOC Comment Letter; Invesco Comment Letter.

[224] *See, e.g.,* SIFMA AMG Comment Letter; USCOC Comment Letter.

[225] *See, e.g.,* SIFMA AMG Comment Letter.

[226] *See, e.g.,* USCOC Comment Letter.

[227] *See* Fidelity Comment Letter.

the potential for adverse impacts on the price of a targeted investment, to scale up an investment, or to find a better investment that corresponds to the investment focus relative to what is currently available. Nonetheless, we are adopting the requirement that, consistent with current guidance, such a period should not exceed 180 consecutive days.[228] We understand, based on staff knowledge of industry practice, that this time frame is generally sufficient for funds to invest fully, consistent with their 80% investment policy, after the fund commences operations.[229] Further, the final amendments generally require funds to be invested consistent with their 80% investment policy ''as soon as reasonably practicable,'' which may be a shorter time than 180 days. The amendments therefore do not permit any fund to exceed 180 consecutive days to invest its assets consistent with its 80% investment policy when launching a fund.

We recognize the likelihood that it can take longer for funds to find investments during their start-up, particularly for funds that invest in securities whose supply is limited. Both reorganizations and launches may result in a fund holding assets in a way that is inconsistent with its 80% investment policy in connection with these fund life-cycle events. For example, at start-up it may take time for a new fund to find and purchase available investments consistent with the fund's investment focus, and the fund may hold cash in the interim. While we anticipate that, for most funds, codifying a required 180-day period for a fund to be fully invested consistent with its 80% investment policy will not result in significant operational changes, we acknowledge that may not be the case for all funds.

Planned reorganizations may take longer to complete than 30 days or even 180 days. Moreover, such a planned action will be disclosed, and the reorganization is likely to be a permanent change to the nature of the investor's investment.[230] Similarly, a change to a fund's 80% investment policy will result in a permanent change to the fund's investments, about which funds notify investors pursuant to the provisions of the names rule. Thus, we do not believe that changes in the fund's investment portfolio to support an upcoming reorganization would generally be inconsistent with investors' reasonable expectations. As a result, we do not believe that an express time limit is necessary for departures from the 80% investment requirement made in connection with these actions. Such departures would still be required to be resolved as soon as reasonably practicable, consistent with any temporary departure under the rule.

3. Considerations Regarding Derivatives in Assessing Names Rule Compliance

Consistent with the proposal, we are adopting amendments that address the valuation of derivatives instruments for purposes of determining compliance with a fund's 80% investment policy, as well as the derivatives that a fund may include in its 80% basket. These amendments are designed to reflect the investment exposure derivatives investments create and to increase comparability, as some funds currently value derivatives instruments using their notional amounts for purposes of determining their compliance with the 80% test while other funds use market values.[231] The amendments are designed both to allow funds to use names that may more effectively communicate their investments and risks to investors, and to reduce the risk that a fund may use derivatives to invest in a manner inconsistent with the investment focus suggested by the fund's name.

The proposed amendments included the requirement for funds to use a derivatives instrument's notional amount, rather than its market value, for the purpose of determining compliance with a fund's 80% investment policy.[232] The proposal also included amendments to address the derivatives instruments that a fund may include in its 80% basket.[233] As discussed below, commenters generally agreed that the names rule should specifically address funds' use of derivatives, although some commenters suggested modifications to the proposed approach.

We are adopting the proposed amendments with certain changes in response to comments. We discuss each element of the final amendments' provisions addressing derivatives below.

Use of Derivatives' Notional Amounts, With Currency Hedging Exclusion

The final amendments generally require a fund to use notional amounts to value derivatives in assessing whether it has invested 80% of the value of its assets in accordance with the investment focus that the fund's name suggests.[234] In a change from the proposal, however, the final amendments also require a fund to exclude from the calculation certain derivatives that hedge the currency risk associated with a fund's foreign-currency denominated investments. These derivatives therefore will not be included in the calculation of the fund's assets or the fund's 80% basket when determining if the fund is complying with its 80% investment policy. A fund must exclude a currency derivative if it: (1) is entered into and maintained by the fund for hedging purposes, and (2) the notional amounts of the derivatives do not exceed the value of the hedged investments (or the par value thereof, in the case of fixed-income investments) by more than 10 percent.

The final amendments' approach of using notional amounts better reflects the investment exposure that derivatives investments create than the use of market values (as the Act would generally otherwise require by operation of its definition of the term ''value''), because a derivative instrument's market value may bear no relation to the investment exposure that the derivatives instrument creates.[235] For most types of derivatives instruments, the notional amount generally serves as a measure of a fund's investment exposure to the underlying reference asset or metric.[236] The use of notional amounts furthers the goal of helping to ensure that a fund's investment activity is consistent with the investment focus its name communicates.[237] Notably, using a

[228] *See* 2001 Names Rule Adopting Release, *supra* footnote 8, at n.39 and accompanying text.

[229] *See also, e.g.,* PRI Comment Letter (supporting all of the proposed time frames for getting back into compliance).

[230] For example, when the board of an open-end fund determines to approve a reorganization, the fund would supplement its prospectus.

[231] *See, e.g.,* Proposing Release, *supra* footnote 2, at nn.76–78 and accompanying text.

[232] *See* proposed rule 35d–1(g).

[233] *See* proposed rule 35d–1(b)(2).

[234] *See* final rule 35d–1(g) (definitions of ''assets'' and ''derivatives instrument''). The final amendments' approach, like the proposed approach, does not distinguish between derivatives instruments that are assets and derivatives that are liabilities of the fund. *See* Proposing Release, *supra* footnote 2, at n.83.

[235] *See* Proposing Release, *supra* footnote 2, at paragraph accompanying nn.77–78; *see also* 15 U.S.C. 80a–2(a)(41)(B) (defining ''value,'' in part, as the market value of securities for which market quotations are readily available and, for all other investments, as fair value as determined in good faith by the board of directors).

[236] A total return swap, for example, can provide a return that is the economic equivalent of a direct investment in the derivative's reference asset.

[237] A fund's name may be materially deceptive or misleading under section 35(d) of the Investment Company Act, however, even if it complies with the 80% investment policy requirement (and uses notional amounts as the final amendments require

Continued

derivatives instrument's market value for purposes of assessing names rule compliance could prevent a fund from using a name that effectively communicates its investments, or could result in a fund being in compliance with its 80% investment policy despite having significant exposure to investments that are *not* suggested by the fund's name.[238]

Comments on the proposed mandatory approach to using notional amounts were mixed. Some commenters supported the proposed approach, stating that notional amounts are a more accurate reflection of funds' economic exposure, as compared to market values, and that exposure is likely what investors assume a fund name reflects.[239] One commenter also expressed appreciation that the proposal attempts to provide a clear rule while also adjusting for accuracy in reflecting exposure.[240] Other commenters generally supported the use of notional amounts but suggested changes to the proposed approach that would permit the use of market values under certain circumstances.[241] For example, some commenters suggested that the rule should permit a fund to value each derivatives instrument consistent with a ''reasonable exposure metric'' and a method that best measures the economic exposure the derivatives instrument obtains synthetically, so long as the fund consistently applies the relevant metric and method.[242] One commenter suggested an alternative approach that would require the use of notional amounts for derivatives that are included in a fund's 80% basket, but that would permit the use of market values for derivatives that are not included in the 80% basket, depending on the nature of the particular derivative.[243]

Commenters suggesting these alternative approaches expressed particular concern about using notional amounts for derivatives transactions entered into to protect against risks posed by investments *not* suggested by a fund's name (*i.e.,* investments not included in the 80% basket).[244] For example, a fund with ''U.S. equities'' in its name might invest a limited percentage of its assets in non-U.S. securities and then enter into derivatives to hedge risks associated with those securities. To comply with the fund's 80% investment policy, the value of the fund's U.S. equity investments in the fund's 80% basket must represent at least 80% of the value of the fund's ''assets'' as defined in the rule. If the derivatives intended to hedge risks associated with the non-U.S. equity securities in this example were valued using notional amounts, however, this would increase the value of the fund's ''assets'' and therefore could have a potentially large impact on the denominator for purposes of names rule compliance, causing the fund to drop below the required 80% threshold.[245] These commenters argued that this, in turn, could dissuade funds from entering into certain derivatives transactions that funds use for hedging or risk management purposes, whose impact on fund performance might be insignificant. One commenter, on the other hand, argued against an alternative approach that uses different valuation approaches for different derivatives because this would be less consistent and more complex than the proposed approach, which would likely result in inconsistencies in treatment, would complicate funds' compliance, and would raise examination challenges.[246]

After analyzing comments, we continue to believe that notional amounts are generally an appropriate measure of derivatives instruments' economic exposure.[247] This approach is designed to provide a clear and consistent approach to derivatives valuation that will simplify names rule compliance because all funds will have a specific standard to follow when valuing derivatives for names rule purposes. This approach also promotes names that effectively communicate a fund's investments and risks because all funds will be using the same calculation methodology. The final amendments' requirement for funds to use notional amounts to value derivatives, in the context of names rule compliance, reflects these goals.

However, we are adopting a modification to this approach in consideration of commenters' concerns that the proposed approach could limit the use of derivatives for hedging purposes. Take the example discussed above, where a U.S. equity fund may invest up to 20% of its assets in stocks of companies domiciled outside of the United States, consistent with the names rule. The fund in this example would not include the foreign stocks in its 80% basket, and therefore these foreign stocks would be in the denominator in the calculation that the fund would use to determine compliance with its 80% investment policy.[248] Any related currency derivative that the fund holds for hedging purposes, therefore, also would be in the denominator. This currency derivative could have a high notional amount, even though it would be reducing, not increasing, the fund's exposure to risks associated with the fund's foreign securities. Holding the currency derivative therefore could significantly limit the extent to which the fund could invest outside of its 80% basket. One commenter stated that this approach could result in funds adopting more generic names, which would permit them to use derivatives with fewer constraints.[249] A fund also could decide to leave its foreign-currency-denominated investments unhedged in lieu of breaching its 80% investment policy, increasing risks to the fund and its shareholders.

While we appreciate these concerns, we continue to believe the names rule's

in performing its compliance calculations). *See infra* section II.A.5.

[238] *See* Proposing Release, *supra* footnote 2, at paragraphs following n.78.

[239] *See* Consumer Federation of America Comment Letter; Capital Group Comment Letter; J.P. Morgan Asset Management Comment Letter; Ceres Comment Letter; Environmental Defense Fund Comment Letter; Comment Letter of Americans for Financial Reform Education Fund (Aug. 15, 2022) (''AFREF Comment Letter''); *see also* Comment Letter of Chris Barnard (June 8, 2022) (''Barnard Comment Letter'') (expressing support for ''an economic consideration that would look through the notional value of assets held in order to determine the economic impact of the fund exposures'').

[240] *See* Center for American Progress Comment Letter; *see also* SIFMA AMG Comment Letter (stating that, while not all SIFMA AMG members agree that notional value is the most appropriate valuation for every derivatives instrument in all cases, many funds ''recognize the benefit of eliminating disparate valuation practices among funds with an 80% investment policy'').

[241] *See, e.g.,* Capital Group Comment Letter; Fidelity Comment Letter; T. Rowe Comment Letter; Dechert Comment Letter; ICI Comment Letter.

[242] *See* Dechert Comment Letter; ICI Comment Letter; *see also* Capital Group Comment Letter.

[243] T. Rowe Comment Letter.

[244] *See* Dechert Comment Letter; ICI Comment Letter; T. Rowe Comment Letter.

[245] If the fund in this example had invested $80 in U.S. equity securities and $20 in non-U.S. securities, and then hedged risks associated with the non-U.S. securities with derivatives with a notional amount of $20, the fund would no longer satisfy its 80% investment policy. The fund's $80 in U.S. equity securities would represent 67% of the fund's $120 in assets. *See also* Proposing Release, *supra* note 2, at nn.75–76 and accompanying text.

[246] Consumer Federation of America Comment Letter.

[247] *But see infra* footnote 259. We believe that the term ''notional amount,'' which is also used in 17 CFR 270.18f–4 (''rule 18f–4''), is understood by market participants and used as a means to reflect the market exposure a derivatives creates—meaning, for example, that if a derivative provides a return based on the leveraged performance of a reference asset, the notional amount must reflect the application of the leverage factor. *See* Derivatives Adopting Release, *supra* footnote 214, at text following n.496.

[248] *See* T. Rowe Comment Letter.

[249] *See id.*

approach to derivatives must be clear and consistently applied, and therefore we are not adopting a principles-based approach that, as some commenters suggested, would permit a fund to use any appropriate exposure metric when valuing derivatives in the context of names rule compliance. Instead, the final amendments require a fund, in calculating its assets for purposes of assessing names rule compliance, to exclude certain currency derivatives instruments that hedge currency risks associated with one or more specific foreign-currency-denominated equity or fixed-income investments held by the fund. A fund must exclude a currency derivative if it: (1) is entered into and maintained by the fund for hedging purposes, and (2) the notional amounts of the derivatives do not exceed the value of the hedged investments (or the par value thereof, in the case of fixed-income investments) by more than 10 percent.

Excluding these derivatives from the names rule compliance calculation addresses concerns that including certain derivatives at their notional amounts in this calculation could limit the use of derivatives for hedging purposes. Limiting this exclusion to currency derivatives is designed to ensure that the exclusion will not result in the names rule calculation excluding instruments that create economic exposures that should be considered in assessing whether a fund's name is materially deceptive and misleading in light of its portfolio. The Commission has previously distinguished currency derivatives, when directly matched to particular investments held by the fund, as instruments that ''predictably and mechanically provide the anticipated hedging exposure.'' [250] The provision in the final rule requiring that these derivatives must be entered into and maintained for hedging purposes, and that the notional amounts of these derivatives must not exceed the value of the hedged investments by more than 10 percent, similarly reflects an approach the Commission has taken in the past to define currency derivatives that qualify as hedges.[251] These instruments therefore would not generally create economic exposures that could cause a fund's name to be materially deceptive or misleading.

On the other hand, other types of hedging transactions executed through derivatives are difficult to distinguish from transactions that create exposures that contribute to (or detract from) the investment focus that a fund's name suggests. For example, while a fund can use derivatives to hedge the interest rate risk that exists in interest-bearing assets, similar derivatives instruments can be used to supplement a portfolio whose strategy reflects a particular conviction about the movement of interest rates. It therefore would not be appropriate to adopt an approach that requires exclusion of interest rate derivatives in this example, as opposed to currency derivatives whose hedging purpose under the final amendments is more straightforward to determine. While no commenter suggested the specific approach to currency derivatives that the final amendments include, this approach addresses commenters' concerns about ways in which the proposal could limit hedging activities, with one commenter specifically discussing hedging involving currency derivatives.[252]

We acknowledge that commenters suggesting alternative approaches generally favored the use of market values for certain derivatives, as opposed to excluding these derivatives from the names rule calculation. While derivatives' market values can often be quite low, such that the use of their market values would be functionally equivalent to excluding these derivatives from a names rule compliance calculation, there are circumstances where the market value of a derivative could be large.[253] The use of market values under these circumstances, as well as an approach that permits but does not require the exclusion of currency derivatives used for hedging purposes, could therefore lead to inconsistent compliance calculation outcomes.

Calculating Notional Amounts for Purposes of Names Rule Compliance

In calculating notional amounts, the final amendments, as proposed, will require a fund to convert interest rate derivatives to their 10-year bond equivalents and to delta adjust the notional amounts of options contracts.[254] A simple way to convert an interest rate derivative to its ten-year bond equivalent is to multiply the derivative's unadjusted notional amount by the ratio of the derivative's duration and the duration of the reference security. The requirement to convert interest rate derivatives to 10-year bond equivalents is designed to result in adjusted notional amounts that better represent a fund's exposure to interest rate changes.[255] Absent this adjustment, short-term interest rate derivatives can produce large unadjusted notional amounts that may not correspond to large exposures to interest rate changes. Similarly, a fund will delta adjust an option by multiplying the option's unadjusted notional amount by the option's delta (*i.e.,* the ratio of change in the value of the option to the change in value of the asset into which the option is convertible).[256] The requirement to delta adjust options is designed to provide for a more tailored notional amount that better reflects the exposure that an option creates to the underlying reference asset.

Some commenters supported the proposed mandatory notional amount adjustments, arguing that these adjustments are standardized practices that will properly account for derivatives instruments' true exposures.[257] Other commenters argued that the names rule should permit, but not require, the proposed adjustments.[258] These commenters stated that rule 18f–4 permits the adjustments but does not require them, and therefore the names rule's approach would permit funds to benefit from compliance and operational efficiencies.[259] One commenter also argued that there is no policy reason for different treatment between the names rule and rule 18f–4 because the permissive adjustments in rule 18f–4

[250] *See* Derivatives Adopting Release, *supra* footnote 214, at paragraph accompanying n.522. While the Commission's discussion in the Derivatives Adopting Release also characterized interest rate derivatives in this way, in addressing derivatives that may be excluded when calculating derivative exposure to determine eligibility for the limited derivatives user exception in rule 18f–4, the policy considerations for interest rate derivatives in the context of the names rule are unique as discussed below.

[251] *See id.* at paragraphs accompanying and following nn.523–526.

[252] *See* Dechert Comment Letter; ICI Comment Letter; T. Rowe Comment Letter (discussing currency derivatives, as well as interest rate derivatives).

[253] While the market value of a derivative almost never will exceed its notional amount, as typically defined, a derivative can equal it, for example in the case of deep in-the-money options.

[254] *See* final rule 35d–1(g).

[255] *See* Proposing Release, *supra* footnote 2, at n.80 and accompanying text; *see also* Derivatives Adopting Release, *supra* footnote 214, at section II.E.1; AFREF Comment Letter (providing numeric examples of the utility of the proposed adjustments).

[256] *See* Derivatives Adopting Release, *supra* footnote 214, at n.500.

[257] *See* AFREF Comment Letter; Center for American Progress Comment Letter; *see also* Consumer Federation of America Comment Letter (stating that it makes sense, for efficiency's sake, for the names rule to apply the same approach with regards to derivatives measurement that rule 18f–4 under the Act requires for purposes of considering funds' derivatives exposure in the context of the rule's limited derivatives user provision).

[258] *See* Dechert Comment Letter; ICI Comment Letter; SIFMA AMG Comment Letter; Fidelity Comment Letter.

[259] *See* SIFMA AMG Comment Letter; Fidelity Comment Letter.

''generate an accurate measure of the exposure created by a particular derivatives transaction.'' [260] Another stated that requiring the proposed adjustments would prevent funds from ''taking a more conservative approach'' by deciding not to scale down the notional value of derivatives to their 10-year bond equivalents.[261]

After considering comments, we are adopting the proposed mandatory adjustments. We continue to believe that requiring these tailoring adjustments is appropriate for purposes of the names rule in order for a fund's 80% investment policy to best reflect the fund's investment exposure, which in turn would help ensure that the investment focus a fund's name communicates is not materially deceptive or misleading.[262] For example, a deep out-of-the money option can have a large unadjusted notional amount, but will provide limited investment exposure to the underlying reference asset. It would not be consistent with the goal of requiring notional amounts when assessing names rule compliance to permit the fund in this example to use such an option's unadjusted notional amount to satisfy its 80% investment policy because, even if the option's unadjusted notional amount equaled or exceeded 80% of the value of the fund's assets, it is not providing a commensurate degree of investment exposure at that time. While permitting the adjustments rather than requiring them could allow a fund to take a ''more conservative'' approach in certain specific cases as one commenter suggested, it also could permit a fund to account for derivatives in its names rule compliance in a way that could be inconsistent with investors' expectations based on the fund's name. Requiring these adjustments would prevent a fund, for example, from including a deep out-of-the money option in its 80% basket to comply with its 80% investment policy. In that case, the option's unadjusted notional amount would not represent the exposure that the option creates to the underlying reference asset at that time. This potential gaming consideration is not applicable in the context of rule 18f–4, because including high unadjusted notional amounts in a fund's calculation of derivatives exposure for rule 18f–4 purposes could result in the possibility only of increased regulatory burden (for a fund not qualifying as a limited derivatives user under the rule).

Reducing the Value of a Fund's Assets by Deducting Cash And Cash Equivalents and Certain U.S. Treasury Securities

The final amendments will permit a fund, in determining compliance with its 80% investment policy, to deduct cash and cash equivalents and U.S. Treasury securities with remaining maturities of one year or less from assets (*i.e.,* the denominator in the 80% calculation), up to the notional amounts of the fund's derivatives instruments.[263] This represents a change from the proposal, which would have limited the deduction to cash and cash equivalents and would have required, not permitted, this deduction.

The Commission stated in the Proposing Release that funds that use derivatives instruments to gain exposure to the markets in which they invest may maintain portions of their assets in cash and cash equivalents, which may not themselves provide market exposure. Rather, such cash and cash equivalents may effectively function as low-risk collateral for those derivatives instruments. Because the notional amount of the derivatives instruments for which the cash and cash equivalents effectively function as collateral is already included in the denominator of the 80% investment test, including the cash and cash equivalents held as such collateral could effectively ''double-count'' the fund's exposure.[264]

Commenters that addressed this aspect of the proposal generally supported it and encouraged the Commission to expand the types of assets that funds may deduct beyond cash and cash equivalents.[265] Some commenters stated that the Commission should extend the proposed approach to allow funds to exclude any assets that they have posted as collateral under derivatives instruments and certain other asset types.[266] These commenters provided examples of what this recommended broader approach would encompass, including other U.S. government securities such as U.S. Treasury securities with under five years to maturity, investment-grade corporate bonds with under three years to maturity, short-term bond fund shares, interests in other short-term investment funds, and repurchase agreements on cash equivalents or any of the foregoing types of instruments. One commenter discussed circumstances in which cash and cash equivalents provide investment exposure and therefore should not be deducted in a fund's 80% investment policy calculation, and another commenter suggested that the deduction of cash and cash equivalents be permissive instead of mandatory as proposed.[267]

We agree that the deduction of cash and cash equivalents should be permissive and not mandatory. For funds that do not employ investment strategies that seek exposure through investments in cash and cash equivalents, the decision *not* to deduct cash and cash equivalents in a fund's 80% investment policy calculation always would be more conservative for purposes of meeting the required 80% threshold. That is, the denominator in the calculation (the fund's assets as defined in the names rule) for a fund that chooses not to deduct cash and cash equivalents would always be larger compared to an equivalent fund that chooses to deduct cash and cash equivalents from its assets. Choosing not to deduct cash and cash equivalents therefore would require proportionately more assets in the fund's 80% basket compared to an equivalent fund that chooses to deduct cash and cash

[260] SIFMA AMG Comment Letter.

[261] Fidelity Comment Letter.

[262] A fund's use of derivatives that results in a substantial portion of the fund's risks or returns being materially different from those which an investor reasonably would expect based on the fund's name, regardless of the fund's compliance with the requirements of the names rule (including the use of derivatives' notional amounts and the required tailoring adjustments) could render a fund's name to be materially deceptive or misleading. *See infra* section II.A.5.

[263] Final rule 35d–1(g). The Commission has stated that items commonly considered to be cash equivalents include certain Treasury bills, agency securities, bank deposits, commercial paper, and shares of money market funds. *See* Proposing Release, *supra* footnote 2, at n.86. U.S. Generally Accepted Accounting Principles (''U.S. GAAP'') define cash equivalents as short-term, highly liquid investments that are readily convertible to known amounts of cash and that are so near their maturity that they present insignificant risk of changes in value because of changes in interest rates. Generally, only investments with original maturities of three months or less qualify under that definition. *See* FASB Accounting Standards Codification Master Glossary, *available at https://asc.fasb.org/glossary.*

[264] *See* Proposing Release, *supra* footnote 2, at paragraphs accompanying nn.84–86.

[265] *See* Dechert Comment Letter; ICI Comment Letter; Dimensional Comment Letter.

[266] *See* Dechert Comment Letter; ICI Comment Letter.

[267] SIFMA AMG Comment Letter (stating that funds may employ investment strategies that seek exposure to the U.S. government through derivative instruments, as well as cash and cash equivalents, and it would be appropriate to permit cash and cash equivalents to be included in both the numerator and denominator of a fund's 80% investment policy calculation when such investments provide market exposure); T. Rowe Comment Letter (stating that if the Commission were to adopt the commenter's suggested alternative approach to the mandatory use of notional amounts, discussed in *supra* footnote 243 and accompanying text, this approach would not require the deduction of cash and cash equivalents to address potential double-counting of a fund's exposure, but if the Commission did not adopt the alternative approach, the deduction of cash and cash equivalents should be permissive and not mandatory).

equivalents. Moreover, permitting a fund to choose not to deduct cash and cash equivalents reflects that there are circumstances in which cash and cash equivalents provide investment exposure that is consistent with the fund's name.

We also agree that expanding the permissible deduction to encompass all U.S. Treasury securities with remaining maturities of one year or less (as opposed to those with original maturities of three months or less, which would qualify as ''cash equivalents'' for purposes of U.S. GAAP) would permit funds to exclude certain additional assets that effectively function as low-risk collateral for derivatives instruments but that do not introduce unexpected investment exposure or risk to the portfolio.[268] U.S. Treasury securities with remaining maturities of one year or less have a significantly lower likelihood of a short-term price change (and the magnitude of any price change is likely significantly lower) than U.S. government securities with longer original and/or remaining maturities.[269]

We decline, however, to expand the permissible deduction beyond cash and cash equivalents and U.S. Treasury securities with remaining maturities of one year or less. We are concerned that this approach could result in funds deducting investments from the names rule calculation that could introduce unexpected investment exposure or risk to the portfolio. For instance, if a fund with a name that suggests a focus in bonds with very short-term maturities were to use derivatives as part of its strategy, and held corporate bonds with longer maturities than its name suggests, deducting those bonds from the names rule calculation would result in deducting instruments that may be riskier than the assets in which the fund's name suggests a focus. The same consideration applies for Treasury securities with relatively long original and/or remaining maturities, as these securities similarly can introduce risk to a portfolio, in particular when interest rates rise. The deduction of these types of assets could result in the fund's investments providing investment exposure that is inconsistent with the fund's name, but is not reflected in names rule compliance assessments, which could mislead investors. The breadth of funds that could be subject to the 80% investment policy requirement makes it challenging to draw clear and consistent lines about what types of collateral—other than cash and cash equivalents and U.S. Treasury securities with remaining maturities of one year or less—would *not* result in potentially misleading names if deducted from the names rule calculation.

Deduction of Closed-Out Derivatives Positions

In a change from the proposal, the final amendments provide that a fund is permitted to exclude any closed-out derivatives positions when calculating assets for purposes of determining compliance with its 80% investment policy, if those positions result in no credit or market exposure to the fund.[270] The proposed amendments did not address closed-out derivatives positions directly. However, the 2022 Proposal included a request for comment asking whether it is sufficiently clear that funds would eliminate from the names rule calculation closed-out derivatives positions, that is, derivatives that were closed out with the same counterparty and result in no credit or market exposure to the fund, or instead whether the rule should address these positions.[271]

Several commenters discussed this request for comment and stated that the Commission should exclude closed-out derivatives positions from the names rule calculation, but should not limit the exclusion of closed-out positions to those with the same counterparty.[272] These commenters contrasted their suggested treatment with the treatment of closed-out positions in rule 18f–4 under the Act.[273] Commenters recognized that rule 18f–4 does not permit funds to exclude offsetting positions across different counterparties in calculating derivatives exposure for purposes of determining whether a fund qualifies as a limited derivatives user.[274] Commenters argued that the concerns underlying the approach in rule 18f–4, however, do not apply for purposes of the names rule, which is focused ''primarily on addressing the alignment between the investment exposures suggested by a fund's name and those resulting from the fund's investments and preventing the use of misleading fund names.'' [275] One commenter argued that limiting excluded closed-out derivatives positions to those with the same counterparty would lead to economic inefficiencies and could be detrimental to a fund's returns.[276]

The final amendments permit funds to exclude closed-out derivatives positions from the names rule calculation if those positions result in no market exposure to the fund because these closed-out positions will not affect the fund's risks or returns. We agree that the concerns underlying rule 18f–4's provision on closed-out derivatives positions are not the same concerns underlying the names rule. Rule 18f–4 does not permit a fund to offset derivatives transactions with different counterparties for purposes of determining whether a fund qualifies as a limited derivatives user under that rule because netting these derivatives transactions could result in a fund having a large volume of open derivatives positions subject to their own margin and other requirements with various counterparties. This, in turn, could involve a scale of derivatives positions and related operational and counterparty risks that the Commission has stated it believes funds should manage as part of a derivatives risk management program. The goals of the names rule, on the other hand, address whether the exposures that a fund's portfolio creates align with the focus that the fund's name suggests. Reflecting these exposures for purposes of calculating names rule compliance does not depend on requiring offset positions to have the same counterparties. The final amendments, therefore, do not require that closed-out positions to be closed out with the same counterparty in order for a fund to exclude them from the calculation of its assets.

Derivatives Instruments Included in the 80% Basket

The final amendments, substantially as proposed, permit a fund to include in its 80% basket a derivatives instrument that provides investment exposure to one or more of the market risk factors associated with the investment focus

[268] *See supra* footnote 263.

[269] *See* ISDA, *Initial Margin Non-Cleared Margin Rules/Eligible Collateral Comparison by Jurisdiction* (Jan. 5, 2023), *available at https://www.isda.org/a/EqxgE/Eligible-Collateral-Comparison-010523.pdf* (haircuts on U.S. debt securities with under 1 year residual maturity are substantially less than haircuts on U.S. debt securities with longer maturities).

[270] Final rule 35d–1(g).

[271] *See* Proposing Release, *supra* footnote 2, at Request for Comment #33.

[272] *See* Dechert Comment Letter; ICI Comment Letter; T. Rowe Comment Letter; *see also* SIFMA AMG Comment Letter.

[273] *See* rule 18f–4(a).

[274] *See* Derivatives Adopting Release, *supra* footnote 214, at section II.E.

[275] Dechert Comment Letter; *see also supra* footnote 270.

[276] Dechert Comment Letter (suggesting that under the proposed approach, ''a fund might be compelled to transact with the counterparty with which it entered in the original derivatives transaction on less favorable terms, including pricing, or which poses more credit risk to the fund, than a different counterparty with which it could enter into an offsetting position at the time it needs to eliminate its exposure under the first transaction'').

suggested by the fund's name.[277] This approach recognizes that, in addition to using derivatives as direct substitutes for cash market investments, some funds use derivatives instruments to hedge exposures or to obtain exposure to market risk factors associated with the fund's investments (for example, interest rate risk and credit spread risk). Those instruments may have very high notional amounts, and if the rule did not allow funds to treat the notional amounts of those derivatives instruments as investments that reflect the fund's investment focus, the notional amounts of those derivatives instruments could cause a fund to fall out of compliance with its 80% investment policy.[278]

Commenters expressed support for the proposed approach, as it recognizes that funds often use derivatives instruments to provide complementary investment exposure to the investments suggested by a fund's name, including exposure to the market risk factors associated with such investments.[279] Some commenters requested that the Commission acknowledge that funds may consider all derivatives that provide exposure to market risk factors associated with investments suggested by a fund name when testing names rule compliance, not just those enumerated risk factors discussed in the Proposing Release.[280] Another commenter requested that the Commission expand the types of derivatives hedging instruments that may be included in a fund's 80% investment policy by allowing derivatives transactions that hedge the risks associated with one or more securities held by a fund, notwithstanding whether they are intended to hedge market risk factors associated with the investments suggested by the fund's name.[281] This commenter provided as an example funds that invest in mortgage pass-through securities, which commonly use U.S. Treasury futures and options to hedge against the impact of mortgage prepayments on the fund's duration (stating that using derivatives to manage duration in this manner may not align with the investments suggested in a fund's name or provide investment exposure to a market risk factor associated with an investment suggested by a fund's name).

After considering comments, the final amendments do not expand the derivatives that may be included in a fund's 80% basket beyond the proposed approach. Under the proposed approach, the derivatives instruments included in a fund's 80% basket would either be functioning as a substitute for direct investments in the securities suggested by the fund's name or (in the case of, for example, interest rate derivatives) used to facilitate the fund's investment in those securities by increasing or decreasing the fund's exposure to risk factors associated with those securities. On the other hand, derivatives used to manage the risks of the fund's portfolio as a whole can involve more complex hedging activities than transactions that provide investment exposure to one or more of the market risk factors associated with investments suggested by the fund's name.[282] This, in turn, could create exposures that could be inconsistent with investors' reasonable expectations of the fund's investment activity.[283]

We acknowledge that there may be transactions other than the ones that the Commission specifically addressed in the Proposing Release that provide investment exposure to one or more of the market risk factors associated with investments suggested by the fund's name, and the examples the Commission provided are not intended to be limiting. To help determine whether a derivatives instrument provides investment exposure to one or more of the market risk factors associated with a fund's name assets, the fund generally should consider whether the derivative provides investment exposure to any explicit input that the fund uses to value its name assets, where a change in that input would change the value of the security.[284] For example, prepayment is an explicit risk factor in the price of a mortgage security, and therefore, in contrast to the concern that a commenter expressed, it would generally be appropriate for a fund whose name indicates a focus in mortgage securities to include derivatives in its 80% basket that manage the prepayment risk of these securities.

Treatment of Short Positions

Under the final amendments and as proposed, if a fund were to use derivatives instruments to obtain exposure to short positions in one or more reference assets, the fund would have to use these derivatives instruments' notional amounts for purposes of determining compliance with its 80% investment policy. That is, these investments would be valued at their notional amounts in the denominator in all cases, and at their notional amounts in the numerator where the fund includes investments that provide short exposure in the numerator. The final amendments, in a change from the proposal, also specify that a fund must value each physical short position using the value of the asset sold short.[285] For example, if a fund sold short one share of a security for $100, the market value of the position would be $0 at that time because the fund has $100 in short sale proceeds but also a liability in the form of the obligation to return a share worth $100. If the fund had obtained the same short exposure via a swap, the notional amount would be $100. Valuing the physical short position at $100 for purposes of the names rule—the value of the asset sold short—provides comparable values for names rule purposes for the swap and physical short sale in this example.

The 2022 Proposal included a request for comment asking about funds' current practices with respect to including short positions in their 80% baskets, and also whether the Commission should address the valuation of physical short sales for purposes of assessing names

[277] Rule 35d–1(b)(2).

[278] *See* Proposing Release, *supra* footnote 2, at paragraphs following paragraph accompanying n.86. For example, if ABC Bond Fund invested $100 in bonds, $100 in interest rate swaps, and held no other assets, the fund would not satisfy its 80% investment policy if the interest rate swaps were not included in the fund's 80% basket ($100 in bonds/$100 in bonds + $100 in swaps = 50%).

[279] *See* SIFMA AMG Comment Letter; Dechert Comment Letter; Fidelity Comment Letter; ICI Comment Letter.

[280] *See* ICI Comment Letter; *see also* SIFMA AMG Comment Letter; Dechert Comment Letter; *see also* Proposing Release, *supra* footnote 2, at section II.A.3 (discussing funds' use of derivatives to obtain exposure to market risk factors associated with the fund's investments, for example interest rate risk, credit spread risk, and foreign currency risk).

[281] Fidelity Comment Letter.

[282] *See* Derivatives Adopting Release, *supra* footnote 194, at n.530 and accompanying text.

[283] Including derivatives in the 80% basket to the extent that they negate the primary market risk factor associated with the assets in which the fund's name suggests an investment focus similarly could result in a fund's name being materially deceptive and misleading, notwithstanding the fund's adoption of an 80% investment policy and compliance with the requirements of the names rule. *See supra* footnote 262. For example, investors may reasonably expect the investments in which the ''XYZ Corporate Bond Fund'' focuses to reflect exposure to certain risks, such as credit risk. If this fund were to purchase credit default swaps or any other derivatives instruments that resulted in the elimination of all credit risk in its portfolio for an extended period of time, and were to include these derivatives in the fund's 80% basket, the fund's name could be materially deceptive and misleading because the fund would have eliminated the primary market risk factor associated with the assets in which the fund's name suggests a focus.

[284] *See* Good Faith Determinations of Fair Value, Investment Company Act Release No. 34128 (Dec. 3, 2020) [86 FR 748 (Jan. 6, 2021)] (for a general discussion of valuation practices with respect to the fair value of a registered investment company or business development company).

[285] Final rule 35d–1(g).

rule compliance. Commenters who discussed these points advocated for the Commission explicitly to permit funds to include short positions in derivatives and physical short sales in their 80% baskets and to address the valuation of physical short sales.[286] They stated that the Commission should adopt an approach that permits, but does not require, funds to include in their 80% baskets short positions in derivatives and physical short sales, where each of these provides short exposure to the investments suggested by the fund's name or to the market risk factors associated with those investments in their 80% baskets, regardless of whether the fund's name specifically suggests the use of short sales or short positions. Commenters stated that many funds currently take this approach when assessing names rule compliance.[287] One commenter stated that funds use both long and short positions to obtain exposures suggested by a fund's name, and this commenter argued that the suggested approach would be consistent with the proposed approach of including derivatives instruments that provide investment exposure to a market risk factor associated with a fund's name.[288] In addressing the valuation of physical short positions, commenters suggested that the Commission should permit funds to use the absolute notional amount or the absolute market value of the asset sold short under a physical short sale for purposes of valuing such transaction for names rule compliance.[289] In addition, they also suggested a fund should be permitted to look through to the components of its open short sale positions to offset their investment exposure (*i.e.,* the fund should be able to close out all or part of a short sale position) for purposes of compliance with its 80% investment policy.

We agree that short positions, under certain circumstances, may qualify as investments that a fund may include in its 80% basket. For example, if a fund's name indicates that its investment focus includes short exposure to a particular type of investment, this inclusion would be appropriate. In other circumstances, however, the inclusion of short positions would not be appropriate where this would result in the fund's economic exposure departing significantly from investors' reasonable expectations based on the fund's name. For example, if a fund were named the ''XYZ Equity Fund,'' and half of the value of its 80% basket were invested in long equity positions, and the other half were invested in short equity positions, the portfolio's net exposure would likely not be consistent with investors' expectations based on the fund's name.

We agree that, to better reflect the exposures that physical short sales provide, the rule should address the valuation of physical short sales and use an approach where their valuation is consistent with the valuation of short positions obtained through a fund's use of derivatives. We are therefore adopting a change to the proposed definition of ''assets'' in the names rule, which specifies that a fund must value each physical short position using the value of the asset sold short.[290] A fund would be able to reduce the value of its assets by excluding any cash and cash equivalents, and U.S. Treasury securities with remaining maturities of one year or less, up to the notional amount of the value of asset(s) sold short, just as a fund could exclude any cash and cash equivalents and such U.S. Treasury securities up to the notional amount of the fund's derivatives instruments, as discussed above.

4. Unlisted Registered Closed-End Funds and BDCs

The final rule will prohibit a registered closed-end fund or BDC whose shares are not listed on a national securities exchange, and that is required to adopt an 80% investment policy, from changing that policy unless authorized by a vote of the majority of the outstanding voting securities of the fund.[291] However, in a modification from the proposal, under the final amendments such funds will be permitted to make changes to their 80% investment policies without this vote if the fund conducts a tender or repurchase offer in advance of the change, the fund provides at least 60 days' prior notice of any change in the policy in advance of that offer, that offer is not oversubscribed, and the fund purchases shares at their net asset value.[292]

Some commenters voiced general support for this element of the proposal, stating that it was an improvement from the current rule, whereby investors in these products generally have limited or no ready recourse if a fund were to change its investment policy, and that it would empower investors.[293] Conversely, other commenters raised concerns regarding the proposed requirement, arguing that it would impede the ability of funds to change their investment strategies without conducting costly special shareholder votes.[294] This, according to commenters, could place these funds at a competitive disadvantage relative to other funds.[295] Furthermore, some commenters expressed that the requirement was unnecessary because it did not seem to address any identified harm to investors in these funds, stating that many closed-end funds and BDCs currently offer tender offer and repurchase programs as periodic sources of liquidity, and that investors in these products are already on notice through existing disclosures of any potential liquidity constraints.[296] Some commenters also suggested that a blanket requirement on BDCs to adopt a fundamental policy was contrary to the congressional intent behind exempting BDCs from Investment Company Act provisions that otherwise require funds to disclose and have a shareholder vote on changes in fundamental policies.[297] Some commenters suggested alternative approaches to address these concerns but also achieve the goals of the proposed amendments. For example, commenters suggested that the Commission require a vote only when all shareholders are not given an opportunity to sell or tender their shares back to the issuer after notice of a

[286] *See* ICI Comment Letter; SIFMA AMG Comment Letter; Dechert Comment Letter.

[287] ICI Comment Letter; Dechert Comment Letter.

[288] ICI Comment Letter.

[289] ICI Comment Letter; Dechert Comment Letter; *see also* SIFMA AMG Comment Letter (stating that, with respect to short positions, whether accomplished through the use of derivatives instruments or the physical short sale of a security or other asset, the Commission should require that funds use the notional value of such positions for purposes of determining names rule compliance).

[290] This approach is consistent with the valuation of physical short positions in rule 18f–4 under the Act. *See* definition of ''derivatives exposure'' in rule 18f–4(a).

[291] Final rule 35d–1(f). This approach has the same practical effect as the proposed approach, which would have required these funds to adopt their 80% investment policies as fundamental policies (policies that funds cannot change unless authorized by a vote of a majority of its outstanding voting securities). *See* proposed rule 35d–1(a)(2)(ii); *see also* 15 U.S.C. 80a–13(a)(3).

[292] Final rule 35d–1(f)(4) (specifying that, in the event of a tender offer, the fund purchases shares at their net asset value). This provision in final rule 35d–1 addresses tender offers but does not specifically address the price at which repurchase offers must be conducted for a fund to be eligible for this exception because the Investment Company Act rules already address the price (net asset value) at which closed-end funds and business development companies conducting periodic repurchase offers are required to repurchase shares. *See* 17 CFR 270.23c–3 (''rule 23c–3''),

[293] Better Markets Comment Letter; NASAA Comment Letter.

[294] *See, e.g.,* ICI Comment Letter; Dechert Comment Letter; SIFMA AMG Comment Letter; Comment Letter of Simpson Thacher and Bartlett, LLP (Aug. 30, 2022) (''Simpson Thacher Comment Letter'').

[295] SIFMA AMG Comment Letter; Invesco Comment Letter.

[296] SIFMA AMG Comment Letter; Simpson Thacher Comment Letter.

[297] Stradley Comment Letter; Dechert Comment Letter.

change in the 80% investment policy, or require a shareholder vote only in the event that the next tender offer or repurchase program after such notice is oversubscribed.[298]

As an alternative to the requirement to make their 80% policies fundamental policies, the current names rule permits funds other than tax-exempt funds to provide shareholders with 60 days' prior notice of such changes. The Commission permitted funds to provide shareholders advance notice, in lieu of adopting a fundamental policy, because the advance notice would provide shareholders with sufficient time to decide whether to redeem their shares in the event that a fund decides to pursue a strategy involving a different investment focus.[299] Unlike other funds subject to the rule, however, unlisted registered closed-end funds and BDCs do not issue redeemable shares or list their shares on a national securities exchange. As a result, shareholders in the affected funds generally have no ready recourse, such as the ability to redeem shares, if a fund were to change its investment policy and the investment focus that the fund's name indicates.[300] In light of these investors' limited options to sell their shares readily, the proposed fundamental policy requirement for unlisted registered closed-end funds and BDCs aimed to ensure that investors in these funds would be able to vote on any changes to a fund's investment policy.

After considering comments, we do not agree that extending the notice period, as some commenters suggested, is a sufficient substitute to respond to the concerns that the proposed approach was designed to address.[301] We recognize, however, that there could be alternative approaches to the proposed requirement that could address the Commission's concerns while decreasing the operational burdens that would accompany a requirement to conduct a shareholder vote for every instance in which a fund changes its 80% investment policy. We also recognize that where a fund *does in fact* give its investors the opportunity to sell their shares in connection with a fund's change of its 80% investment policy, the fund alleviates the concern that investors will be forced to hold investments that they wish to sell.

The final amendments include a limited exception to the shareholder approval requirement for funds that conduct qualifying tender or repurchase offers in advance of a proposed change in policy.[302] This exception is intended to function in a similar manner to the rule's general notice alternative by giving investors in unlisted registered closed-end funds and BDCs that use this alternative the opportunity to exit the fund prior to a fund's change in investment policy. This exception will provide funds with increased optionality in effecting changes to their investment policies compared to the proposed approach, and this approach is designed to mitigate commenter concerns that the proposed fundamental policy requirement would have put unlisted registered closed-end funds and BDCs at a competitive disadvantage against other types of funds.

To be eligible for this exception, a fund must conduct a tender or repurchase offer in accordance with all applicable Commission rules prior to any change in policy and provide shareholders with at least 60 days' prior notice of any change in such policy in advance of the offer. In the case of tender offers, a fund must purchase shares at NAV in order to be eligible for the exception. The exception applies only insofar as the tender or repurchase offer is not oversubscribed.[303] If a tender or repurchase offer is oversubscribed, suggesting that the shareholders are not supportive of the change, a fund therefore would then be required to conduct a shareholder vote prior to making the change to its investment policy that the notice describes, in accordance with the final rule. This change also gives a fund discretion to determine the number of shares it is willing to repurchase from shareholders after the notice of the change, in accordance with all applicable Commission rules. This will permit fund managers to weigh the risk of oversubscription, and the resulting need to have a special shareholder meeting to vote on the change, against the amount of liquidity they are willing to provide to shareholders.

5. Effect of Compliance With an 80% Investment Policy

We are adopting, substantially as proposed, a new provision in the names rule providing that a fund's name may be materially deceptive or misleading under section 35(d) of the Investment Company Act even if the fund adopts and implements an 80% investment policy and otherwise complies with the rule's requirement to adopt and implement the policy.[304] The Commission has previously stated that the names rule's 80% investment policy requirement is not intended to create a safe harbor from liability under section 35(d) for materially deceptive or misleading fund names, and we are codifying this view to make clear that a fund name may be materially deceptive or misleading even where the fund complies with its 80% investment policy.[305]

Many commenters supported this aspect of the proposal.[306] Some commenters asserted that the codification is particularly important for fund names that articulate an ESG focus.[307] One commenter urged the Commission to require funds that use ESG terms in their name to state clearly and prominently what percent of the fund is invested in securities that do not

[298] *See* Dechert Comment Letter; Simpson Thacher Comment Letter.

[299] 2001 Names Rule Adopting Release, *supra* footnote 8, at n.19 and accompanying text.

[300] *See also* Proposing Release, *supra* footnote 2, at n.99. For example, many of the tender offer and repurchase programs currently offered by unlisted registered closed-end funds and BDCs are periodic and limited, and are therefore unlikely to provide recourse where a large percentage of a fund's investors disapprove of a change.

[301] *See, e.g.,* Invesco Comment Letter; ICI Comment Letter. *But see* NASAA Comment Letter (stating that a longer notice period would be insufficient as it would not provide investors a voice in these decisions).

[302] The final amendments do not frame the requirement to obtain shareholder approval under certain circumstances as the requirement to adopt a ''fundamental policy.'' *See supra* footnote 297 and accompanying text (discussing commenters' concerns about the proposed approach that would require BDCs to adopt fundamental policies). While the final amendments do retain the requirement to obtain a shareholder vote under certain circumstances, which the proposed approach effectively would have required, we believe that this is an appropriate use of the Commission's authority under section 35(d), and in light of the fact that the requirement to seek a shareholder vote under the final amendments is triggered only where a fund chooses a name that conveys a particular investment focus. We also believe this is appropriate in the context of unique investor protection concerns for investors in unlisted funds including BDCs resulting from the general lack of readily available liquidity.

[303] ''Oversubscribed'' in this case means shareholders have tendered or requested repurchase of a greater number of shares than the fund has offered to purchase (or ultimately purchases) in accordance with applicable Commission rules including rule 13e–4 under the Exchange Act and rule 23c–3 under the Investment Company Act. *See* final rule 35d–1(g).

[304] Final rule 35d–1(c). In addition, the anti-fraud provisions of the Federal securities laws regarding disclosures to investors continue to apply to funds notwithstanding their compliance with the names rule.

[305] *See* Proposing Release, *supra* footnote 2, at n.101.

[306] *See, e.g.,* Better Markets Comment Letter; CFA Institute Comment Letter; Sierra Club Comment Letter; Fidelity Comment Letter; U.S. SIF Comment Letter.

[307] *See, e.g.,* PRI Comment Letter; Comment Letter of As You Sow (Aug. 15, 2022) (''As You Sow Comment Letter''); Comment Letter of Blue Haven Initiative (Aug. 16, 2022) (''Blue Haven Comment Letter''); Comment Letter of Building a Sustainable Investment Community Comment Letter (Aug. 15, 2022) (''Building a Sustainable Investment Community Comment Letter'').

comply with the investment criteria for the 80% basket.[308] Other commenters suggested that fund names that imply a prohibition or absence of investments or issuers with certain characteristics should have an investment policy that prohibits these investments.[309]

Several commenters, however, suggested that the Commission should provide more clarity or define precisely what types of investments would be considered inconsistent with the fund's name to the degree that the name would be materially deceptive or misleading despite the fund's compliance with an 80% investment policy.[310] In response to an example in the 2022 Proposal that a fund that complies with the names rule but makes a substantial investment that is ''antithetical'' to the fund's investment focus would have a materially deceptive or misleading name, commenters expressed that the proposed provision poses significant risks of second-guessing because evaluating whether an investment is antithetical to a fund's name is highly subjective.[311] Commenters also suggested that the uncertainty related to the provision would decrease portfolio management discretion and flexibility in managing the fund's portfolio, as this uncertainty would give rise to concern about violating the rule.[312] A few commenters asserted that absent a claim in a fund's name that the fund will not invest in a particular type of investment, a fund should have flexibility as long as it discloses how it will invest its 20% basket.[313]

After considering the comments on the proposed provision, we continue to believe that a fund's name could be materially deceptive or misleading for purposes of section 35(d) even if that fund has complied with the names rule's 80% investment policy requirement. For example, a fund's name could be materially deceptive or misleading for purposes of section 35(d) if the fund invests in a way such that the source of a substantial portion of the fund's risks or returns is materially different from that which an investor reasonably would expect based on the fund's name, regardless of the fund's compliance with the requirements of the names rule (*e.g.,* a ''green energy and fossil fuel-free'' fund making a substantial investment in an issuer with fossil fuel reserves, or a ''conservative income bond'' fund using the 20% basket to invest in highly volatile equity securities that introduce significant volatility into a fund that investors would expect to have lower levels of volatility associated with lower-yielding bonds).[314] To the extent a fund uses its 20% basket to invest in assets that are materially inconsistent with the investment focus or risk profile reflected by the fund's name, the fund's name would be materially deceptive or misleading under section 35(d). While we appreciate commenters' expressed concerns, the provision is designed to codify the existing relationship between the names rule and section 35(d) and not to create new requirements or standards with respect to the selection of investments in a fund's 20% basket that are not now present. For these reasons, this provision will not require certain disclosures related to the percent of a fund's assets invested in securities that do not comply with the investment criteria for the 80% basket, nor will this provision include an explicit prohibition on investments that are inconsistent with the activity that a fund's name communicates, as suggested by a few commenters.

Relatedly, the 2022 Proposal discussed situations where a fund may be invested 80% or more in a market index referenced in the fund's name, but that underlying index may have components that are contradictory to the index's name.[315] In such circumstances, even though the fund meets the names rule requirements by its investments in the index, the name could still be materially misleading or deceptive in that the *index's* name would suggest an investment focus that the fund does not follow. A few commenters agreed that this example could lead to materially deceptive or misleading fund names, asserting that terms used in the name of index funds can communicate an investment focus to investors, therefore such funds should not be allowed to circumvent the technical holding requirements of the names rule.[316] Other commenters, however, expressed that index funds should not be required to determine compliance with an 80% investment policy regarding investments that the name of an index indicates, but rather the fund should comply with the rule by investing 80% of its assets in the components of the underlying index.[317] Some of these commenters expressed that fund managers may have visibility into index methodologies, but they do not determine the particular investments that an index includes, making it challenging to deviate from an index if their principal objective is to track its returns.[318] In addition, some commenters suggested that applying the rule to index funds in the manner the Commission's example described could increase tracking error between index funds and indices, while increasing costs and the likelihood of potential confusion for investors if funds have to deviate from the methodologies of the underlying index.[319]

We continue to believe that a fund that is invested 80% or more in an index included in the fund's name can be materially deceptive and misleading if a meaningful nexus does not exist

[308] Comment Letter of Corey Shapiro (Aug. 16, 2022) (''Shapiro Comment Letter'').

[309] *See, e.g.,* CFA Institute Comment Letter; As You Sow Comment Letter; Blue Haven Comment Letter; Bonwood Comment Letter; Comment Letter of Change Finance (Aug. 15, 2022) (''Change Finance Comment Letter'').

[310] *See, e.g.,* ICI Comment Letter; SIFMA AMG Comment Letter; Dechert Comment Letter; Capital Group Comment Letter; PRI Comment Letter.

[311] *See, e.g.,* J.P. Morgan Asset Management Comment Letter; Federated Hermes Comment Letter; Stradley Comment Letter; *see also* Fidelity Comment Letter (expressing particular concern with the statements provided in the 2022 Proposal, asserting that ''the current regulatory landscape, which requires certain specific disclosures under Form N–1A and provides for further registration statement liability through other securities laws, appropriately addresses any potential liability for material omissions or misstatements in the registration statement'').

[312] *See, e.g.,* MFS Comment Letter; Stradley Comment Letter; Capital Group Comment Letter; Fidelity Comment Letter (stating that ''the 20% portion of the fund's portfolio that is not subject to the Names Rule is a diversification tool in managing fund assets'').

[313] *See* SIFMA AMG Comment Letter; MFS Comment Letter.

[314] *See* Proposing Release, *supra* footnote 2. As another example, a fund that is perpetually out of compliance with the 80% investment requirement on account of temporary departures may have a name that is materially deceptive or misleading under section 35(d) even if each temporary departure is permissible under the rule. *Id.* Further, as discussed above, a fund of funds or other acquiring fund can reasonably rely upon the entire value of its investment in an appropriate acquired fund as a general matter. *See supra* paragraph following paragraph accompanying footnotes 139–140. However, if an acquiring fund was aware that an underlying fund has changed its investments such that it is not following the acquiring fund's investment focus, that acquiring fund's name may be materially misleading or deceptive if it continues to include the value of the investment in the acquired fund in its 80% basket.

[315] *See* Proposing Release, *supra* footnote 2, at n.102 and accompanying discussion.

[316] PIABA Comment Letter; Dogwhistle Comment Letter.

[317] *See, e.g.,* ICI Comment Letter; SIFMA AMG Comment Letter; Dechert Comment Letter; Fidelity Comment Letter; Invesco Comment Letter.

[318] *See* SIFMA AMG Comment Letter; BlackRock Comment Letter; Dechert Comment Letter (stating that ''[w]hile fund sponsors conduct initial and ongoing periodic due diligence on index providers, index funds rely upon the index providers, on a daily basis, to construct the index. Funds make clear disclosures concerning their use of indices, and we believe investors have established a clear understanding of how index funds operate in the decades since their introduction'').

[319] *See* Comment Letter of State Street Global Advisors (Aug. 16, 2022) (''State Street Comment Letter''); ICI Comment Letter; WisdomTree Comment Letter.

between the components of the underlying index and the investment focus suggested by the index's name.[320] We acknowledge that many investors that invest in index funds are seeking exposure to a particular index and that funds will have names that reflect the index that they track. However, terms used in fund names, including index funds, can communicate an investment focus that creates a reasonable expectation among investors that the fund will hold investments that support that focus. While we recognize the practical constraints and potential for investor confusion raised by commenters, we believe permitting index funds not to consider the relationship between the terms in their name and the investment focus such terms convey undermines the investment protection concerns that underlie the names rule and section 35(d). If a fund's name indicates an investment focus, such as investments in a specified industry, investors reasonably will expect that there is a meaningful nexus between fund's investments and the fund's investment focus—regardless of whether the fund executes its strategy by selecting companies in the specified industry or tracking an index that identifies such companies. As a result, consistent with rule 38a–1, index funds should generally adopt and implement written policies and procedures reasonably designed to ensure that indexes selected by a fund do not have materially misleading or deceptive names themselves.[321] While index funds should generally implement written policies and procedures ensuring that they comply with the requirements of section 35(d), in response to commenters, we are confirming that the terms in a market index referenced in an index fund's name would not be subject to an 80% investment policy test that would be in addition to the fund's policy to invest at least 80% of its assets in the index's components required under the rule.

B. Prospectus Disclosure Defining Terms Used in Fund Name

We are adopting amendments to funds' registration forms—specifically, Form N–1A, Form N–2, Form N–8B–2, and Form S–6—that each fund that is required to adopt and implement an 80% investment policy must include disclosure in its prospectus that defines the terms used in its name, including the specific criteria the fund uses to select the investments that the term describes, if any.[322] We are also adopting a requirement that funds must tag most of the new information that will be included under the final amendments, using a structured data language (specifically Inline eXtensible Business Reporting Language or ''Inline XBRL'').[323] The final amendments are designed to help investors better understand how the fund's investment strategies correspond with the investment focus that the fund's name suggests, as well as to provide additional information about how the fund's management seeks to achieve the fund's objective. We are adopting these amendments substantially as proposed.

Commenters generally supported the proposed prospectus disclosure requirements.[324] We did not receive any comments opposing this proposed requirement. In particular, the Commission received comments supporting the proposal's approach that allows funds the flexibility to use reasonable definitions when defining the terms in their names, as there may be more than one reasonable definition for a particular term.[325] Commenters also supported requiring funds to disclose the specific, non-proprietary criteria used to select the investment terms used in the fund's name.[326] Without this proposed disclosure, these commenters stated, funds are not required to convey the key information about the fund's holdings, risks, characteristics, or strategies associated with the fund's 80% investment policy.

The final prospectus disclosure requirements will provide investors with important information to determine whether a particular investment meets an investor's needs and goals. These requirements are additive to current names rule and other disclosure requirements.[327] Despite the protections afforded by the Commission's anti-fraud rules, the final prospectus disclosure requirements will help ensure that investors are given important information about how a fund manager understands how the terms used in the fund's name connect to the fund's 80% investment policy.[328] These funds must disclose in their prospectuses the specific criteria used by the fund to select these investments. Understanding how terms used in a fund's name are understood by the fund's investment manager is key information that an investor needs to make an investment decision, as this will help the investor understand whether the investment focus the name suggests is consistent with the investor's investment goals and risk tolerance. There are many types of fund names for which understanding additional detail about how these terms are defined would provide greater clarity to an investor about the investment focus that the name suggests.[329]

We understand, based on staff experience with fund disclosure, that it is currently common practice for funds to include prospectus disclosure that describes the fund's 80% investment policy and that defines the terms in the fund's name.[330] The amendments we are adopting codify certain best practices of some funds that currently provide disclosure defining terms used in a fund's name. The disclosure requirement, however, does not otherwise alter or address disclosure that funds currently provide, for example in response to prospectus

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[320] *See* Proposing Release, *supra* footnote 2, at n.102 and accompanying discussion.

[321] *See supra* footnote 119.

[322] *See* instructions to Item 4(a)(1) and Item 9(b)(1) of Form N–1A; instruction to Item 8(2) of Form N–2; and instruction to Item 11 of Form N–8B–2.

[323] *See* General Instruction C.3.(g) of Form N–1A; General Instruction I of Form N–2; General Instruction 2.(*l*) of Form N–8B–2; and General Instruction 5 of Form S–6. For purposes of the final disclosure requirements, ''terms'' mean any word or phrase used in a fund's name, other than any trade name of the fund or its adviser, related to the fund's investment focus or strategies. However, words like ''fund'' or ''portfolio'' in a fund's name do not describe an investment focus or strategy and do not need to be defined.

[324] *See, e.g.,* ICI Comment Letter; CFA Institute Comment Letter; SIFMA AMG Comment Letter; Public Citizen Comment Letter; Comment Letter of IRI (Aug. 16, 2022) (''IRI Comment Letter''); Fidelity Comment Letter; LTSE Comment Letter.

[325] *See, e.g.,* ICI Comment letter; CFA Institute Comment Letter; SIFMA AMG Comment Letter.

[326] *See, e.g.,* CFA Institute Comment Letter; SIFMA AMG Comment Letter.

[327] However, the names rule does currently include this requirement for funds with names suggesting investment in particular countries or geographic regions. The final amendments replace this provision with a general requirement to define terms used in the fund's name whenever the fund's name suggest an investment focus requiring an 80% investment policy.

[328] *See, e.g.,* Public Citizen Comment Letter.

[329] *See supra* section I.B (discussing growth in the breadth of fund investment strategies over the past two decades).

[330] When the Commission adopted the names rule in 2001, the Commission stated that a fund that is subject to the rule's 80% investment policy requirement should disclose this policy as one of its principal investment strategies in its prospectus. *See* 2001 Names Rule Adopting Release, *supra* footnote 8, at nn.15 and 43; *see also* section 8(b) of the Act (requiring a registered investment company's registration statement to contain certain information, including a recital of its investment policies); Fidelity Comment Letter (stating that it is currently common practice for mutual funds to include prospectus disclosure that describes the fund's 80% policies and defines any terms that their names include in plain English, including funds whose names do not currently require such disclosures).

disclosure requirements regarding the fund's investment policies.

In addition, we are modifying the proposed disclosure requirement for open-end funds registered on Form N–1A to provide that definitions of terms in the fund's name must be summarized in the summary section of the prospectus and disclosed in the statutory prospectus.[331] We proposed to require funds to provide this disclosure solely in the summary section of the prospectus. The modifications in the final amendments reflect that the principal investment strategies disclosure in the summary section of the prospectus is intended to summarize disclosure that appears later in the statutory prospectus. Specifically, the Form N–1A requirement for principal investment strategies disclosure that appears in the summary prospectus (Item 4(a) of Form N–1A) provides that, based on the information given in response to the Form N–1A requirement for principal investment strategies disclosure that appears in the statutory prospectus (Item 9(b) of Form N–1A), a fund must summarize how it intends to achieve its investment objectives by identifying the fund's principal investment strategies.

Funds have flexibility to use reasonable definitions of the terms that their names use. A fund's use of reasonable definitions of the terms used in the fund's name under the final rule, however, may not be inconsistent with their plain English meaning or established industry use.[332] As discussed above, what constitutes ''reasonable'' in context could vary depending on the fund name, but requires that definition have a meaningful nexus between the term used in the fund's name and the fund's investment focus.[333] For instance, when the investment focus relates to an industry, we recognize that there are different approaches a fund could take to determine if a given security is tied to the economic fortunes and risks associated with the named industry. As there could be multiple reasonable definitions of the same term that multiple funds use in their names, each fund required to adopt an 80% investment policy must disclose how it interprets these terms to help investors better distinguish among funds.[334]

As proposed, we are requiring that all funds subject to the new prospectus disclosure requirements tag information we are requiring funds to disclose on their registration forms in a structured, machine-readable data language, specifically Inline XBRL.[335] We received a comment supporting the proposed Inline XBRL tagging requirement, stating that the XBRL standard is well-suited to narrative disclosures and will enhance the ability of those interested in using the data to extract disclosures quickly and to compare disclosures across entities more easily.[336] One commenter discussed that, as the Commission recognized in the Proposing Release, the proposed Inline XBRL tagging requirement would be new for UITs, as UITs are not currently subject to structured data tagging requirements.[337] This commenter requested that the Commission except UITs from the Inline XBRL tagging requirement, as most UIT unitholders are not familiar with Inline XBRL and introducing this requirement to UITs would be costly.

We are adopting the Inline XBRL tagging requirements substantially as proposed.[338] These requirements include block text tagging of narrative information about a fund's 80% investment policy and the terms used in its name, including the specific criteria the fund uses to select the investments that the term describes, if any.[339] Many funds are already required to tag certain registration statement disclosure items using Inline XBRL. While UITs do not currently have experience with tagging in Inline XBRL, after considering comments received, we are adopting the proposed requirements because we anticipate that tagging names rule disclosure for all funds that are subject to this disclosure requirement will benefit investors, other market participants, and the Commission by making the tagged disclosures more readily available and easily accessible for aggregation, comparison, filtering, and other analysis.[340] This requirement will enable automated extraction and analysis of granular data about how funds are defining the terms used in their names, allowing investors and other market participants to more efficiently perform large-scale analysis and comparison across funds and time periods. An Inline XBRL requirement facilitates other analytical benefits, such as more easily extracting and searching disclosures about funds' names and their 80% investment policies (rather than having to manually run searches for these disclosures through entire documents), and automatically comparing these disclosures against prior periods.

C. Plain English/Established Industry Use Requirement

For funds that are required to adopt an 80% investment policy, we are requiring that any terms used in the fund's name that suggest either an investment focus or that such fund is a tax-exempt fund must be consistent with those terms' plain English meaning or established industry use.[341] This requirement is designed to provide investors with a better understanding of the fund and its investment objectives

[331] *See* Instruction to Item 4(a)(1) of Form N–1A; Instruction 8 to Item 9(b)(1) of Form N–1A.

[332] *See* final rule 35d–1(a)(2)(iii) and 35d–1(a)(3)(ii); *see also* Proposing Release, *supra* footnote 2, at text following n.112.

[333] *See supra* section II.A.1.c). Commission staff could request information from the fund regarding the fund's basis for determining that the fund name is sufficiently consistent with the definitions provided, just as staff currently may request information from a fund to support its disclosure reflecting the fund's compliance with various provisions of the Act and rules thereunder.

[334] This disclosure, like other disclosure in funds' prospectuses, should avoid ''excessive detail, technical or legal terminology, and complex language.'' *See* General Instruction C.1.(c) to Form N–1A.

[335] Many funds are already required to tag certain registration statement disclosure items using Inline XBRL. *See* Proposing Release, *supra* footnote 2, at n.115.

[336] *See* Comment Letter of XBRL US (Aug. 16, 2022) (''XBRL Comment Letter''); *but see* SIFMA AMG Comment Letter (stating that the costs associated with Inline XBRL tagging as proposed would be significant).

[337] *See, e.g.,* Invesco Comment Letter.

[338] While the proposal did not distinguish between names-related information that open-end funds would disclose in their summary prospectuses versus their statutory prospectuses, the final amendments do make this distinction. *See supra* paragraph accompanying footnote 331 and accompanying text. Only the summary prospectus disclosure would be tagged in Inline XBRL format; however, the disclosure that open-end funds provide in their statutory prospectuses also would be reported on Form N–PORT, where it would be tagged in XML format. *See infra* section II.E.2.

[339] This tagging requirement would be implemented by including cross-references to rule 405 of Regulation S–T in each applicable fund registration form (and, as applicable, updating references to those fund registration forms in rule 11 and rule 405, as well as references in those fund registration forms that currently require certain information to be tagged in Inline XBRL—that is, Form N–1A and Form N–2), by revising rule 405(b) of Regulation S–T to include the proposed names rule disclosures, and by adopting conforming amendments to rule 485 and rule 497 under the Securities Act. The final amendments incorporate technical changes to the proposed amendments, but the tagging requirements that the final amendments effectuate are designed to be the same as under the proposed amendments. Pursuant to rule 301 of Regulation S–T, the EDGAR Filer Manual is incorporated by reference into the Commission's rules. In conjunction with the EDGAR Filer Manual, Regulation S–T governs the electronic submission of documents filed with the Commission. Rule 405 of Regulation S–T specifically governs the scope and manner of disclosure tagging requirements for operating companies and investment companies, including the requirement in rule 405(a)(3) to use Inline XBRL as the specific structured data language to use for tagging the disclosures.

[340] *See infra* section IV.D.2 at footnotes 566–568 and accompanying text (for a discussion of the costs for UITs to comply with the new Inline XBRL requirement).

[341] Final rule 35d–1(a)(2)(iii) and (3)(ii).

by effectively requiring a fund's name to be consistent with a reasonable investor's likely understanding of the investment focus or tax status that the fund's name suggests.

We received many comments supporting the proposed requirement.[342] Commenters expressed support for a requirement that would address reasonable, plain-English definitions for terms used in a fund's name as a means of providing additional clarity to fund shareholders.[343]

We received several comments requesting clarification on this requirement. One commenter asked how the Commission will determine whether a term is consistent with its ''plain English'' or ''established industry use'' meaning.[344] Another commenter requested clarification about circumstances where the plain English or established industry meaning of a word could be inaccurate or misleading.[345] For clarity on this point, commenters suggested that the final rule be modified to allow funds to use only any ''reasonable'' definition of the terms of its name.[346]

One commenter stated that some plain English meanings may lack clarity in an investment context and that funds should be required to include a description of how terms relate to the fund's 80% investment focus.[347] Another commenter similarly stated that certain terms like ''sustainable'' or ''socially responsible'' are evolving, and investors need to understand how funds define those terms.[348] As one commenter stated, certain terms have meanings that changed over time, and certain terms, particularly in the ESG context, may develop new meanings as markets and the investment management industry continue to evolve.[349]

Some commenters conveyed concern about the proposed plain English and established industry use requirement. One commenter stated that the plain English standard already applies to prospectus disclosure, and it should therefore not be separately required in the names rule.[350] One commenter suggested that there may still be deviations in how funds define terms even with this requirement. As a result, investors will still need to read the prospectus for clarity about the terms used in the fund's name, mitigating any positive impact of the requirement.[351] Commenters expressed specific concerns about the proposed ''established industry use'' standard. Commenters stated that this standard is nebulous, as industries and terminology can change over time, thereby altering the understood meaning of the term under established industry use.[352] Additionally, the Commission received a comment expressing concern that the relationship between the ''plain English'' standard and the ''established industry use'' standard is potentially contradictory and opaque.[353] One commenter cautioned that the established industry use standard could contribute to greenwashing for terms that have been widely used in inconsistent ways because the standard could permit funds to use terms consistent with industry practice when the usage of the term for the particular fund is misleading.[354] For example, this commenter stated that the term ''impact'' is used in many fund names with a range of meanings within the fund industry, and therefore funds should disclose the definitions of the terms used in the name as well as the criteria used to select the investments the terms describe.

After considering comments, we are adopting this requirement as proposed. We recognize that certain terms may be defined in multiple reasonable ways. Accordingly, the final amendments are intended to support these differences while providing that the use of terms that are inconsistent with their terms' plain English meaning or established industry use would mislead investors. Whether a fund is using a term consistent with its plain English meaning or established industry use could be derived from a variety of sources, including, but not limited to, the dictionary, prior public disclosures, industry codes or classifications, and/or a colloquial understanding of the term. Regardless of this requirement, funds that use terms in a materially misleading manner, for example, by using a term that has a plain English meaning or established industry use but then defining that term in disclosure in a materially different way, would generally violate section 35(d) of the Act and potentially other provisions of the Federal securities laws.

Under the final amendments, funds are required to include in their prospectus disclosure the definitions of the terms used in the fund's name, and as discussed above funds have flexibility in defining the terms under the policy that a fund adopts under the names rule.[355] The plain English/established industry use requirement is designed to prevent materially deceptive and misleading names in light of the flexibility that funds otherwise have to define the terms in their names. A name would be considered materially deceptive or misleading if the fund's prospectus disclosure defines a given term in the name inconsistent with the term's plain English meaning or established industry use, even if that disclosure correctly describes the fund's 80% investment policy.[356] While the final amendments require that the fund's prospectus disclosure and the terms used in a fund's name not be inconsistent, we recognize that prospectus disclosure may—and at times is required to—provide further information about the terms used in the name. For example, a ''solar energy'' fund's prospectus will need to provide additional context to what the name term ''solar energy'' means. This disclosure may not, however, otherwise change the plain English understanding of what solar energy means, for example, to include a type of alternative energy company that does not include solar energy.

The final rules' prospectus disclosure requirements provide additional context to the terms used in a name. Prospectus disclosure which, as a commenter highlighted, also has a plain English

[342] *See, e.g.,* J.P. Morgan Asset Management Comment Letter; Comment Letter of Delbert L. Coonce, Jr. (Aug. 15, 2022) (''Coonce Comment Letter''); Comment Letter of John Rosenmiller (Aug. 15, 2022) (''Rosenmiller Comment Letter''); Building a Sustainable Investment Community Comment Letter; Comment Letter of Peter Vandermark (Aug. 15, 2022) (''Vandermark Comment Letter''); Comment Letter of Rodney Smith (Aug. 15, 2022) (''Smith Comment Letter''); Comment Letter of Jim Metzinger (Aug. 15, 2022) (''Metzinger Comment Letter''); Change Finance Comment Letter; Comment Letter of Steve Wardwood (Aug. 15, 2022) (''Wardwood Comment Letter''); Public Citizen Comment Letter; Comment Letter of Veris Wealth Partners (Aug. 15, 2022) (''Veris Comment Letter''); Feinberg Comment Letter.

[343] *See, e.g.,* Fidelity Comment Letter (''We believe the requirement that the definition be reasonable and in plain English, along with the existing anti-fraud provisions under the securities law, will provide sufficient clarity to shareholders, without stifling innovation and opportunities for investment advisers to differentiate their investment strategies.''); CFA Institute Comment Letter.

[344] *See, e.g.,* Calamos Comment Letter.

[345] *See, e.g.,* Public Citizen Comment Letter.

[346] *See, e.g.,* Seward & Kissel Comment Letter and WisdomTree Comment Letter.

[347] *See* CFA Institute Comment Letter.

[348] *See* Public Citizen Comment Letter.

[349] *See* J.P. Morgan Asset Management Comment Letter.

[350] *See* Seward & Kissel Comment Letter.

[351] *See, e.g.,* Calamos Comment Letter.

[352] *See, e.g.,* Fidelity Comment Letter; Seward & Kissel Comment Letter.

[353] *See* Seward & Kissel Comment Letter.

[354] *See* Consumer Federation of America Comment Letter.

[355] *See* instructions to Item 4(a)(1) and Item 9(b)(1) of Form N–1A; instruction to Item 8(2) of Form N–2; and instruction to Item 11 of Form N–8B–2; *see also supra* paragraph accompanying footnotes 92–94.

[356] Final rule 35d–1(a)(2)(iii) and (3)(ii).

requirement, is separate from the plain English meaning and established industry use requirement we are adopting for fund names, which is specifically focused on the meaning of terms used in the fund's name.[357] The plain English requirements applicable to prospectus disclosures are focused on making prospectuses simpler, clearer, and more useful to investors.[358] Further, while a fund's disclosure in its prospectus provides important information about how a fund defines the terms used in its name and the criteria used to select investments consistent with the fund's 80% investment policy, the plain English requirement in the names rule addresses the goal that the name itself is reasonably communicative and clear to an investor based on the plain English or established industry use of terms that appear in the name. The plain English and established industry use requirement is not meant to be static and is designed to acknowledge that the language used in a fund's name may evolve as industries change and grow and the words used to describe funds and their investment focuses likewise change. While we recognize commenters' concerns about the ''established industry use'' of a term evolving over time, we are adopting this standard as proposed in recognition that certain terms in fund names might not have a plain English meaning, but still convey a particular focus to investors. The reference to ''established industry use'' is not designed to prevent a fund from defining a name term in reference to an emerging or developing definition, or from defining a name term in a way that is subject to industry debate. The fact that members of an industry have different conceptions of a term's definition, and that members of a particular industry are in good faith actively debating or discussing a definition, would be an indication that the definition is consistent with established industry use. That is, members of an industry need not coalesce on a standard, singular definition of a term for the term to be consistent with ''established'' industry use.

Further, we recognize that certain fund name terms used in a way that is standard within the fund industry could be less communicative to reasonable investors if they must be translated into ''plain English.'' Regarding the relationship between the ''plain English'' and ''established industry use'' standards, we are adopting a requirement that includes both standards in recognition that the established industry use of a particular term may not be the same meaning given to the term in in a plain English context. The meaning of a term in reference to a specific industry or investment strategy, however, may be clear within the terminology of a particular industry or sector. For example, an equity fund could use the term ''high beta'' in its name, which is understood within the industry, and the investing public, to mean that the fund seeks to invest in stocks with high sensitivity to market movements, although arguably this term has no ''plain English'' usage. As another example, a fund might define the term ''value'' in its 80% investment policy by referring to financial metrics that are specific to value investing, and therefore may not be viewed as reflecting the plain English meaning of the term ''value.'' The ''established industry use'' requirement is therefore an important corollary to the ''plain English'' requirement. The use of certain fund name terms, whose meanings are communicative to investors interested in investing in funds focused in a particular industry or using a strategy that uses a specific industry-specific lexicon, could be limited if we were to adopt a plain English requirement without alternatively permitting fund name terms to be consistent with their established industry use.

D. Modernizing the Rule's Notice Requirement

Consistent with the current rule, the final rule amendments will continue to require that, unless a fund's 80% policy is a fundamental policy, notice must be provided to shareholders of any change in the fund's 80% policy.[359] The amendments to the names rule's notice requirement we are adopting, substantially as proposed, are designed to specify further the content and delivery of the notice, and address more directly the needs of investors who elect electronic delivery. These changes reflect the Commission's commitment to adapting and modernizing the way in which information is disseminated to the investing public in response to changes in the industry and technology.[360] As an additional modification, the final amendments, as proposed, will also require notices to describe not only a change to the fund's 80% investment policy, but also an accompanying change in the fund's name.

The Commission proposed to modernize the current notice requirements in several ways. Specifically, the proposed approach would: (1) clarify the current requirement that the notice must be provided separately from any other documents; (2) update the legend requirements alerting the investor to a change in investment policy and/or name; (3) specify the content that the notices include; and (4) specify notices that may be delivered electronically. We are adopting each of these requirements as proposed, as detailed below.

The Commission received limited comments in response to these proposed requirements. Some commenters generally supported the proposed requirements, stating, for example, that the proposal would provide greater flexibility and clarity with respect to how the notice requirements translate to an electronic setting.[361] One supporting commenter recommended that the Commission further modernize shareholder notice requirements by allowing funds to post notice of certain policy changes on their websites rather than doing so through paper or email communications.[362]

Amendments Clarifying That Notice Be Provided Separately From Other Documents

The final amendments, as in the current rule, will continue to require the notice to be provided in plain English and delivered ''separately from any

[357] *See, e.g.,* 17 CFR 230.421(d) and General Instruction B.4 of Form N–1A.

[358] *See* Plain English Disclosure, Securities Act Release No. 7497 (Jan. 28, 1998) [63 FR 6370 (Feb. 6, 1998)].

[359] Final rule 35d–1(a)(2)(ii) and final rule 35d–1(d); *see also* final rule 35d–1(g) (defining the term ''fundamental policy'').

[360] *See, e.g.,* Use of Electronic Media for Delivery Purposes, Investment Company Act Release No. 21399 (Oct. 6, 1995) [60 FR 53458 (Oct. 13, 1995)] (providing Commission views on the use of electronic media to deliver information to investors, with a focus on electronic delivery of prospectuses, annual reports, and proxy solicitation materials); Optional internet Availability of Investment Company Shareholder Reports, Investment Company Act Release No. 33115 (June 5, 2018) [83 FR 29158 (June 22, 2018)], at n.18; Exchange-Traded Funds, Investment Company Act Release No. 33646 (Sept. 25, 2019) [84 FR 57162 (Oct. 24, 2019)] (''ETF Adopting Release''), at n.229 (encouraging ETFs to consider whether there are technological means to make their disclosure more accessible).

[361] *See* Fidelity Comment Letter; J.P. Morgan Asset Management Comment Letter; Dogwhistle Comment Letter; Environmental Defense Fund Comment Letter; PRI Comment Letter.

[362] *See* Fidelity Comment Letter. This commenter stated that electronic postings should be considered to be sufficient notice where a change does not materially impact the risk profile of the fund. Another commenter similarly advocated for a one-time exception from the notice requirements for funds whose policies are not ''meaningfully'' changing. Dogwhistle Comment Letter.

other documents.'' [363] Further, as proposed, the final amendments specifically provide that if the notice is delivered in paper form, it may be provided in the same envelope as other written documents.[364] This amendment is designed to clarify the current rule's provisions that address when and how the notice can be provided with other written documents, but not to alter these current provisions substantively.

Amendments Updating Legend Requirement

Similar to the current notice requirement and as proposed, the final amendments require the notice contain the following prominent statement, or similar clear and understandable statement, in bold-face type: ''Important Notice Regarding Change in Investment Policy [and Name].'' [365] This requirement represents a change from the current rule by requiring a fund to prominently indicate to investors any changes made to its *name* that accompany a change in investment policy in addition to changes made to the policy itself. This new requirement is designed to put investors on alert that, going forward, the fund that is described in various regulatory materials and other fund and intermediary communications is the same fund in which they are currently invested.

Under the current notice requirement, the mandated statement is required to appear on the envelope in which the notice is delivered, or if the notice is delivered separately from other communications to investors, the statement must appear either on the notice *or* on the envelope.[366] Under the final rule, for any notice that is provided in paper form, this required statement *must* also appear on the envelope in which the notice is delivered.[367] This expansion of the current requirement is designed to help draw shareholders' attention to an important document that provides them information about the change in the fund's investment policy and, if applicable, the fund's name.

Amendments to Notice Content Requirements

The final amendments include certain new requirements designed to incorporate greater specificity on content the notices include. Substantially as proposed, the final amendments will require that the notice describe, as applicable, the fund's 80% investment policy, the nature of the change to the 80% investment policy, the fund's old and new names, and the effective date of any investment policy and/or name changes.[368] These requirements are designed to codify certain best practices of some funds, help facilitate funds' compliance with the notice requirement, and increase specificity in the content that notices include in order to provide the information that fund shareholders need to decide whether to stay invested in a fund whose investment policy is changing.

Amendments Providing Specificity for Notices That May Be Delivered Electronically

The final amendments also include certain requirements designed to address the needs of investors who elect to receive notice electronically. Substantially as proposed, for notices that are provided electronically, the final rule will require that the statement appear on the subject line of the email communication that includes the notice.[369] This new requirement is designed to highlight the purpose of the electronic notice to shareholders, in the same way that the current requirement for a statement to appear on the delivery envelope highlights the purpose of the included paper notice. This aspect of the final amendments is also intended to clarify the application of the rule's requirements to electronic notices, which in turn will help ensure that investors who have opted into electronic delivery will receive the notices the names rule requires in the format that they prefer.

As proposed, the final amendments do not permit funds to post notices to their websites as an alternative to sending notice directly to shareholders. As the Commission discussed in the Proposing Release, requiring delivery of notice directly to shareholders, rather than permitting funds to post notices to websites, increases the likelihood that an investor would see and read the notice. This requirement will play an important role in helping investors make informed decisions in light of any changes to a fund's investment focus, portfolio holdings, risks and returns.

E. Form N–PORT Reporting

We are adopting amendments to Form N–PORT to include new reporting items for registered management investment companies and exchange-traded funds organized as a unit investment trust (''UIT''), other than money market funds or small business investment companies, (collectively, ''N–PORT funds'') regarding the 80% investment policy that such a fund adopts in compliance with the names rule.[370] As proposed, the final rules require N–PORT funds that are required to adopt an 80% investment policy to report on Form N–PORT: (1) whether each investment in the fund's portfolio is in the fund's 80% basket; and (2) the value of the fund's 80% basket, as a percentage of the value of the fund's assets.[371]

In light of some of the changes to the proposed names rule amendments that we are adopting, and in response to

[363] While the requirement in the final rule that the notice be provided ''separately from any other document'' is worded differently than in the current rule, it is functionally the same as the current rule's requirement. *See* final rule 35d–1(d)(1); rule 35d–1(c)(1) (''the notice will be provided in plain English in a separate written document''). This rewording is designed to provide clarity regarding what it means for the notice to be provided separately from any other documents (*i.e.,* the notice cannot be built into the fund's prospectus or into other required shareholder communications). *See* Proposing Release, *supra* footnote 2, at paragraph accompanying nn.131–132.

[364] Final rule 35d–1(d)(1).

[365] Final rule 35d–1(d)(2).

[366] Rule 35d–1(c)(3).

[367] Final rule 35d–1(d)(2)(i).

[368] Final rule 35d–1(d)(3).

[369] Final rule 35d–1(d)(2)(ii). As the Commission discussed at proposal, the Commission's current guidance regarding electronic delivery does not prohibit names rule notices from being delivered electronically. *See* Proposing Release, *supra* footnote 2, at n.136. Although paper is the default format for delivery of prospectuses and certain other required disclosures such as the proposed notice, the Commission has provided guidance noting that electronic delivery may be used to satisfy prospectus and certain other required disclosure delivery requirements if: (1) the investor has notice of the availability of the information; (2) the use of the medium is not so burdensome that intended recipients cannot effectively access the information being provided; and (3) the issuer has evidence of delivery. *Id.*

[370] All N–PORT funds are required to electronically file with the Commission, on a quarterly basis, monthly portfolio investment information on Form N–PORT, as of the end of each month. *See* Investment Company Reporting Modernization Adopting Release, *supra* footnote 47. As BDCs and money market funds are not subject to Form N–PORT reporting requirements generally, they will not be subject to the final amendments to Form N–PORT. This approach is consistent with the proposal, and we did not receive any comments on this aspect of the proposal. *See* Proposing Release, *supra* footnote 2, at nn.146–147 and accompanying text. Exchange-traded funds organized as a UIT will have to comply with the Form N–PORT reporting requirements only if their initial deposit occurs after the effective date of the final amendments. *See infra* section II.G. Other UITs are not subject to reporting on Form N–PORT.

[371] *See* Item B.9 and Item C.2 of Form N–PORT. Consistent with the final amendment's approach to derivatives generally, when responding to Item B.9, the percentage that the fund reports in response to Item B.9.b must reflect the use of notional amounts of funds' derivatives instruments with certain adjustments, as well as the value of assets sold short with respect to physical short positions. This percentage also must reflect any reduction of the value of the fund's assets resulting from, as applicable, those exclusions provided in final rule 35d–1(g). *See* instruction to Item B.9 and *supra* section II.A.3.

comments, the final Form N–PORT amendments modify the proposed reporting approach by requiring reported information for the third month of each quarter, instead of for every month. Given that the final amendments will not require continual names rule compliance monitoring as proposed, and instead will require that funds review their portfolios for compliance no less than quarterly, the reporting time frame in the final Form N–PORT requirements therefore reflects the period for review that will otherwise be mandated by the final amendments.[372]

We are also adopting certain changes to the proposed approach to names-related information that funds will report on Form N–PORT, which we discuss in more detail below: (1) adding a new reporting item, in which funds will report the definitions of terms used in the fund's name; and (2) not adopting the proposed requirement that funds report the number of days that that the value of the fund's 80% basket fell below 80% of the value of the fund's total assets during the reporting period.

As discussed below, the final amendments to Form N–PORT are designed to provide market-wide insight with respect to those registered investment companies, other than money market funds and BDCs that are subject to the 80% investment policy requirement for the Commission, its staff, and market participants.

1. Investments To Be Included in a Fund's 80% Basket

As proposed, we are adopting a new Form N–PORT reporting item that requires N–PORT funds subject to the 80% investment policy requirement to indicate, with respect to each portfolio investment, whether the investment is included in the fund's 80% basket. Such N–PORT funds must provide this new information, along with the other information they are currently required to report, for each of their portfolio investments on Form N–PORT, and as proposed the new information will be publicly available. In a change from the proposal, we are adopting a requirement that each N–PORT fund that is subject to the 80% investment policy requirement must also report the definitions of the terms used in the fund's name, including the specific criteria the fund uses to select the investments the term describes, if any.[373] These reporting requirements are designed to provide investors as well as the Commission and its staff insight into the types of investments a fund includes in its 80% basket.

The Commission received several comments broadly supporting the proposed Form N–PORT reporting requirements collectively.[374] One of these commenters stated that the proposed requirements would help investors and other market participants understand which factors or elements that a portfolio investment exhibits are consistent with a fund's 80% policy.[375] The Commission received several comments that objected generally to the collective proposed Form N–PORT reporting requirements.[376] Commenters stated that the proposed reporting requirements would be of little benefit to investors, as investors are more prone to review prospectus disclosure rather than information included on Form N–PORT.[377] The Commission received a comment questioning the rationale for the proposed reporting requirements given the name rule's unique role in addressing materially deceptive and misleading names, distinct from other disclosure requirements.[378] Commenters stated that the costs and operational burdens of the proposed requirements, in light of these concerns and particularly with respect to the names that would be included in the proposed expanded scope of the 80% investment policy requirement, would be significant and questioned whether they would be warranted.[379]

The Commission received several comments specific to the proposed requirement that N–PORT funds report whether each investment is counted towards the fund's 80% basket. One included a general comment stating that this proposed reporting requirement would benefit investors and other market participants.[380] Several other commenters objected to this reporting requirement.[381] These commenters expressed concern about the costs and burden of tagging each investment on a monthly basis.[382] The Commission also received a comment that the Commission should not require funds to classify 100% of their portfolio when the rule requires that only 80% of a given fund's portfolio be invested consistent with the funds 80% investment policy.[383]

Some commenters questioned the usefulness of this reporting item because Form N–PORT disclosure is by its nature backward-looking, and so the reported information may not accurately represent what the fund's portfolio looks like at the present time.[384] Several commenters stated that how a fund categorizes individual investments in its portfolio is subjective and therefore not comparable across funds.[385] Without additional disclosure regarding how a fund may categorize individual investments, we received comment asserting that this disclosure may be confusing to investors.[386] Separately, a commenter stated that whether each investment qualifies as an 80% basket investment under a fund's 80% investment policy may change on a more frequent basis than the proposed monthly reporting period and that the disclosure requirement therefore may overwhelm investors with outdated information that would not help compare funds in a meaningful way.[387]

Some commenters stated that the proposed new reporting item would

[372] The rationale for the required period for reporting this information on Form N–PORT is based on the period of the quarterly review requirement under the names rule and not the required period for filing Form N–PORT. Although the Commission has separately proposed to increase the frequency with which funds file reports on Form N–PORT, that proposal, if adopted, would not affect the requirement adopted in this release for funds to report names-related information on Form N–PORT on a quarterly basis, providing the information for the third month in each fiscal quarter. *See, e.g.,* Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N–PORT Reporting, Investment Company Act Release No. 34746 (Nov. 2, 2022) [87 FR 77172 (Dec. 16, 2022)].

[373] The final amendments also require disclosure of these definitions in funds' prospectuses. *See supra* section II.B.

[374] *See, e.g.,* Comment Letter of Nate Regan (June 15, 2022) (''Regan II Comment Letter''); Center for American Progress Comment Letter; PRI Comment Letter; Fidelity Comment Letter.

[375] *See* PRI Comment Letter.

[376] *See, e.g.,* SIFMA AMG Comment Letter; T. Rowe Comment Letter; J.P. Morgan Asset Management Comment Letter; USCOC Comment Letter; Nationwide Comment Letter; Federated Comment Letter; WisdomTree Comment Letter; MFS Comment Letter; Invesco Comment Letter; Capital Group Comment Letter; Seward & Kissel Comment Letter; Dimensional Comment Letter.

[377] *See, e.g.,* Nationwide Comment Letter; SIFMA AMG Comment Letter; Federated Comment Letter; WisdomTree Comment Letter; MFS Comment Letter; Invesco Comment Letter; Capital Group Comment Letter; J.P. Morgan Asset Management Comment Letter; Dimensional Comment Letter.

[378] *See* SIFMA AMG Comment Letter; *see also* Proposing Release, *supra* footnote 2, at nn.4–6 and accompanying text.

[379] *See, e.g.,* MFS Comment Letter; J.P. Morgan Asset Management Comment Letter; T. Rowe Comment Letter.

[380] *See* Center for American Progress Comment Letter.

[381] *See, e.g.,* ICI Comment Letter; Nationwide Comment Letter; Federated Comment Letter; J.P. Morgan Asset Management Comment Letter; Fidelity Comment Letter; WisdomTree Comment Letter; Capital Group Comment Letter; MFS Comment Letter; SIFMA AMG Comment Letter.

[382] *See* MFS Comment Letter.

[383] *See* ICI Comment Letter.

[384] *See, e.g.,* SIFMA AMG Comment Letter; Wellington Comment Letter.

[385] *See, e.g.,* ICI Comment Letter; J.P. Morgan Asset Management Comment Letter; SIFMA AMG Comment Letter; Dimensional Comment Letter.

[386] *See* Capital Group Comment Letter.

[387] *See* Fidelity Comment Letter.

require the build-out of new systems, for daily testing and validation of names rule compliance information, and for mapping this information over for reporting on Form N–PORT.[388] Additionally, commenters stated that the new reporting requirements would consume compliance resources to the extent compliance personnel would have to attend to the new reporting requirements, which would impact other compliance activities.[389] Some commenters stated that funds may need to hire third-party vendors for supplemental and specially tailored data on their portfolio investments, in order to comply with the proposed new reporting requirements.[390] The use of third-party vendors may, according to these commenters, lead to the homogenization in how funds define certain terms.

The requirement for an N–PORT fund to report whether each investment is included in the 80% basket helps the Commission and investors to have insight into how funds invest consistent with their 80% investment policies. The final amendments to Form N–PORT will complement the required prospectus disclosure defining terms used in fund names by providing additional information that is designed to increase investor understanding of a particular fund's investment focus, which will assist investors in making investment choices that better match their investment preferences. While the new information that funds would report on Form N–PORT is backward looking in that it reflects, on a quarterly basis, how funds have implemented their 80% policies, investors and third-party users who provide services to investors could also use this information to understand on a going-forward basis how funds may continue to implement their 80% investment policies consistent with the fund's name. While investors may not be directly accessing Form N–PORT, third-party service providers that investors look to for assistance in selecting investments, such as broker-dealers, investment advisers, and those that provide investment information for analysis to fund investors, will be able to use this information to analyze how a fund invests consistent with its name. We recognize that the benefits of these new reporting requirements will come with costs, as complying with the new reporting requirements will entail new compliance activities, and potentially also systems and operational modifications and the use of third-party service providers. The Form N–PORT reporting requirements may generate costs of adding new data tags for the new reporting items. By requiring less frequent Form N–PORT reporting and reducing the amount of names-related information that must be reported on N–PORT than was proposed, however, the final amendments should, on balance, have lower costs compared to the proposal.[391]

We also recognize that funds with similar names and investment focuses may reasonably make different determinations regarding whether an investment is appropriately within the 80% basket. Some funds may have an investment focus where the selection of 80% basket investments involves some degree of subjectivity. The reporting requirement we are adopting provides transparency that should help investors and other market participants providing transparency to investors, as well as Commission staff, understand what specific portfolio investments a fund may consider to be consistent with the fund's 80% investment policy and those that they do not. The Commission, investors, and these other market participants will also have the ability to examine, across N–PORT funds with similar investment focuses, whether these funds may be characterizing particular investments similarly. For example, investors interested in funds with a growth investment focus will better be able to compare across funds with similar names to determine whether specific investments are characterized similarly or differently, and therefore invest according to their specific preferences.

In a change from the proposal, we are adopting an accompanying reporting requirement to provide necessary context for this reporting. Under the final amendments to Form N–PORT, a fund subject to the 80% investment policy requirement must report the definitions of the terms used in the fund's name, including the specific criteria the fund uses to select the investments that the term describes, if any. This required reporting leverages the same disclosure that funds will also, under the final amendments, be required to include in their prospectuses.[392] This requirement addresses comments the Commission received expressing concern that the portfolio-specific information that would be required under the proposal lacked context.[393] We are requiring this information in both Form N–PORT and in the fund's prospectus to ensure that a user of the investment categorization information in Form N–PORT is not required to look to two documents to understand how investments are categorized by the fund, and how funds define the terms used in their names and the specific criteria the fund uses to select the investments (which gives context for the investment categorizations). With this additional information, investors will be able to better contextualize how the specific investments made by the fund adhere to the fund's stated criteria for how investments are selected consistent with the fund's 80% investment policy.

2. Investment Company Act Names Rule Investment Policy

We are adopting, as proposed, the requirement for N–PORT funds that adopt an 80% investment policy to report on Form N–PORT the value of the fund's 80% basket as a percentage of the value of the fund's assets.[394] This reporting requirement is designed to increase the effectiveness of the Commission's oversight of funds' compliance with the names rule as well as provide investors meaningful information about how funds comply with the names rule. This information also may allow investors to make investment choices that are more consistent with their investment preferences. As discussed below, we are not, however, adopting the proposed requirement that an N–PORT fund report the number of days that the value of the fund's 80% basket fell below 80% of the value of the fund's total assets during the reporting period.

The Commission received some comments specific to the proposed requirement that N–PORT funds report the value of the fund's 80% basket as a percentage of the value of the fund's assets. Some commenters stated that this proposed reporting requirement

[388] *See, e.g.,* T. Rowe Comment Letter; Invesco Comment Letter; Seward & Kissel Comment Letter.

[389] *See, e.g.,* Nationwide Comment Letter; Federated Comment Letter; Capital Group Comment Letter.

[390] *See, e.g.,* ICI Comment Letter; SIFMA AMG Comment Letter.

[391] *See infra* section IV.D.2.

[392] Given that funds can leverage efficiencies in reporting the information that they will include in their prospectuses in response to the final rules' disclosure requirements, we anticipate that the burden of this additional reporting item should be minimal. *See infra* section V.D.

[393] *See, e.g.,* Capital Group Comment Letter; J.P. Morgan Asset Management Comment Letter.

[394] To the extent a fund's name suggests an investment focus that has multiple elements, and therefore must adopt an 80% investment policy that addresses each element of that investment focus, the fund must report a single percentage that reflects its multi-element investment focus. *See supra* paragraph accompanying footnotes 139–140. For example, a ''Wind and Solar Fund'' would report the percentage of its assets invested in wind and solar companies combined, rather than reporting separate percentages for each of wind and solar.

would lead to inappropriate comparisons among funds.[395] These commenters stated that, because funds may have different 80% investment policy formulations, despite having the same or similar terms in their names, comparisons about the percentage of funds' assets invested in their 80% baskets would not provide useful information to investors.

We recognize that there are various reasonable ways in which funds with a similar name could implement the 80% investment requirement, and the Form N–PORT reporting requirements provide an important window into exactly how funds implement their 80% investment policies. Understanding how different funds with the same or similar terms in their names may have different strategies that invest more or less of the fund's assets outside of their 80% basket may provide investors with important information that better enables investors to select the investment that best meets their investment goals.[396] The reported information is designed to provide an additional data point that supplements other reported and disclosed information about how a fund invests in accordance with the focus its name suggests. This other reported and disclosed information, including the definitions of funds' name terms, will provide context that helps ensure that information reported about the percentage of a fund's portfolio invested in 80% basket assets is not misleading.

With respect to the proposed requirement that a fund report the number of days that the value of the fund's 80% basket fell below 80% of the value of the fund's total assets during the reporting period, the Commission received one supporting comment.[397] This commenter stated that the proposed reporting requirement would assist shareholders in comparing different funds as well as the Commission in its role overseeing fund's compliance with the names rule. The Commission received many comments, however, opposing this proposed reporting requirement.[398] For example, a commenter stated that monitoring individual securities on a daily basis for name rule compliance—which would de facto be a necessary corollary of the proposed reporting requirement—would be operationally onerous and should not be required by the final rule.[399] The Commission also received feedback that this proposed reporting requirement would be confusing, as the information would be reported without context and may raise unnecessary concern from investors.[400] Commenters also suggested that it was inappropriate to utilize Form N–PORT as a compliance tool.[401] Relatedly, a commenter stated that requiring the proposed reporting of departures below 80%, without also requiring reporting that would provide context of the investment team's judgment, could create legal risk for the fund and result in the fund manager taking more conservative portfolio management approaches despite the fact that the names rule permits certain departures.[402] At a minimum, one commenter suggested that these reporting items, like similar ones for liquidity and derivatives reporting, should be non-public.[403]

We are not adopting this proposed reporting requirement. The temporary departures provision we are adopting as part of the final names rule amendments does not require funds to monitor names rule compliance on a continual basis, but instead adopts a time-of-investment test with a minimum quarterly review of the investments in the fund's portfolio. A requirement to report the number of days that the value of the fund's 80% basket fell below 80% of the value of the fund's total assets would be inconsistent with this approach to temporary departures, because it would require daily compliance monitoring.

F. Recordkeeping

Consistent with the proposed amendments, the final rule will require funds that are subject to the 80% investment policy requirement to maintain certain records documenting their compliance with the rule, including changes that reflect the final rule's approach to temporary departures.[404] As a modification to the proposal, the final amendments do not include the proposed requirement for funds that do not adopt an 80% investment policy to maintain a written record of their analysis that the policy is not required under the names rule.

We are adopting recordkeeping requirements designed to enable Commission staff, as well as a fund's compliance personnel, to evaluate a fund's compliance with the names rule. Neither the current rule nor the general recordkeeping rule under the Act includes a recordkeeping requirement specific to names rule compliance-related topics. Consistent with the proposal, under the final amendments, funds that are required to adopt an 80% investment policy will be required to maintain written records documenting their compliance with the names rule. Specifically, these funds will be required to maintain:[405]

- Written records, at the time the fund invests its assets, documenting (1) whether the investment is included in the fund's 80% basket and, if so, the basis for including that investment in the 80% basket; and (2) the value of the fund's 80% basket, as a percentage of the value of the fund's assets;[406]
- Written records documenting the fund's review of its portfolio investments' inclusion in the fund's 80% basket, to be conducted at least quarterly, including whether each investment is included in the fund's 80% basket and the basis for including each investment in the 80% basket;
- If during this review or otherwise the fund identifies that the 80% requirement is no longer met due to drift, written records documenting the date this was identified and the reason for any departures from the 80% investment policy;[407]
- If there was a departure from the 80% requirement in other-than-normal

[395] *See, e.g.,* SIFMA AMG Comment Letter; Dimensional Comment Letter; Fidelity Comment Letter.

[396] *See* Proposing Release, *supra* footnote 2, at n.145 and accompanying text for examples of how this may be the case.

[397] *See* Fidelity Comment Letter.

[398] *See, e.g.,* ICI Comment Letter; Nationwide Comment Letter; J.P. Morgan Asset Management Comment Letter; Capital Group Comment Letter; MFS Comment Letter.

[399] *See, e.g.,* J.P. Morgan Asset Management Comment Letter. The commenter who supported this reporting item also suggested a longer compliance monitoring period than what was proposed. *See* Fidelity Comment Letter.

[400] *See, e.g.,* ICI Comment Letter and J.P. Morgan Asset Management Comment Letter; Capital Group Comment Letter; MFS Comment Letter; *see also* ICI Comment Letter III (discussing particular challenges for certain tax-exempt funds that apply the income test pursuant to rule 35d–1(a)(3)(i)(B)).

[401] *See, e.g.,* USCOC Comment Letter.

[402] *See* J.P. Morgan Asset Management Comment Letter.

[403] *See* ICI Comment Letter.

[404] Final rule 35d–1(b)(3).

[405] The new Form N–PORT reporting requirements would not satisfy the record-keeping requirements of rule 35d–1(b)(3). The Form N–PORT requirements reflect a snapshot of the fund's investments at the end of the reporting period. The recordkeeping requirement, however, reflects the fund's ongoing names rule compliance activity.

[406] These recordkeeping requirements apply as well to any derivatives that a fund includes in its 80% basket (either because the derivatives instrument provides investment exposure to investments suggested by the fund's name, or investment exposure to one or more of the market risk factors associated with the investment focus that the fund's name suggests). *See supra* section II.A.3.

[407] As a technical change to the proposed rule text, the final amendments do not specify that a fund's reason for any departure must be ''pursuant to paragraphs (b)(1)(2)'' of the rule. This is because final rule amendments do not address specific circumstances under which temporary departures from the 80% investment requirement would be permitted. *See supra* section II.A.2.

circumstances, written records documenting the date of any such departure and reason why the fund departed (including why the fund determined that circumstances are other-than-normal); and

- Any notice sent to the fund's shareholders pursuant to the rule.

All of these records must be maintained for at least six years following the creation of each required record (or, in the case of notices, following the date the notice was sent), the first two years in an easily accessible place.[408]

Functionally, under these recordkeeping requirements, each time a fund procured an investment, the fund would record the basis for including that investment in the 80% basket and the value of the 80% basket. A fund would also make or update such records in connection with its quarterly review reassessing the characteristics of investments in the fund's 80% basket (or any time the fund otherwise determines that certain investments' characteristics are inconsistent with the fund's 80% investment policy).[409]

Some commenters expressed general support for the proposed recordkeeping requirements, stating that these requirements would allow Commission staff to better understand and evaluate funds' compliance with the names rule, as well as encourage good governance and internal controls.[410] The majority of commenters, however, expressed opposition to the proposed recordkeeping requirements. Several commenters stated that the proposed requirement to maintain documentation of each investment included in a fund's 80% basket would be overly burdensome on funds' compliance and management personnel.[411] Certain commenters stated that they expected this requirement to be particularly burdensome in light of the increased scope of the names rule's 80% investment policy requirement.[412] One of these commenters stated that the requirements would necessitate portfolio management personnel devoting significant time to documenting the basis for each investment, including short-term investments.[413] Other commenters stated that some of the proposed recordkeeping requirements may not be easily automated, including the requirement to state the basis for including each investment in the 80% basket.[414] Some commenters also argued that this requirement would reduce a fund's capacity to focus on other aspects of compliance.[415]

After considering commenters' input, the final amendments retain the proposed requirement for funds required to adopt 80% policies to maintain documentation of each investment it includes in the 80% basket.[416] The records resulting from this requirement will enable our staff to evaluate a fund's treatment of specific investments, and the interaction of such investments with the overall operation of a fund's 80% investment policy. This information will allow our staff to identify deficiencies and assess compliance of the overall rule as amended.

As discussed above, the final rule's requirements related to temporary departures from the 80% requirement are different from what was proposed, particularly by retaining the time-of-investment test; requiring a quarterly, as opposed to continual, review; and creating different requirements for departures in other-than-normal circumstances as opposed to drift discovered during this quarterly review. We are providing more detail in the final rule to reflect these changes and make clear which records funds must maintain and when funds must create them under the final amendments. For example, the final rule provides specific requirements on which records a fund will be required to maintain pursuant to its quarterly review reassessing the characteristics of each investment in the fund's 80% basket (or any time the fund otherwise determines that certain investments' characteristics are inconsistent with the fund's 80% investment policy).[417]

These changes also help to address questions as to when funds should make records under the final rule. Some commenters, discussing expected burdens, anticipated the need to monitor a fund's 80% basket on a daily basis to comply with the proposed recordkeeping requirements.[418] As adopted, the frequency with which records under the final rule will be made would be at the time of investment, as well as when the fund engages in an activity that the rule requires which triggers a record (*e.g.,* conducts a quarterly review), consistent with the changes to the temporary departure requirements. Making records at each of these times will produce documentation supporting the fund's compliance with the rule and its 80% investment policy at the time a fund invests its assets, and in reflection of the fact that the fund's 80% basket and investments included in the 80% basket could change following initial investment, as provided in the rule. The frequency of records will, as a practical matter, vary based on the specific activities and compliance needs of the fund, and many funds would make certain of these records daily in order to reflect ongoing investment activity. For example, if a fund (for instance, an actively-managed fund whose portfolio turns over regularly, or a fund that frequently buys and sells portfolio assets in response to high or volatile investor flows) were making investments daily, that fund would keep daily records. These records would document whether the investments made each day are included in the fund's 80% basket (and, if so, the basis for that determination) and of the value of the fund's 80% basket, as a percentage of the value of the fund's assets.

As discussed above, the final amendments will require funds to conduct at-least quarterly—rather than continual—assessment of portfolio investments' inclusion in the 80% basket. This modification, in turn, could mitigate some of the anticipated costs of certain of the recordkeeping obligations compared to the proposal to the extent these anticipated costs assumed continual monitoring and assessment of portfolio investments, as well as recordkeeping requirements that would reflect this continual monitoring. We recognize that the recordkeeping requirements under the final amendments will still entail certain costs, particularly those associated with those records that certain funds (those

[408] The six-year retention period under the final amendments is designed to be generally consistent with other recordkeeping retention periods provided in rules under the Act. *See, e.g.,* rule 31a–1; rule 2a–7. This consistency with other retention periods will likely reduce the compliance burden of the recordkeeping requirements under the final amendments.

[409] *See supra* paragraph following footnote 165; *supra* paragraph following footnote 174.

[410] *See* J.P. Morgan Asset Management Comment Letter; Environmental Defense Fund Comment Letter.

[411] *See* ICI Comment Letter; T. Rowe Comment Letter; USCOC Comment Letter; Invesco Comment Letter; Federated Comment Letter; Dechert Comment Letter; SIFMA AMG Comment Letter; Seward & Kissel Comment Letter.

[412] ICI Comment Letter; T. Rowe Comment Letter; USCOC Comment Letter; Federated Comment Letter; SIFMA AMG Comment Letter; Dechert Comment Letter.

[413] Dechert Comment Letter.

[414] Invesco Comment Letter; Seward & Kissel Comment Letter.

[415] Invesco Comment Letter; Federated Comment Letter; Dechert Comment Letter.

[416] Final rule 35d–1(b)(3).

[417] *See supra* paragraph following footnote 165; *supra* paragraph following footnote 174.

[418] USCOC Comment Letter; T. Rowe Comment Letter.

that make investments on a daily basis) would make daily under the final rules and records that may not easily lend themselves to automation (due to the nature of certain investments, or otherwise). We continue, however, to anticipate that much of the required recordkeeping would be able to be at least partially automated.[419] We also recognize that there may be multiple reasonable approaches to documenting the basis for an investments' inclusion in a fund's 80% basket in compliance with the final amendments.

As proposed, the final amendments will not prescribe the particular form of documentation required to be maintained but will instead provide flexibility in how a fund documents the information delineated in the recordkeeping requirement. Funds, however, should generally maintain appropriate documentation that would be sufficient for a third party to verify the matter covered by each record and would be readily available to Commission staff.

The final rule will not include a requirement for funds that do not adopt 80% investment policies to maintain a written record of their analysis as to why such policy is not required.[420] Numerous commenters opposed this requirement.[421] While one commenter expressed general support for this provision, several others voiced general opposition, asserting that requiring funds to demonstrate affirmatively that a rule does not apply would be inconsistent with the general character of the Federal securities laws.[422] One commenter stated that this requirement would not provide a meaningful benefit to shareholders, and another expressed concern that it could potentially imply that funds' boards of directors were required to make or approve a finding that the fund is not required to adopt an 80% policy.[423]

After considering comments, we have determined that this provision is not necessary to motivate proper determinations of when a fund is required to adopt an 80% policy. Moreover, the obligations imposed on funds through the substantive operation of the names rule as amended will continue to provide safeguards by generally requiring funds to adopt 80% investment policies where a fund name contains terms suggesting that the fund focuses in investments that have, or investments whose issuers have, particular characteristics. In addition, a fund with a name that appears to Commission staff to be within the scope of the 80% investment policy requirement, but that determines not to adopt an 80% investment policy, would nonetheless be responsible for sharing its analysis as to why it is not in violation of the names rule if requested by the Commission's examinations and enforcement staff.[424]

G. Unit Investment Trusts

The 2022 Proposal included exceptions for UITs that made their initial deposit of securities prior to the proposed amendments' effective date. Specifically, the Commission proposed to except these UITs from the requirements to adopt an 80% investment policy and maintain written records relating to the rule, unless the UIT already adopted—or was required to adopt at the time of the initial deposit—an 80% investment policy under the current rule.[425] This proposed approach was designed to be generally consistent with the treatment of UITs under the current names rule, and also to retain the existing exception from the 80% investment policy requirements for UITs that pre-date the original rule. In a modification from the 2022 Proposal, the final amendments will simply provide that the 80% investment policy and recordkeeping requirements will apply to UITs only at the time of initial deposit. This modification is designed to accommodate the practical realities that UITs would encounter if required to comply with the new provisions in the final amendments that require periodic review and potential rebalancing of a fund's portfolio.

Commenters expressed broad support for the proposed exceptions.[426] These commenters suggested, however, that for UITs that do not qualify for the exemption, the requirements of the names rule should apply only at the time of initial deposit and not on an ongoing basis. As these commenters observed, UITs typically maintain a fixed and transparent portfolio of securities and are limited in how and under what circumstances they can acquire or sell securities in their portfolio. These commenters therefore asserted that UITs are marketed as *pro rata* portions of a fixed portfolio and investors generally understand that security weightings will change during the life of the UIT due to market fluctuations. These commenters suggested that maintaining compliance with the temporary departure provisions of the proposed amendments could result in a UIT having to rebalance its portfolio post-deposit, which could create potential operational and legal issues.

After considering these comments, we are modifying the proposed approach to better align the rule's new requirements with the way in which UITs are constructed. Unlike the current rule, the final amendments will require a fund to review its portfolio assets' inclusion in its 80% basket as least quarterly and will also require that, if a fund drifts out of compliance with its 80% basket, the fund must come back into compliance within 90 days.[427] Because UITs are passively managed vehicles with fixed portfolios, it would be challenging for them to adjust their portfolios to comply with the new portfolio maintenance and testing requirements in the final amendments. If UITs were required to comply with the new requirements for temporary departures, portfolio changes could result over time that could be inconsistent with the requirements of UITs' governance documents or investor expectations.[428] Accordingly, we have modified the proposed exceptions for UITs to provide that the 80% investment policy and recordkeeping

[419] *See infra* section IV.D.2; *see also, e.g.,* J.P. Morgan Asset Management Comment Letter (stating that, for funds within the current scope of the names rule, ''routine testing for compliance can be done in a highly automated fashion,'' and stating that ''bespoke automated processes'' have already been developed for funds the sponsor offers that use ESG-related terms in their names, but expressing concern that for certain names that would be brought within the proposed broadened scope, compliance testing would be relatively more manual. *But see supra* footnote 71 and accompanying text (discussing commenters who suggested that it would be challenging to establish automated compliance monitoring solutions for terms in fund names where subjective criteria are part of the decision-making process). As the Commission stated in the Proposing Release, records that do not lend themselves to automation would need to be created on an as-needed basis.

[420] Final rule 35d–1(b)(3).

[421] *See* Comment Letter of Independent Directors Council (Aug. 16, 2022) (''IDC Comment Letter''); ICI Comment Letter; Seward & Kissel Comment Letter; Dechert Comment Letter; SIFMA AMG Comment Letter; USCOC Comment Letter; Invesco Comment Letter.

[422] *See* J.P. Morgan Asset Management Comment Letter. *But see* ICI Comment Letter; Seward & Kissel Comment Letter; Dechert Comment Letter.

[423] *See* Invesco Comment Letter; IDC Comment Letter.

[424] It would be appropriate for such a fund to compile a written analysis at the time it receives any such request from staff. This would be consistent with final rule's recordkeeping requirements, which do not include a requirement for funds that do not adopt 80% investment policies to maintain a written record of their analysis as to why such policy is not required. To be clear, the lack of a requirement to maintain a record of the analysis does not mean the fund would not be required to determine the applicability of the 80% investment policy requirement in the first instance.

[425] *See generally* Proposing Release, *supra* footnote 2, at nn.159–162 and accompanying text.

[426] *See* ICI Comment Letter; SIFMA AMG Comment Letter; Invesco Comment Letter.

[427] *See* final rule 35d–1(b)(1)(i); *see also supra* section II.A.2.

[428] *See* Proposing Release, *supra* footnote 2, at n.160 and accompanying text.

requirements will apply only at the initial deposit.[429]

As a result, UITs that have names that are implicated by the final amendments and whose initial deposit occurs after the compliance date of the final amendments will need to adopt an appropriate 80% investment policy, including making such a policy fundamental or providing notice to investors in the event of a change of the policy, if appropriate. However, such UITs will not be required to engage in the monitoring and other requirements associated with the final amendments' temporary departure requirements nor will they be required to keep records under the final amendments beyond the initial deposit. Also consistent with the proposal, all UITs will be subject to the rule's other requirements under the final amendments, as applicable, as well as those of the Federal securities laws generally, including section 35(d) of the Investment Company Act.[430] For example, all UITs will continue to be subject to the prohibition on names that suggest a guarantee by the U.S. Government regardless of the date of initial deposit.[431] Consistent with the 2022 Proposal, we continue to believe that the ability to provide prospectus disclosure is not precluded by the fixed nature of a UIT's portfolio.[432] As a result, UITs will be subject to the plain English requirements and the prospectus disclosure requirements, including the requirement to tag newly required information in the prospectus using Inline XBRL.[433]

H. Compliance Dates

The compliance date for the final amendments is [FILL IN date 24 months following amendments' effective date] for larger entities, and [FILL IN date 30 months following amendments' effective date] for smaller entities.[434] We are adopting this tiered compliance period to provide existing funds with adequate time to prepare to come into compliance with the final amendments. We proposed a one-year compliance period for all funds that would be subject to the amendments, regardless of asset size, and we solicited comment on whether the transition period should be shorter or longer, and whether it should be the same for all funds. We received comments on this aspect of the proposal, with many commenters stating that a one-year compliance period is an inadequate timeframe given the legal, compliance, and operational challenges associated with implementing the various components of the rule.[435] Some commenters specifically stated that funds will need time to evaluate the impact of the amendments, determine necessary changes, and seek board and/or shareholder approval of any required changes to funds' names or investment strategies.[436] Other commenters stated that service providers assisting with ongoing assessment of funds' portfolios will need time to develop and update systems necessary to support the rule.[437] One commenter stated that many small funds would be particularly burdened by heavy legal and compliance costs.[438]

After consideration of commenters' concerns, we are adopting a compliance period of 24 months following the final amendments' effective date for larger entities, and 30 months following the final amendments' effective date for smaller entities. The tiered compliance period we are adopting is designed to strike the appropriate balance between allowing funds adequate time to adjust their compliance practices, and allowing investors and shareholders to benefit from the amended names rule framework. This tiered compliance period also recognizes commenter concerns related to the operational challenges associated with compliance with the final amendments. In considering the adequacy of this compliance period, we also have considered that certain funds' current investment policies may already be in line with the final amendments or could be readily conformed without material change.[439] Furthermore, certain provisions of the final amendments will reduce both the initial and ongoing costs associated with compliance compared to the proposed amendments from which some commenter concerns

[429] *See* final rule 35d–1(e). Functionally, UITs that have made their initial deposit prior to the compliance date of the final amendments, including those that would have been subject to the exception in the 2022 Proposal because they pre-date the original rule, will not be required to adopt a new 80% investment policy or comply with the recordkeeping requirements in the final amendments.

[430] A few commenters suggested that the Commission should expressly exclude from the 80% investment policy requirement sub-accounts of insurance company separate accounts classified as UITs that fund variable annuity contracts and variable life insurance contracts when the sub-account invests in a single, designated underlying fund and has substantially the same name as the corresponding underlying fund. *See* Dechert Comment Letter; IRI Comment Letter; Comment Letter of Committee of Annuity Insurers (Aug. 16, 2022). These UITs should comply with the 80% investment policy requirement at initial deposit if they use a term in their name that suggests an investment focus. *See also supra* discussion in section II.A.1.c) (it would generally be reasonable for a fund of funds or other acquiring fund to include the entire value of its investment in an appropriate acquired fund when calculating compliance with the 80% investment requirement without looking through to the acquired fund's underlying investments, provided that the acquired fund has an 80% investment policy, unless it knows that the underlying fund is not investing consistent with the acquiring fund's investment focus).

[431] *See* final rule 35d–1(a)(1). In addition, ETFs organized as a UIT will be subject to the Form N–PORT reporting requirements regarding a fund's 80% investment policy post-deposit, consistent with their current reporting obligations. *See supra* section II.E. Other UITs will not be required to make these reports as they are not required to report on Form N–PORT generally. *See supra* footnote 371.

[432] *See* Proposing Release, *supra* footnote 2, at section II.H.

[433] *See supra* sections II.B and II.C. One commenter stated that the Inline XBRL tagging requirements would introduce new costs for UITs without significant benefit to investors. *See* Invesco Comment Letter. *But see* XBRL US Comment Letter (supporting the proposed requirement that all funds subject to the new disclosure requirements provide these disclosures in Inline XBRL format, for the reasons discussed at *supra* footnote 336 and accompanying text, and expressing that UITs can avail themselves of the same applications and processes used by other fund types that report information using Inline XBRL data language). These costs and benefits are discussed in more depth in *infra* section IV.D.

[434] For purposes of the final rules' tiered compliance period, larger entities are funds that, together with other investment companies in the same ''group of related investment companies'' (as such term is defined in rule 0–10 under the Investment Company Act [17 CFR 270.0–10]) have net assets of $1 billion or more as of the end of the most recent fiscal year, and smaller entities are funds that together with other investment companies in the same ''group of related investment companies'' have net assets of less than $1 billion as of the end of the most recent fiscal year. This standard is consistent with prior Commission approaches for tiered compliance dates based on asset size for rules affecting registered investment companies. *See, e.g.,* Investment Company Reporting Modernization Adopting Release, *supra* footnote 47; Liquidity Adopting Release, *supra* footnote 214; Inline XBRL Filing of Tagged Data, Securities Act Release No. 10514 (June 28, 2018) [83 FR 40846 (Sep. 17, 2018)]. In our experience, this threshold is a reasonable means of distinguishing larger and smaller entities for purposes of tiered compliance dates for rules affecting investment companies. We estimate that, as of December 2022, 77% of registered investment companies would be considered to be larger entities. This estimate is based on data reported in response to Items B.5, C.9, and F.11 on Form N–CEN. We estimate that, as of March 2023, 48% of BDCs would be considered to be larger entities. This estimate is based on data from Refinitiv BDC Collateral.

[435] *See* ICI Comment Letter; SIFMA AMG Comment Letter; Federated Comment Letter; TIAA-Nuveen Comment Letter; IRI Comment Letter; MFS Comment Letter; Invesco Comment Letter; Nasdaq Comment Letter; J.P. Morgan Asset Management Comment Letter; Fidelity Comment Letter; Dechert Comment Letter; Capital Group Comment Letter; XBRL US Comment Letter.

[436] *See* ICI Comment Letter; SIFMA AMG Comment Letter; TIAA-Nuveen Comment Letter; J.P. Morgan Asset Management Comment Letter; Fidelity Comment Letter; Dechert Comment Letter; Capital Group Comment Letter.

[437] *See* ICI Comment Letter; Fidelity Comment Letter; Dechert Comment Letter; Capital Group Comment Letter.

[438] *See* Freeman Capital Management Comment Letter.

[439] *See infra* section IV.D.2.

stemmed. We anticipate that smaller entities will benefit from having an additional six months to come into compliance with the final amendments, based on feedback from commenters and to the extent that smaller entities may face additional or different challenges in coming into compliance with the amendments than larger entities.

We disagree with the commenter who asserted that the amended rule is impermissibly retroactive.[440] The compliance period that we are adopting ensures that the rule amendments will operate and will be enforced prospectively. That regulated entities may have to take action to come into compliance with the rule does not make that rule retroactive.[441]

Staff in the Division of Investment Management are reviewing its no-action letters and other statements addressing compliance with the names rule to determine which letters and other staff statements, or portions thereof, should be withdrawn in connection with the final amendments. Some of these letters and other staff statements, or portions thereof, may be moot, superseded, or otherwise inconsistent with the final rule and, therefore, may be withdrawn by the staff. The staff's review includes, but is not necessarily be limited to, the staff no-action letters and other staff statements listed below.

- Frequently Asked Questions about Rule 35d–1;
- Disclosure by Funds Investing in Government Sponsored Enterprises (staff letter to the ICI, Oct. 17, 2003);
- IM Guidance Update, No. 2013–12, Fund Names Suggesting Protection from Loss (Nov. 2013).

III. Other Matters

Pursuant to the Congressional Review Act,[442] the Office of Information and Regulatory Affairs has designated the final amendments as 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.

IV. Economic Analysis

A. Introduction

We are mindful of the costs imposed by, and the benefits obtained from, our rules. Section 2(c) of the Investment Company Act[443] provides that when the Commission is engaging in rulemaking under the Act and is required to consider or determine whether an action is consistent with the public interest, the Commission shall also consider whether the action will promote efficiency, competition, and capital formation, in addition to the protection of investors. The following analysis considers, in detail, the likely significant economic effects that may result from the final rule amendments, including the benefits and costs to investors and other market participants as well as the broader implications of the final rule amendments for efficiency, competition, and capital formation.

Many of the benefits and costs discussed below are difficult to quantify. For example, the Commission cannot quantify how investors may change their investments in funds in response to the final rule amendments. Also, in some cases, data needed to quantify these economic effects are not currently available and the Commission does not have information or data that would allow such quantification. For example, the costs for investors to search for funds and monitor them to ensure that their investments are consistent with their preferences will depend on investors' opportunity cost of time, which could differ across investors. While the Commission has attempted to quantify economic effects where possible, much of the discussion of economic effects is qualitative in nature.

B. Broad Economic Considerations

As discussed in section I above, we believe that a fund's name is one important piece of information that investors use to select a fund, and that asset managers give considerable thought to the fund names that they choose. To the extent that investors value and can determine whether a fund's investments comport with the fund's name, there are reputational incentives for funds to hold such assets.[444] However, it is costly for individuals or third parties to analyze and monitor the extent to which every fund invests in assets consistent with an investment focus suggested by its name, or even to discover the reputation of each fund. As a result, it may be more efficient for investors to be able to rely on certain regulatory standards addressing the relationship between a fund's name and its investments than to rely on third parties or individual analyses for these purposes. Investors within a fund also differ in their preferences, and this variability mitigates an adviser's incentive to cater to those types of preferences, such as preferences over risk or correlation with particular market factors.

Further, an adviser has an incentive for the fund to hold investments different from those suggested by the fund's name to the extent that doing so would lead to increased assets under management and increased fee revenues. For example, a fund may be incentivized to depart from the investment focus suggested by its name in an attempt to outperform its peers and attract greater inflows and may act on this incentive within regulatory and market constraints. Holding investments not consistent with the investment focus that a fund's name suggests could lead to investors holding investments that are inconsistent with their goals and risk tolerances.

Some commenters believed that the current names rule needs to be amended.[445] Some of these commenters stated, for example, that the current scope of the 80% investment policy provision does not cover all instances in which fund names create the reasonable expectation that a fund will invest in a certain way.[446] Funds that suggest an investment focus but that are not currently covered by the names rule are popular. For example, funds with ''growth'' or ''value'' in their name make up over 15% of funds.[447]

In addition, derivatives have become a more common tool used by funds since the inception of the names rule, and many funds that use derivatives do so in ways that amplify, rather than hedge, their non-derivative positions.[448] Because the market value of derivatives

[440] *See* Stradley Comment Letter.

[441] *See Mobile Relay Assocs.* v. *FCC,* 457 F.3d 1, 11 (D.C. Cir. 2006) (''It is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive lawmaking, and indeed most economic regulation would be unworkable if all laws disrupting prior expectations were deemed suspect.'') (internal quotation marks omitted).

[442] 5 U.S.C. 801 *et seq.*

[443] 15 U.S.C. 80a–2(c).

[444] *See* Zycher Comment Letter.

[445] For a fuller discussion, *see* section I.B.

[446] *See supra* footnote 26 and accompanying text.

[447] Based on an analysis of fund names as of Dec. 2022.

[448] *See* R. Kaniel, and P. Wang, Unmasking Mutual Fund Derivative Use, CEPR Discussion Paper 17755 (2022) (''Kaniel Paper''). The authors find that 26% of active equity mutual funds use derivatives. Of these, 63% have derivative returns that correlate positively with their non-derivative returns. The median correlation was 0.25. For comparison, J Koski and J Pontiff, *How are Derivatives Used? Evidence from the Mutual Fund Industry,* Journal of Finance, Volume 54(2), 791–816 (1999) finds that only 21% of similar funds use derivatives.

tends to be small relative to the exposures they create, certain derivatives may currently provide funds a way to create large exposures not suggested by a fund's name without falling out of compliance with an 80% investment policy if derivatives are valued using their market value.[449]

Researchers have studied whether a fund's name can drive investor behavior above and beyond the investment strategy of the fund. That is, they have studied whether an incentive exists for managers to use names to attract fund flows in ways that are not reflected in the investment allocation of the fund. Research has found that fund names have an impact on fund flows in different types of environments.[450] Researchers have also found that certain funds have changed their names to suggest changes in style, but the funds do not subsequently change styles.[451] Gaps between the investment style implied by a fund's name and the actual style of the fund are consistent with self-interest of the fund's adviser. For example, research findings suggest that fund managers may alter funds' investment styles during the last part of a year, without changing their names to reflect a new style, in an effort to outperform their peers and attract greater inflows over the remainder of the year.[452] Research findings also suggest that funds' name changes that do not also involve a style change may be intentional and aimed at attracting investors.[453] In particular, these fund name changes tend to suggest fund styles that have performed well recently and that have received a disproportionate amount of fund flows.[454]

Some commenters disputed the relevance of this research to the proposed amendments to the names rule, claiming that it predates the current names rule, misuses terms like ''growth'' and ''value,'' and does not demonstrate that investors have been misled.[455] While some of this evidence does predate the current names rule, it also reflects styles that are not within the scope of the current names rule but are in the scope of the amended rule (*i.e.,* growth and value funds). As such, we do not anticipate that the current names rule impacted the main findings of these studies. Further, we believe that the totality of the academic research, both before and after the enactment of the names rule, suggests that fund names affect investor behavior above and beyond what can be explained by a fund's returns, risk level, correlation with market risk factors, or classification by third parties. This is not to suggest that names are solely determinative in investor decisions. While the above research is consistent with some investors unknowingly choosing funds that invest in assets outside of the investment focus suggested by their names, this is not the only possible explanation for the given findings. For example, funds with names that superficially suggest popular styles may be included more often in investors' initial screenings for funds, and investors may nonetheless disproportionately choose these funds after investigating them more thoroughly despite this fact. However, this would still suggest inefficiencies in the investor-fund matching process that could be improved by more precise naming and establishes the existence of an incentive for managers to choose names that maximize fund flows, even if the chosen name is not indicative of the investment practice of the fund. The academic research cited generally does not distinguish whether funds were purchased directly by investors or by a fiduciary or other intermediary. However, the rule is intended to increase search efficiency for both retail investors and fiduciaries.

Some commenters also criticized the proposed amendments for the costs they would impose on funds and, by extension, investors. Prevalent among these were concerns that the expansion of the scope of the rule would encompass many funds whose names have terms that are defined at least partially by managerial judgment.[456] These funds, commenters argued, would have significantly higher costs of compliance with the names rule than would funds that are already scoped into the rule. In particular, commenters were worried that automated processes could not be implemented that would categorize each asset and determine whether it fell in its 80% basket.[457] These concerns were heightened because the approach in the proposing release effectively would have required funds to do this categorization continually (and in some circumstances daily) in order to determine the number of days that a fund was out of

[449] *See* Kaniel Paper. The authors find that, among funds that use derivatives, derivatives are, on average, 2% of the market value of those funds. By contrast, derivatives make up, on average, 21% of those same funds' gross notional exposure. *See also supra* footnote 238 and accompanying text (stating that using a derivatives instrument's market value for purposes of assessing names rule compliance could result in a fund being in compliance with its 80% investment policy despite the fund having significant exposure to investments that are *not* suggested by the fund's name).

[450] *See e.g.,* S. El Ghoul, and A. Karoui, *What's in a (Green) Name? The Consequences of Greening Fund Names on Fund Flows, Turnover, and Performance,* Finance Research Letters, Volume 39, 101620 (2021). The authors find that, following a fund name change suggesting socially responsible investment, fund inflows increase but there is a statistically insignificant change in fund exposure to socially responsible investment. *See also* B. Candelon, J. B. Hasse, J.-Q. Lajaunie, *ESG-Washing in the Mutual Funds Industry? From Information Asymmetry to Regulation,* Risks, 9, 199 (2021). The authors provide empirical evidence that some asset managers portray their funds as socially responsible yet do not make tangible investment decisions consistent with that portrayal. *See also* C. Wu and W. Chen, *What's an AI Name Worth? The Impact of AI ETFs on Their Underlying Stocks,* Finance Research Letters, Volume 46 (B), 102474 (2022). The authors compare returns between the stocks in two different kinds of AI ETFs: those with and without ''AI'' in their name. They find that the constituent stocks of the group with ''AI'' in the name has a higher cumulative abnormal return than the constituent stocks of the group without ''AI'' in the name, and attribute this to differential fund flows to the different groups.

[451] *See* Michael J. Cooper, Huseyin Gulen, and P. Raghavendra Rau, *Changing Names with Style: Mutual Fund Name Changes and Their Effects on Fund Flows,* Journal of Finance, Volume 60, 2825–2858 (2005) (''Cooper Paper''). The authors identify 296 equity mutual funds that make a style name change over the period April 1994 to July 2001. They find that 63% of style-related name changes are 'misleading' in that they are not accompanied by corresponding changes in investment style to reflect the investment style suggested by the new name. *See also* Susanne Espenlaub, Imtiaz ul Haq, and Arif Khurshed, *It's all in the name: Mutual fund name changes after SEC Rule 35d–1,* Journal of Banking and Finance, Volume 84, 123–134 (2017) (''Espenlaub Paper''). The authors examine 2,677 fund name changes among 2,110 funds from the fourth quarter of 2001 through the fourth quarter of 2011. The authors find 435 ''misleading'' name changes in their sample.

[452] *See* Anne-Florence Allard et al., *When Mutual Fund Names Misinform* (working paper, 2020), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3628293.* The researchers find that funds that perform poorly over the first three quarters of a year, and funds that have experienced poor fund flows over the first three quarters of a year, are more likely to change to an investment style that is inconsistent with the style implied by the fund's name. These results suggest that funds that have performed poorly over the first three quarters of a year, and funds that have experienced poor fund flows over the first three quarters of a year, would bear an opportunity cost if they continued to follow the investment style consistent with the strategy implied by the funds' names.

[453] *See* Espenlaub Paper, *supra* footnote 451. The researchers find that ''superficial'' name changes result in increased fund flows but do not result in either higher performance or lower fees. *See also* Cooper Paper, *supra* footnote 451. The researchers find that funds that change their names: (1) experience negative flows, relative to their peers, prior to changing their names, (2) have performed poorly on a risk-adjusted basis, and (3) are in a style, irrespective of a fund's individual performance, that has recent poor performance.

[454] *See* Cooper Paper, *supra* footnote 451.

[455] *See* ICI Comment Letter and SIFMA AMG Comment Letter.

[456] *See, e.g.,* ICI Comment Letter, SIFMA AMG Comment Letter; J.P. Morgan Asset Management Comment Letter.

[457] *See, e.g.,* ICI Comment Letter, J.P. Morgan Asset Management Comment Letter; T. Rowe Comment Letter.

compliance with its 80% investment policy.

The final amendments have taken several steps to mitigate costs for most funds relative to the amendments in the proposing release. For example, the final rule does not include a requirement for continual or daily monitoring to reassess the characteristics of the investments in the fund's 80% basket, alleviating the need for daily recategorization. However, a fund must review its portfolio investments on a quarterly basis to determine whether or not the fund's investments continue to be consistent with its 80% investment policy. As is true under the baseline, a fund must also categorize an asset at its time of investment. If a fund is trading each of its assets daily then the cost mitigation described above would not apply.

C. Economic Baseline

The baseline against which the costs, benefits, and the effects on efficiency, competition, and capital formation of the final rule are measured consists of the current state of the fund market, current practice as it relates to fund names and investment policies, and the current regulatory framework. 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.[458]

1. Fund Industry Overview

The fund industry has grown and evolved substantially in past decades in response to various factors, including investor demand, technological developments, and an increase in domestic and international investment opportunities, both retail and institutional. As of December 2022, there were 9,533 mutual funds (excluding money market funds) with approximately $21,861 billion in total net assets, 2,735 ETFs organized as an open-end fund or as a share-class of an open-end fund with approximately $8,843 billion in total net assets, 748 registered closed-end funds with approximately $389 billion in total net assets, and 45 UITs with approximately $812 billion in total net assets.[459] There also were 355 money market funds with approximately $5,556 billion in total net assets.[460] Finally, as of December 2022, there were 125 BDCs with approximately $138 billion in total net assets.[461]

The final rule amendments would also affect current and prospective individual investors who invest in funds. According to an association representing registered funds, as of 2022, 71.7 million (54.7%) U.S. households and 120.5 million individuals owned shares in U.S. registered investment companies.[462] Median mutual fund assets of mutual fund-owning households were $125,000 with the median number of mutual funds held being three.[463] Moreover, registered funds play an important role in individuals' retirement savings. 72% of households had tax-advantaged retirement savings with $10.1 trillion invested in mutual funds either through defined contribution plans or IRAs.[464]

2. Market Practice

Fund names are an important mechanism in marketing funds to investors. Although investors have access to the entirety of a fund's disclosures, a fund's name is often the first piece of fund information investors see and can have a significant impact on their investment decision. Several commenters stated that the name of a fund is vital to an investor's decision-making process and can have a large impact on its fund flows.[465] Fund names commonly include words that describe the fund's investment focus—for example, the asset class(es) in which the fund invests, as well as the fund's investment strategy. For example, the words ''equity'' or ''stock''—terms that convey an investment type and therefore subject funds to the existing names rule's 80% investment policy requirement—appear in 1,393 fund names (approximately 10.6% of non-money market funds).[466] The words ''growth,'' ''income,'' and ''value''—terms that do not convey an investment type—appear in 1,167 (8.9% of non-money market funds), 1,472 (11.2%), and 829 (6.3%) fund names, respectively.[467]

A review of fund filings suggests that approximately 82% of funds have investment policies specifying a minimum percentage of investments consistent with a certain fund focus,[468] while 67% of all funds have such a policy with a minimum threshold of 80% or higher.[469] Certain funds also specify investment maximums as a

[458] *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'' (March 16, 2012), available at *https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf* (''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.

[459] Estimates of the number of registered investment companies and their total net assets are based on an analysis of Form N–CEN filings as of Dec. 31, 2022. For open-end management funds, closed-end funds, and management company separate accounts, total net assets is the sum of monthly average net assets across all funds in the sample during the reporting period (*see* Item C.19.a of Form N–CEN). For UITs, we count only N–CEN UIT filers that indicated registration on Form S–6 or Form N–8B–2. Furthermore, we use the total assets as of the end of the reporting period (*see* Item F.11 of Form N–CEN), and for UITs with missing total assets information, we use the aggregated contract value for the reporting period instead (*see* Item F.14.c of Form N–CEN).

[460] Estimates of the number of money market mutual funds and their total net assets are based on an analysis of Form N–MFP filings as of Dec. 31, 2022.

[461] Estimates of the number of BDCs and their net assets are based on an analysis of Form 10–K and Form 10–Q filings as of Dec. 31, 2022. Our estimate includes BDCs that may be delinquent or have filed extensions for their filings.

[462] *See* Investment Company Institute, 2023 Factbook (2023) (''2023 ICI Factbook'') *available at https://icifactbook.org/pdf/2023-factbook.pdf.*

[463] *Id.*

[464] *Id.*

[465] *See, e.g.,* Better Markets Comment Letter, Consumer Federation of America Comment Letter, Center for American Progress Comment Letter.

[466] Based on an analysis of fund names as of Dec. 2022.

[467] Certain word pairs are also common in fund names. For example, the word pair ''small cap'' appears in 3.6% of fund names. Other common word pairs include ''large cap'' (2.5% of funds), ''high yield'' (2.0% of funds), and ''emerging markets'' (3.5% of funds).

[468] This estimate is based on a random stratified sample of 100 fund names, which is a representative sample based on fund size randomly selected from the population of N–CEN filings as of Dec. 31, 2022. Specifically, 497 and 485BPOS fund prospectuses filed in 2021 or 2022 that match to the sample of 100 funds are parsed both programmatically and manually for keywords and phrases indicative of minimum investment commitment policies. 485BPOS refers to any post-effective amendments to the initial registration statement or prospectus filed pursuant to Securities Act rule 485(b). The investment policies for ten funds could not be identified in the 497 and 485BPOS fund prospectuses filed in 2021 or 2022. Therefore, these ten funds are excluded for this estimate. The random sample of 100 funds referenced here is the same sample of funds as that used to estimate the percentage of funds whose names implicate the 80% requirement. *See infra* section IV.C.3

[469] 22% of funds that have investment policies specifying a minimum percentage of investments consistent with a certain fund focus specify a percentage less than 80%. While 67% of funds have an investment policy requiring at least 80% of fund investments be consistent with a certain investment strategy, we estimate that 60% of funds have names that trigger the 80% requirement (discussed below). These results suggest that funds may adopt 80% investment policies even if they are not currently within the scope of the names rule's current requirement to adopt an 80% investment policy.

percentage of fund assets.[470] The review also found that 60% of funds are required under the current names rule to maintain an 80% investment policy.[471]

Funds' use of derivatives has grown in the time since the names rule was originally adopted in 2001, with 26% of funds now having some derivatives exposure.[472] Funds use derivatives in a variety of ways, including increasing or hedging their exposure to certain risk factors. Funds primarily do this through the use of futures and swaps contracts but other derivatives, such as options, are also widely used.[473] For example, a fund may wish to hedge the currency risk of a foreign asset through the use of a forward contract or its interest rate risk using a swap. Similarly, a fund may gain exposure to certain equities or commodities through the use of forward and option contracts. Funds also use derivatives for cash management purposes when fund flows are high,[474] for tax efficiency,[475] or to arbitrage market mispricing.

3. Current Regulatory Framework

As discussed above, section 35(d) of the Act authorizes the Commission to define certain fund names or titles as materially deceptive or misleading.[476] The current names rule applies to a registered investment company and any series of the investment company.[477] The rule generally requires that if a fund's name suggests a particular type of investment, industry, or geographic focus, the fund must invest at least 80% of its assets in the type of investment, industry, country, or geographic region suggested by its name.[478] The names rule also provides that a fund's 80% investment policy applies ''under normal circumstances'' [479]—giving funds flexibility to take cash or other defensive positions during market crises. The names rule also imposes an 80% investment policy requirement for tax-exempt funds.[480] Under the rule, a fund may generally elect to make its 80% investment policy a fundamental policy (*i.e.,* a policy that may not be changed without shareholder approval) or instead provide shareholders notice at least 60 days prior to any change in the 80% investment policy.[481] The names rule also requires a fund with a name suggesting that the fund focuses its investments in a particular country or geographic region to disclose in its prospectus the specific criteria used by the fund to select these investments.[482]

The current names rule has no express provision for how derivatives are to be treated in a fund's 80% calculation. In practice however, funds typically use a derivative's market value consistent with the definition of the term ''value'' in the Investment Company Act.[483]

A review of fund names suggests that approximately 60% of funds have names that implicate the 80% investment policy requirement, but that approximately 67% of funds have an investment policy that covers at least 80% of investment assets.[484]

The 80% investment policy requirement generally applies at the time when an investment company invests its assets.[485] If an investment causes a fund to no longer satisfy its 80% investment policy, then all future investments must be made in a manner that will bring the fund back into compliance with the 80% investment policy.[486]

Because the current rule applies to all registered investment companies, it applies to UITs as well as mutual funds and registered closed-end investment companies.[487] UITs are passively managed vehicles that operate pursuant to a trust indenture or a similar document and have fixed portfolios. They are also generally subject to the 80% investment policy requirement of the current names rule at the time of investment. However, UITs that have made an initial deposit of securities before the compliance date of the original rule are exempted from this requirement.[488]

BDCs, while not registered investment companies, are subject to requirements of section 35(d) of the Act, and thus the names rule, by operation of section 59 of the Act.[489] Accordingly they must meet the current rule's 80% investment policy requirement including to either adopt the required 80% investment policy as a fundamental policy or provide shareholders 60 days' advance notice for any change in the investment policy.[490] Unlisted registered closed-end funds and BDCs, however, do not issue redeemable shares or list their shares on a national securities exchange. Shareholders in an unlisted registered closed-end fund or BDC generally will have no ready recourse, such as the ability to redeem or quickly sell their shares, if the fund were to change its investment policy and the investment focus that the fund's name indicates.[491]

All registered management investment companies (other than money market funds and small business investment companies), as well as ETFs organized as UITs, file Form N–PORT with the Commission on a monthly basis. Form N–PORT requires reporting of a fund's complete portfolio holdings in a structured data language, with every third month available to the public 60 days after the end of the fund's fiscal quarter.

D. Benefits, Costs, and Effects on Efficiency, Competition and Capital Formation

The final amendments are designed to modernize and enhance the investor protections that the names rule currently provides. The final amendments are designed to improve, and broaden the scope of, the requirement for certain funds to adopt a

[470] For example, a fund may specify that it invests no more than a given percentage of fund assets in a given country or geographic region.

[471] *See* section IV.C.3 for details on the current regulatory requirement.

[472] *See supra* footnote 448 and accompanying text.

[473] *See* Kaniel Paper.

[474] *See, e.g.,* A. Frino, A. Lepone, and B Wong, *Derivative Use, Fund Flows and Investment Manager Performance,* Journal of Banking & Finance, Volume 33, 925–933 (2009).

[475] For example, 60% of futures contracts profits may be taxed at the long-term capital gains rate regardless of duration of the investment.

[476] *See supra* section I.A.

[477] Rule 35d–1(d)(1).

[478] *See* rule 35d–1(a)(2)(i), (a)(3)(i).

[479] *Id.*

[480] Alternatively, at least 80% of the income that it distributes will be exempt. *See* rule 35d–1(a)(4); *see also supra* footnote 15.

[481] *See* rule 35d–1(a)(2)(ii), (a)(3)(iii). An 80% investment policy relating to a tax-exempt fund, however, must be a fundamental policy.

[482] Rule 35d–1(a)(3)(ii).

[483] 2020 Request for Comment, *supra* footnote 20.

[484] This estimate is based on a random stratified sample of 100 fund names. *See supra* footnote 468.

[485] Rule 35d–1(b); *see also* 2001 Names Rule Adopting Release, *supra* footnote 8.

[486] Rule 35d–1(b). As described in greater detail in the Proposing Release, *supra* footnote 2, funds' compliance with the baseline rule is facilitated by Commission staff review of funds' initial registration statements, post-effective amendments, proxy statements, and annual reports. Likewise, the names rule's 80% investment policy requirement has never been intended to create a safe harbor from liability under section 35(d) for materially deceptive or misleading fund names generally. *See supra* section II.A.5; *see also* 2001 Names Rule Adopting Release, *supra* footnote 8, (stating that the Division would ''continue to scrutinize investment company names not covered by the proposed rule . . . and [i]n determining whether a particular name is misleading, the Division w[ould] consider whether the name would lead a reasonable investor to conclude that the company invests in a manner that is inconsistent with the company's intended investments or the risks of those investments''). Funds that anticipate oversight may be more likely to take steps to align their investment practices with the terminology used in these funds' names.

[487] 2001 Names Rule Adopting Release, *supra* footnote 8.

[488] Rule 35d–1(b).

[489] *See supra* footnote 13 (citing 15 U.S.C. 80a–58).

[490] Rule 35d–1(a)(2)(ii), (a)(3)(iii).

[491] *See* Proposing Release, *supra* footnote 2, at n.99 and accompanying text.

policy to invest at least 80% of their assets in accordance with the investment focus that the fund's name suggests. These amendments further the name rule's objective of preventing fund names from misrepresenting a fund's investments and risks by ensuring that a fund's investment activity is consistent with the investment focus its name communicates. The final amendments also update the rule's notice requirements, establish recordkeeping requirements, and require enhanced prospectus disclosure and reporting on Form N–PORT.

1. Benefits

The investor protections provided by the names rule benefit investors by helping to ensure investors' assets in funds are invested in accordance with their investment goals and risk tolerances. The distinction in the current rule between a type of investment—which implicates the 80% requirement under the baseline—and an investment strategy—which does not implicate this requirement—is not useful from an investor protection perspective because any fund name that may connote a particular investment focus can result in reasonable investor expectations regardless of whether the fund's name describes a strategy or a type of investment. Also, under certain circumstances, the current structure of the rule may not protect investors from funds departing from the investment focus suggested by their name over time. For example, funds may passively hold assets whose characteristics change, such as a small-cap firm becoming a mid-cap firm. Since funds are currently required only to assess assets at the time of investment, changes in the relative value of the assets of a fund could allow a fund's portfolio to drift such that its holdings no longer reflect the investment focus suggested by its name, which could mislead new or existing investors. Additionally, the investor protections provided by the names rule are not designed to address funds' increasing use of derivatives.

The benefits associated with the final amendments may vary based on funds' current practices. We estimate that 82% of funds, and over half of funds not currently subject to the names rule, currently have in place practices related to investing a certain percentage of their assets in a particular type of assets or assets that have certain characteristics.[492] Depending on the extent to which those practices differ across funds or differ from the final amendments' requirements, the benefits realized by fund investors, as detailed below, may vary across fund investors.

Generally, the final rules should increase investor confidence that funds' portfolios are aligned with the investment focus suggested by their names. The provisions are intended to align fund investments with the preferences of investors. To the extent that funds change their behavior and invest in assets more suited to investor preferences, allocation efficiency will increase.

One commenter questioned the general benefits of the amendments on the basis of a lack of enforcement actions or lawsuits arising from the current names rule.[493] We disagree with this assessment. There are a number of factors that determine whether and when the Commission brings enforcement actions, meaning the presence or absence of such actions does not necessarily indicate whether rulemaking is or is not justified. For the reasons discussed throughout, including the Commission and staff's experience with the names rule over the past two decades and developments in the fund industry, the Commission believes that this rulemaking is justified.[494]

Names Suggesting an Investment Focus. To the extent fund names are not representative of funds' investment focuses, existing and potential investors may hold, or invest in, funds with risk and return characteristics that differ from investors' reasonable expectations. Absent investor protections with respect to fund holdings, existing investors may expend resources they otherwise would not expend to confirm that fund investments are consistent with their expectations based on the fund's name, or they may choose to reduce or eliminate their investments in funds. Similarly, uncertainty about fund holdings despite the fund's name could cause potential investors to expend greater resources to confirm fund investments prior to investment or could lead potential investors to invest less or forgo investment altogether. The final amendments would extend the provisions of the names rule to a broader set of fund names.

Specifically, we estimate that approximately 8,100 (60%) funds are currently subject to the names rule's 80% investment policy requirement and that our final amendments would increase this number to approximately 10,300 (76%) funds.[495] We believe that investors in these additional funds would benefit to the extent that the scope expansion helps ensure that a fund's investment activity is consistent with the investment focus its name communicates and, thus, the investor expectations the name creates.

Temporary Departures. The final amendments will continue to permit a fund to depart temporarily from the requirement to invest at least 80% of the value of its assets in accordance with the investment focus its name suggests. The final rule requires that a fund must invest in accordance with its 80% investment policy under normal circumstances. Funds must review their portfolios on a quarterly basis for compliance with the 80% investment requirement. In instances where a fund identifies that its portfolio is out of compliance with the 80% investment requirement, the fund must make future investments in a manner that would bring the fund into compliance as soon as reasonably practicable and in all circumstances within 90 consecutive days of the fund's identification that the requirements are no longer met. If the fund departs from the requirements in other-than-normal circumstances, the fund is not required to come back into compliance as soon as reasonably practicable but must come back into compliance within 90 consecutive days of the initial departure.

In addition, funds are permitted under the final rule to temporarily depart from the 80% investment requirement in connection with a reorganization (for which the final rule does not specify a required time frame for accompanying temporary departures) or a fund launch (departure not to exceed the period of 180 consecutive days) or when a notice of a change in a fund's policy in certain circumstances has been provided to fund shareholders.[496]

The current rule requires a fund to determine at the time it invests whether the security is appropriately included in the fund's 80% basket. As a result, a fund that does not frequently trade could potentially have assets that comported with the name of the fund at the time of investment, but whose characteristics have changed with time. As a result, the requirement in the final rule for a fund to reassess the characteristics of a fund's assets on a quarterly basis will benefit investors by

[492] *See supra* footnote 468 and accompanying text.

[493] *See* SIFMA AMG Comment Letter.

[494] *See supra* section II.A.1.

[495] *See supra* footnotes 468–469. The percentage estimate is applied to the total number of funds (13,541) listed in section IV.C.1.

[496] *See supra* section II.A.2 for a full description of the requirement.

ensuring that funds cannot passively drift such that their name no longer reflects their holdings for a prolonged period.

The final rule will also benefit investors by imposing a limit to the amount of time that a fund can invest less than 80% of the value of its assets in accordance with the fund's investment focus in other-than-normal circumstances. The new deadline gives a predictable timeline for discrepancies to be resolved, during which funds can investigate a name change and shareholders can determine whether to redeem their shares. Some commenters highlighted the benefit of increased investor protection that this would produce.[497] For example, the final rule would disallow a departure for longer than 90 consecutive days to address a market disruption. This will benefit investors to the extent that such a departure would frustrate the expectation of investors who may expect the fund to invest consistent with its stated investment focus even during market disruptions, and therefore may choose to rebalance investments on their own rather than relying upon the fund to do so.

Because UITs are passively managed vehicles that have fixed portfolios, it would be difficult to adjust their portfolios to comply with the rule's portfolio composition requirements.[498] Accordingly, UITs are exempted from this provision and the associated benefits discussed above do not apply to UITs.

Considerations Regarding Derivatives in Assessing Names Rule Compliance. The final amendments also address the valuation of derivatives instruments for purposes of determining a fund's compliance with its 80% investment policy, as well as the derivatives that a fund may include in its 80% basket. The final amendments generally require that, in calculating its assets for purposes of names rule compliance, a fund must value each derivatives instrument using its notional amount, with certain adjustments.[499] The final amendments also, in a change from the proposal, require a fund to exclude from the calculation derivatives transactions that it uses to hedge currency risk associated with one or more specific foreign-currency-denominated equity or fixed-income investments held by the fund provided that: (1) such currency derivatives are entered into and maintained by the fund for hedging purposes, and (2) the notional amounts of such derivatives do not exceed the value of the hedged investments (or the par value thereof, in the case of fixed-income investments) by more than 10 percent. The final amendments will permit a fund, in determining compliance with its 80% investment policy, to deduct cash and cash equivalents and U.S. Treasury securities with remaining maturities of one year or less from assets (*i.e.,* the denominator in the 80% calculation) up to the notional amounts of the fund's derivatives instruments, as well as any closed-out positions if those positions result in no credit or market exposure to the fund.[500] The final amendments also specify that, in addition to any derivatives instrument that a fund includes in its 80% basket because the derivatives instrument provides investment exposure to the investments suggested by the fund's name, the fund also may include in its 80% basket a derivatives instrument that provides investment exposure to one or more of the market risk factors associated with the investment focus suggested by a fund's name.

As discussed above, a derivatives instrument's ''value,'' as defined in the Act, will not be the same as the investment exposure created by the derivatives instrument.[501] We believe the notional amount generally serves as a better measure (than market value) of the fund's investment exposure to the underlying reference asset or metric. Also, as discussed in section II.A.3 above, using derivatives instruments' market values for purposes of assessing names rule compliance could result in a fund being in compliance with the fund's 80% investment policy despite the fund having significant exposure to investments that are *not* suggested by the fund's name, as is allowed under the baseline. The final amendments will benefit investors by allowing funds that use derivatives to use names that may more effectively communicate their investments and risks and reduce the risk that a fund may use derivatives to invest in a manner inconsistent with the investment focus suggested by the fund's name. The final amendments also provide clarity to funds and investors on how to value derivatives for the purpose of the 80% investment test, and make the test a more effective tool in assessing names rule compliance. Comments on different aspects of the proposed approach to using notional amounts were mixed; however, commenters largely agreed that using an approach that better reflects the economic exposure obtained by a derivatives instrument, rather than the market value, would result in the benefits outlined for this aspect of the rule.[502]

Unlisted Registered Closed-End Funds and BDCs. Unlisted registered closed-end funds and BDCs do not issue redeemable shares or list their shares on a national securities exchange. Under the baseline, shareholders in an unlisted registered closed-end fund or BDC generally would have no ready recourse, such as the ability to redeem or quickly sell their shares, if the fund were to change its investment policy. Under the final rule amendments, unlisted registered closed-end funds and BDCs will not be permitted to change their 80% investment policies without shareholder approval unless an appropriate liquidity event is offered a certain time prior to the implementation of such a change.[503] This rule will increase investor protections by requiring that investors have a choice when a fund takes action to change its 80% investment policy, either in the form of a vote or in the ability to disinvest.

The proposed rule would have required that 80% investment policies for unlisted registered closed-end funds and BDCs be fundamental policies. We believe that the final rule's approach to unlisted registered closed-end funds and BDCs achieves the same investor protection benefits that the proposal would have provided relative to the current rule, because investors who no longer wish to invest in a fund after a change in investment policy will be able to either vote on such a change or liquidate their position. For most investors, we assume that the ability to liquidate is at least as strong a recourse as the ability to vote in this context.

Effect of Compliance with an 80% Investment Policy. We are adopting a new provision in the names rule providing that a fund's name may be materially deceptive or misleading under section 35(d) even if the fund adopts and implements an 80% investment policy and otherwise complies with the rule's requirement to adopt and implement the policy.[504] The

[497] *See, e.g.,* NASAA Comment Letter; Center for American Progress Comment Letter; Consumer Federation of America Comment Letter.

[498] *See supra* footnote 428.

[499] Interest-rate derivatives must be adjusted to their 10-year bond equivalent, and options must be delta-adjusted. Physical short positions must instead use the value of the asset sold short. *See* discussion in *supra* section II.A.3.

[500] *See* final rule 35d–1(g).

[501] *See* discussion in *supra* section II.A.3.

[502] *See, e.g.,* Consumer Federation of America Comment Letter; Capital Group Comment Letter; J.P. Morgan Asset Management Comment Letter.

[503] *See supra* section II.A.4 for a discussion of the rule requirement.

[504] *See supra* section II.A.5 and final rule 35d–1(c).

Commission has previously stated that the names rule's 80% investment policy requirement is not intended to create a safe harbor for fund names, and the provision we are adopting codifies this position.[505] We anticipate that investors will benefit from this codification of the prior guidance to the extent that it deters funds from investing in a way such that the source of a substantial portion of the fund's risks or returns is materially different from that which an investor reasonably would expect based on the fund's name, as communicated to investors. It may also lead funds to consider further ways in which their names could be materially deceptive and misleading even outside of compliance with the 80% investment policy requirement and modify their names and/or investment practices accordingly.

Prospectus Disclosure. We are also adopting amendments to funds' registration forms that would require each fund that is required to adopt and implement an 80% investment policy to disclose in its prospectus the definitions of the terms used in its name, including the specific criteria the fund uses to select the investments that the terms describe, if any.[506] These provisions are intended to help an investor understand whether the investment focus the name suggests is consistent with the investor's investment goals and risk tolerance. The final amendments will also reduce costs for investors to search for funds that match their investment preferences and facilitate monitoring by investors or third parties as well as facilitate oversight by the Commission.[507]

The final amendments will require funds to tag most of the new prospectus disclosure in Inline XBRL, a structured, machine-readable data language.[508] This requirement is designed to make the tagged prospectus disclosures more readily accessible for aggregation, comparison, filtering, and other analysis. As a point of comparison, XBRL requirements for public operating company financial statement disclosures have been observed to improve investor understanding of the disclosed information.[509] While those observations are specific to operating company financial statement disclosures (including footnotes), and not to disclosures from funds outside the financial statements, they indicate that the final rule's Inline XBRL requirements will provide fund investors with increased insight into term definitions and investment selection criteria at specific funds and across funds, asset managers, and time periods.[510] An Inline XBRL requirement is designed to ensure that all disclosures on these forms—including both structured and unstructured disclosures—will be human-readable, because Inline XBRL enables a single document to include both human-readable and machine-readable disclosure.

Plain English/Established Industry Use Requirement. We are also requiring that any terms used in the fund's name that suggest either an investment focus, or that the fund is a tax-exempt fund, must be consistent with those terms' plain English meaning or established industry use. This requirement is designed to provide investors with a better understanding of the fund and its investment objectives by effectively requiring a fund's name to be consistent with a reasonable investor's likely understanding of the investment focus or tax status that the fund's name suggests. Because terms may inherently have multiple meanings, and the amended rule provides flexibility to funds to define the terms in their name, this provision will provide a safeguard to investors by helping to ensure that these chosen definitions are within a term's plain English meaning or established industry use.

While many commenters agreed with the benefits of this requirement, some stated that this benefit may be mitigated in certain instances; for example, if the name uses terms that evolve over time, or if the plain English meaning of a term differs from its established industry use. These commenters suggested that investors would need to look at the prospectus disclosure to reasonably understand these terms and so there would be no additional benefit to requiring that terms in the name comport to either their plain English meaning or established industry use.[511] While investors should look to prospectus disclosure to understand how terms in a fund's name are defined, this provision would still benefit investors in those circumstances by allowing them to more quickly search for funds that match their investment goals by more effectively filtering for funds with names that could be related to their desired investment allocation.

New Form N–PORT Reporting Requirements. We are also amending Form N–PORT to include new reporting

[505] *See supra* section II.B; *see also* 2001 Names Rule Adopting Release, *supra* footnote 8, section II.A.1.

[506] *See* Proposing Release, *supra* footnote 2, at n.104 and accompanying text.

[507] *See* section II.B, section II.C, section II.E, and section II.F for discussions of how the proposed prospectus disclosure requirements, plain English requirements, N–PORT reporting requirements, and recordkeeping requirements, respectively, facilitate monitoring of fund investments by investors or third parties as well facilitate oversight by the Commission.

[508] *See supra* section II.B. For Forms N–2, N–8B–2, and S–6, all new prospectus disclosures will be tagged in Inline XBRL. For Form N–1A, the new summary prospectus disclosures in Item 4 will be tagged in Inline XBRL. While the new statutory prospectus disclosures in Item 9(b) will not be tagged in Inline XBRL, this disclosure will be reported on Form N–PORT, where it will be tagged in XML format.

[509] *See, e.g.,* Birt, J., Muthusamy, K. & P. Bir, *XBRL and the Qualitative Characteristics of Useful Financial Information,* Accounting Research Journal, 30 (2017) (finding ''financial information presented with XBRL tagging is significantly more relevant, understandable and comparable to non-professional investors''); Cahan, S.F., Chang, S., Siqueira, W.Z. & K. Tam, *The roles of XBRL and processed XBRL in 10–K readability,* Journal of Business Finance & Accounting (2021) (finding 10–K file size reduces readability before XBRL's adoption since 2012, but increases readability after XBRL adoption, indicating ''more XBRL data improves users' understanding of the financial statements''); Efendi, J., Park, J.D. & C. Subramaniam, *Does the XBRL Reporting Format Provide Incremental Information Value? A Study Using XBRL Disclosures During the Voluntary Filing Program,* Volume 52, Issue 2, Abacus, 259 (2016) (finding XBRL filings have larger relative informational value than HTML filings).

[510] The SEC's fund XBRL data are frequently accessed; for example, during the final week of Jun. 2023, over 37,000 investment company XBRL files were accessed via EDGAR. EDGAR access data is *available at https://www.sec.gov/about/data/edgar-log-file-data-sets.* As another example, the Commission's quarterly XBRL datasets for mutual fund prospectus risk/return summaries garnered over 13,000 pageviews from June 2022 to June 2023, according to a Google Analytics query of the Commission's XBRL dataset web page. The web page is *available at https://www.sec.gov/dera/data.* Even if some pageviews are not from investors themselves, investors may indirectly benefit from the processing of XBRL data by information intermediaries such as financial media, data aggregators, academic researchers, *et al.*). *See, e.g.,* Trentmann, N., *Companies Adjust Earnings for Covid–19 Costs, but Are They Still a One-Time Expense?,* The Wall Street Journal (2020) (citing an XBRL research software provider as a source for the analysis described in the article); *Bloomberg Lists BSE XBRL Data* (Mar. 17, 2019), *available at https://www.xbrl.org/news/bloomberg-lists-bse-xbrl-data/;* Hoitash, R & U. Hoitash, *Measuring accounting reporting complexity with XBRL,* The Accounting Review, Volume 93, 259–287 (2018). Also, in contrast to XBRL financial statements (including footnotes), which consist of tagged quantitative and narrative disclosures, the disclosures here do not expressly require the disclosure of any quantitative values (if a fund were to include any quantitative values as nested within the required discussion—for example by disclosing as a selection criterion a specific upper limit of company revenues from industries the fund deems incongruent with its definition of ''ESG''—those values will also be individually detail tagged, in addition to the block text tagging of the narrative discussion). Tagging narrative disclosures can facilitate analytical benefits such as automatic comparison/redlining of these disclosures against prior periods and the performance of targeted artificial intelligence/machine learning (''AI/ML'') assessments (tonality, sentiment, risk words, etc.) of specific definition and selection criteria disclosures rather than the entire unstructured document.

[511] *See supra* footnotes 357–358 and accompanying text for a discussion responding to the issues raised by these commenters.

items.[512] Registered investment companies, other than money market funds, required to adopt an 80% investment policy would be required to report on Form N–PORT: (1) with respect to each portfolio investment, whether the investment is included in the fund's 80% basket, (2) the value of the fund's 80% basket, as a percentage of the value of the fund's assets, and (3) the definitions of terms used in the name and any selection criteria associated with these terms. The new information that funds will be required to report on Form N–PORT filings will facilitate the Commission's oversight of funds' names rule compliance and assist Commission staff in examination, enforcement, and monitoring with respect to the consistency between funds' portfolio investments and the investment focus that the fund's name suggests. In addition to assisting the Commission in its regulatory functions, investors and other potential users will benefit from the periodic public disclosure of the information reported on Form N–PORT. Although Form N–PORT is not primarily designed for disclosing information directly to individual investors, we intend that entities providing services to investors, such as investment advisers, broker-dealers, and entities that provide information and analysis for fund investors, will also utilize and analyze the new information that will be required by the final amendments to Form N–PORT to monitor fund investments for consistency with investment focuses suggested by fund names. The analysis done by these parties will make it easier for all investors to determine whether or not a fund's investment strategy is consistent with their goals and preferences. Accordingly, whether directly or through third parties, the final new disclosure on Form N–PORT is intended to benefit all fund investors.

Recordkeeping. The final amendments require funds to maintain certain records if the fund is required to adopt an 80% investment policy.[513] While the amendments do not prescribe the particular form of documentation required to be maintained, funds generally should maintain appropriate documentation that would be sufficient for a third party to verify the matter covered by each record and would be readily available to Commission staff. These requirements will provide our staff, and a fund's compliance personnel, the ability to evaluate the fund's compliance with the proposed amendments and thereby will benefit investors.

Notice Requirement. The final amendments also protect investors by modifying the current notice requirements when a fund chooses to change its investment policy. The final amendments are designed to specify further the content and delivery of the notice, and address more directly the needs of investors who elect electronic delivery. The rule change benefits shareholders by requiring more prominent notice, and by requiring notice of both policy changes and corresponding name changes. This is intended to help ensure that investors are aware of any name and/or policy change, including to help prevent confusion when investors begin receiving fund materials referring to the new name. The rule change also benefits funds by expressly permitting use of email for notices and by permitting paper notices to be bundled with other shareholder correspondence. These changes could result in cost savings for funds that may be passed on to investors.

2. Costs

We believe that compliance costs associated with the final amendments, particularly those that expand the current scope of the names rule or create new requirements, would vary based on a fund's current practices with respect to adopting policies to invest a particular percentage of fund assets in investments that have, or whose issuers have particular characteristics. We assume that certain funds' current investment policies may already be in line with many of the final rule's requirements or could be readily conformed without material change. For example, as discussed in section IV.C.3 above, a review of fund filings suggests that approximately 7% of funds have investment policies that cover at least 80% of investment assets but are not required to do so under the current names rule. Over 80% of these funds would be newly scoped into the rule. Since we also estimate that 16% of funds will be newly subject to the rule, this means that roughly one third of funds that will be newly subject to an 80% investment policy requirement already have an 80% investment policy, though the exact implementation of this policy may differ from that required by the rule. Even more funds not currently scoped into the names rule already have a minimum investment policy covering less than 80% of assets. These funds will have lower implementation costs than they would have if they did not already have such an investment policy. For example, these funds are likely already to track the value of their assets on an initial and periodic basis for purposes of complying with such policy, as well as whether a particular asset is part of the percentage of their assets consistent with the investment policy.[514]

We expect that funds would incur costs to review the proposed rule's requirements and modify, as necessary, their investing practices, policies and procedures, and recordkeeping to comply with the proposed rule, or may decide to instead change their name. Even though we understand that many funds, even those that are not currently within the scope of the names rule, currently have in place practices related to investing a certain percentage of their assets in a particular type of assets or assets that have certain characteristics, those practices may differ across funds and also may differ from the proposed rule's requirements.

Certain costs may be fixed, while other costs may vary with the size of the fund and its investment focus. For instance, certain funds may determine that, in furtherance of the 80% investment policy that the rule requires, they will need to create or purchase data to track whether selected investments are consistent with the fund's investment focus. In certain circumstances, this cost may be relatively low and not vary much across similar funds. For example, some growth funds may rely on U.S. financial data when selecting fund portfolio investments. Even if different funds use different metrics to choose their investments, or invest in different industries, the cost of obtaining and using their data will likely be similar across funds unless they are able to share this cost across funds in a fund complex. Further, the cost of aggregating and analyzing financial data is likely to be relatively low because Generally Accepted Accounting Principles promote consistency and comparability in reported financial information, and because in most cases these data are

[512] As discussed above, the final amendments to Form N–PORT, like all Form N–PORT reporting requirements, apply to registered investment companies other than money market funds. BDCs are not subject to any Form N–PORT reporting requirements and thus would not be subject to the final amendments to Form N–PORT. *See supra* footnote 370.

[513] *See* final rule 35d–1(b)(3). The recordkeeping requirements will apply to UITs only at the time of initial deposit, and with respect to any notice sent to shareholders.

[514] Implementations of such existing 80% investment policies may vary, for example with respect to the kind and frequency of the determinations being made. Cost savings would be greater for funds whose existing implementation can more easily be adapted to meet the specific requirements of the final rule.

already tagged in XBRL so they can be parsed automatically. Conversely, other growth funds may rely on other metrics or more subjective criteria, and so the cost of creating or acquiring a dataset to track whether selected investments are consistent with the fund's investment focus may be higher. In general, this cost is likely to be relatively larger for smaller funds or funds with more esoteric or bespoke strategies.

Similarly, the cost of data that funds will likely use to comply with the rule may vary across funds based on the investment focus. For example, funds with an ESG focus may face a lack of consistent and comparable ESG information since different vendors of ESG ratings come to different conclusions about the same investment assets. This disparity arises from differing methodologies as well as differing inputs. Data vendors may charge a premium for their relatively more bespoke analysis compared to vendors of other more consistent data, such as financial statement data. Further, some funds may integrate multiple sources of information themselves to determine whether a particular asset is consistent with a fund's investment focus, further increasing the cost.

Also, while larger funds or funds that are part of a large fund complex may incur higher costs in absolute terms, larger funds may find it less costly, per dollar managed, to meet the requirements of the final amendments. For example, larger funds may have to allocate a smaller portion of existing resources, and fund complexes may realize economies of scale in complying with the final amendment's requirements for several funds.

Names Suggesting an Investment Focus. The final amendments broaden the scope of the names rule's current 80% investment policy requirement to also apply to fund names that include terms suggesting that the fund focuses in investments that have, or whose issuers have, particular characteristics.[515] As discussed above, we estimate that this amendment would subject an additional 2,200 funds to this requirement.[516] Fund registration forms currently require each fund to include disclosure in its prospectus that describes its principal investment strategies (including the type or types of securities in which the fund invests or will invest principally).[517]

Some commenters projected that the costs of compliance with the expanded scope will be substantially larger than was estimated in the Proposing Release.[518] Regarding the modifications of systems to comply with the proposed amendments, one commenter suggested that ''programming and testing efforts are far more complex and time consuming than contemplated by the Commission.'' [519] Another stated that ''[t]his type of compliance monitoring for an investment strategy would be novel and potentially require substantial changes and updates to compliance systems.'' [520] We believe funds with names that would be newly scoped into the names rule's 80% investment policy requirement under the final amendments already have systems in place for monitoring compliance with existing principal investment strategy disclosure requirements, as these requirements predate the amendments we are adopting and funds presumably have systems to ensure that their investments are in line with these disclosures. Similarly, some of these funds already have minimum percentage investment policies in place and would have systems in place to monitor their portfolios in compliance with these policies.[521] As a result, we believe that most funds with names that would be newly scoped in already have internal systems that could be modified to assess compliance with the final rule. Further, many fund complexes will use the same automated systems across their funds, and so these costs could be shared across their funds. However, funds would need to develop new, or revise existing, recordkeeping processes as discussed below.

Funds with names that are not currently scoped into the 80% investment policy requirement may face costs in the need to determine whether a specific asset would qualify as part of a fund's 80% basket. One commenter stated that conducting an 80% test on terms that rely on judgment on the part of a fund manager ''could become a highly manual process of confirming and recording the judgment of investment professionals with respect to each holding in a fund.'' [522] We believe that to the extent that fund names covered by the amended rule include terms that represent the judgment of their fund managers, the rule could create additional compliance costs. Assessing compliance with the 80% test for funds with such terms could be more costly (relative to doing so for terms with more automatable criteria) as this process is less scalable and potentially introduces more operational risk than would similar automated compliance processes. For example, manual entry of data is more prone to error than is an automated system.

The difficulty in scaling this process was particularly highlighted by some commenters.[523] These commenters stated that for certain terms used in fund names, particularly ''growth'' and ''value,'' there might be no reliable data from a third-party vendor that would match internal definitions.[524] According to these commenters, the definition of these terms and therefore the classification of certain assets may even differ across fund managers at the same firm, so any classification system would need to allow tags at the fund level rather than globally.[525] Such classification, in some of these cases, may be difficult to automate or outsource. As a result, some classifications may need to be done manually, with costs being incurred each time a fund performs the classification process.

Commenters' concerns about the scalability of this process were based on the proposed rule, which in effect would have required funds to engage in continual compliance testing to reassess the characteristics of investments in a fund's 80% basket. The final amendments are considerably less burdensome relative to the proposal in that such a test would need to take place only quarterly, in association with Form N–PORT reporting, or for each new investment (not the entire portfolio) at

[515] *See* section II.A.1 and *supra* footnote 56.

[516] *See supra* footnote 495 and accompanying text.

[517] *See, e.g.,* Item 9(b)(1) of Form N–1A. Instruction 2 to Item 9(b)(1) of Form N–1A states that a fund shall, in determining whether a strategy is a principal investment strategy, consider, among other things, the amount of the fund's assets expected to be committed to the strategy, the amount of the fund's assets expected to be placed at risk by the strategy, and the likelihood of the fund's losing some or all of those assets from implementing the strategy. *See also* Item 8(2)(b) of Form N–2. Item 8(2)(b) requires the registrant to disclose the investment objectives and policies of the registrant that will constitute its principal portfolio emphasis as well as how it proposes to meet its objectives, including: (1) the types of securities in which the registrant invests or will invest principally, and (2) the identity of any particular industry or group of industries in which the registrant proposes to concentrate.

[518] *See, e.g.,* J.P. Morgan Asset Management Comment Letter, T. Rowe Comment Letter, Stradley Comment Letter.

[519] ICI Comment Letter.

[520] SIFMA AMG Comment Letter.

[521] *See supra* footnotes 419 and 469 and accompanying text.

[522] J.P. Morgan Asset Management Comment Letter.

[523] *See, e.g.,* ICI Comment Letter; SIFMA AMG Comment Letter; J.P. Morgan Asset Management Comment Letter.

[524] *See, e.g.,* ICI Comment Letter, SIFMA AMG Comment Letter; J.P. Morgan Asset Management Comment Letter.

[525] *See, e.g.,* ICI Comment Letter, SIFMA AMG Comment Letter; T. Rowe Comment Letter.

the time of the investment.[526] A fund subject to the 80% investment policy requirement that trades its entire portfolio each day would still be required to make a daily assessment for each asset of whether the asset belongs in a fund's 80% basket. However, funds whose disclosure of principal investment strategies indicates that the fund invests in assets with particular characteristics are presumably already doing the type of analysis required for such classification at the time of investment.[527] The primary new burden of the amended rule in this respect is that the analysis must be redone for each asset on a quarterly basis. At this frequency, the classification process should be manageable even if done manually, though we recognize that this will be more costly for funds with names that include terms involving managerial judgment than it will be for funds whose names evoke a strategy where compliance testing is more easily automated.

Many commenters stated that the expanded scope will create interpretive questions.[528] For example, funds that were not previously required to have an 80% investment policy will need to evaluate whether their current fund name would subject them to this requirement. In addition, some commenters were concerned that including more ''subjective'' terms into the scope of the rule would engender ''second-guessing'' by the Commission or staff on a fund's choice of definition of these key terms.[529] The amended rule will require that these definitions comport with their plain English meaning or established industry use.[530] So to the extent that a term is relatively more subjective, funds will have discretion to define it consistent with the fund's investment strategy. Regardless of the chosen definition, a fund manager must make investments by applying specific criteria set forth in the fund's prospectus [531] related to the fund's investment focus or strategies such as ''growth'' or ''value.'' [532] The investment decision is guided by definitions and methodologies prescribed in advance and publicized by the fund, mitigating the concern expressed by the commenters.

Nonetheless, to the extent that ''subjective'' terms in a fund's name cause the fund's managers to be concerned about ''second-guessing,'' funds may spend more resources to comply with the final rule.

Some commenters were concerned that wherever fund names that are newly subject to an 80% test employ terms that are based on projections or otherwise forward-looking metrics, the Commission might evaluate their compliance with these terms retrospectively based on the outcomes of the investments.[533] For example, a fund that calls itself a ''growth'' fund, on the basis of its projection that fund assets will grow in value, might be concerned that if those assets do not grow, its name could be construed as misleading. However, the amended rule is designed for funds to retain reasonable discretion in establishing their 80% investment policies and defining the terms in their names. This discretion includes the use of forward-looking metrics and models in their selection process, just as is allowed under the baseline in certain circumstances.

Newly scoped index funds may also face higher costs of compliance than those already subject to the rule. One commenter was concerned that ''managers of index funds could be required to develop new fundamental analysis capabilities to evaluate each index constituent against the index name,'' and this sentiment was shared by several commenters.[534] Commenters also suggested that an index fund's tracking error could increase as a result, which could also frustrate investor expectations.[535] As is true under the baseline, index funds should generally adopt and implement written policies and procedures reasonably designed to ensure that the names of their selected indexes are not materially misleading themselves.[536] However, for terms whose meanings may vary across people or time, such as ''growth'' or ''value,'' we acknowledge that funds may incur a higher cost for determining that the indexes they rely on are not themselves misleading.

Similarly, funds may not take a position that would undermine the investment focus suggested by the fund's name, even if such a position contributes less than 20% of the fund's total assets. Ensuring that a fund's investments are not inconsistent with its name in this way is likely to be costlier for funds that are newly scoped into the rule than it is for those already subject to an 80% investment policy requirement. In response to an example in the 2022 Proposal, some commenters highlighted what they characterized as the subjective nature of deciding whether an investment is ''antithetical'' to the description of the fund, particularly when no specific prohibitions are included in the fund's name.[537] We agree that such a determination of whether a substantial portion of the fund's risks or returns is materially different from that which an investor reasonably would expect based on the fund's name may be more difficult to make in some cases and accordingly come with higher costs of compliance.

Finally, to the extent that funds choose to rename their funds in more generic ways to avoid having to comply with the amended names rule, investors may face increased search costs in determining their optimal fund allocation. However, this cost will exist only to the extent that those funds who choose to change their name previously had names that provided useful information to investors for their investment allocation decision.

Temporary Departures. The final amendments would retain a fund's ability to depart temporarily from the 80% investment requirement. The final amendments require that a fund must invest in accordance with its 80% investment policy under normal circumstances. Funds must reassess their portfolio assets' inclusion in the fund's 80% basket at least quarterly. In instances where a fund identifies that its portfolio is out of compliance with the 80% investment requirement, the fund must make future investments in a manner that would bring the fund into compliance as soon as reasonably practicable and in all circumstances within 90 consecutive days of the fund's identification that the requirements are no longer met. If the fund, in other-than-normal circumstances, invests in a manner not consistent with the 80% investment policy, the fund is not required to come back into compliance as soon as reasonably practicable, but

[526] *See supra* section II.A.2.

[527] *See supra* footnote 486.

[528] *See, e.g.,* ICI Comment Letter; SIFMA AMG Comment Letter; Stradley Comment Letter.

[529] *See, e.g.,* ICI Comment Letter; CCMC Comment Letter; Dechert Comment Letter.

[530] *See supra* footnote 341 and accompanying text.

[531] *See* Forms N–1A, N–2, and N–8B–2, as amended.

[532] *See* final rule 35d–1(a)(2)(ii).

[533] *See, e.g.,* SIFMA AMG Comment Letter; J.P. Morgan Asset Management Comment Letter.

[534] WisdomTree Comment Letter. *But see also, e.g.,* Fidelity Comment Letter; Dechert Comment Letter; SIFMA AMG Comment Letter.

[535] *See supra* footnote 319 and accompanying text.

[536] *See supra* section II.A.5.

[537] *See, e.g.,* ICI Comment Letter; J.P. Morgan Asset Management Comment Letter; Capital Group Comment Letter. This release does not incorporate the ''antithetical investment'' language that the 2022 Proposal included, as final rule 35d–1(c) is designed to codify the existing relationship between the names rule and section 35(d) and not to create new requirements or standards with respect to the selection of investments in a fund's 20% basket that are not now present.

must come back into compliance within 90 consecutive days of the initial departure. Funds are permitted under the final rules to temporarily depart from the 80% investment requirement in connection with a reorganization (for which the final rule does not specify a required time frame for accompanying temporary departures) or a fund launch (departure not to exceed the period of 180 consecutive days) or when a notice of a change in a fund's policy in certain circumstances has been provided to fund shareholders.

This change could create a cost for investors under circumstances where departing from the 80% investment requirement for an extended period of time would be beneficial to the fund and its shareholders, and such a departure would have been allowed absent the adopted amendments. For example, investors may experience lower returns if funds are forced to sell assets at depressed prices, or in a tax-disadvantaged manner, or if funds are forced to purchase less liquid securities in a compressed timeframe, which could drive up their cost for those securities. Also, to the extent that funds' assets become less liquid during a market crisis, funds' ability to manage liquidity risk may be affected as well as funds' ability to meet redemptions.

These costs are generally mitigated by the length of the period of time for resolving departures from investment compliance. In many circumstances, 90 days is significantly longer than we understand would be required for a fund to remedy departures from its 80% investment policy.[538] This cost is also mitigated by flexibility in the amended rule for funds to instigate a name change as an alternative to returning to compliance.

When a fund manager considers purposely departing from the fund's 80% investment policy, the manager must weigh the risks of bearing these costs against the potential benefit. Accordingly, these costs should arise only when the likelihood of bearing such costs is small relative to the upside of the departure. More often, the cost of this aspect of the rule will be reflected in any unearned excess return that the fund does not earn because it chose not to depart from its investment focus or tax treatment when it otherwise would have, absent the amended rule.

To the extent that funds do not already have systems in place for doing so, they would have to set up systems to identify departures from the 80% investment requirement during quarterly testing, and systems to monitor the time limits for returning to the 80% investment requirement after a temporary departure. This will entail additional costs.

Many commenters were concerned that a UIT would be required to monitor and change its assets in a case where its assets passively drifted such that they would no longer be consistent with the fund's 80% investment policy.[539] The final rule clarifies that UITs are subject to the 80% investment policy requirement at the time of initial deposit, but not on an ongoing basis. As a result, the costs associated with ongoing monitoring of portfolio investments for consistency with the fund's 80% investment policy discussed for other funds above will not be present for UITs.

The final rule's approach to temporary departures differs from that in the Proposing Release, which would have enumerated four specific cases in which funds would be allowed to depart temporarily from compliance with the 80% test for a period of, generally, no longer than 30 days. Many commenters interpreted this as requiring daily or otherwise constant monitoring of their assets in regard to the 80% test, even when they were not trading.[540] The final amendments mitigate this concern by requiring a fund to review its portfolio investments on a quarterly basis to determine whether the fund's investments continue to be consistent with its 80% investment policy. Many commenters were also concerned with the enumerated exceptions to compliance with the 80% requirement and preferred the current standard in which compliance was required ''under normal circumstances.'' [541] Some commenters wanted more specific exceptions to be added if the final rule were to include a prescribed list.[542] Still more commenters were concerned that unforeseeable events might occur which would reasonably cause managers and investors to agree that a temporary change in investment focus was warranted.[543] We agree that enumerating the circumstances in which a fund could deviate from their 80% investment policy would have provided significantly less flexibility to fund managers. Under the final rule the loss of flexibility is significantly less than under the proposed rule, relative to the baseline. A fund's use of its flexibility in accordance with investors' preferences will also promote capital allocation efficiency. Conversely, compared to the proposal, the final rule may be less effective at protecting investors to the extent that fund managers do not effectively manage their funds to the benefit of the fund's investors (for example, because fund managers do not fully internalize investors' preferences over risk or diversification benefits). However, we intend that the newly established timeline for returning to compliance with an 80% investment policy will limit this potential harm.

Considerations Regarding Derivatives in Assessing Names Rule Compliance. The final amendments address the valuation of derivatives instruments for purposes of determining the fund's compliance with its 80% investment policy requirement. Specifically, the final amendments require that, in calculating its assets for purposes of names rule compliance, a fund must generally use the notional amount [544] of each derivatives instrument, with certain adjustments as discussed above, and may reduce the value of its assets by excluding cash, cash equivalents, and certain Treasury securities up to the notional amounts of the derivatives instrument(s) and the value of asset(s) sold short and by excluding closed-out derivative positions.[545] An exception to this requirement is the use of currency derivatives associated with one or more specific foreign-currency-denominated equity or fixed-income investments held by the fund, that are entered into and maintained by the fund for hedging purposes, which must be excluded.[546] The final rule also specifies that a fund may include in its 80% basket derivatives that provide investment exposure to one or more of the market risk factors associated with investments suggested by the fund's name.[547]

Our understanding is that funds that use derivatives typically calculate notional amounts for purposes other than names rule compliance, and that such a calculation, if not already performed, would not be burdensome.[548] As such, we do not

[538] *See, e.g., supra* footnote 207 and accompanying text.

[539] *See, e.g.,* SIFMA AMG Comment Letter; Invesco Comment Letter; ICI Comment Letter.

[540] *See, e.g.,* J.P. Morgan Asset Management Comment Letter; T. Rowe Comment Letter; ICI Comment Letter.

[541] *See, e.g.,* Dimensional Comment Letter; Seward & Kissel Comment Letter; Nasdaq Comment Letter.

[542] *See, e.g.,* ICI Comment Letter; Dechert Comment Letter; SIFMA AMG Comment Letter.

[543] *See, e.g.,* SIFMA AMG Comment Letter; Dimensional Comment Letter; J.P. Morgan Asset Management Comment Letter.

[544] In the case of a physical short, a fund would use the value of the asset sold short.

[545] *See* final rule 35d–1(g).

[546] *See supra* discussion following footnote 234.

[547] *See* final rule 35d–1(b)(2).

[548] For example, rule 18f–4 includes an exception from certain of the rule's requirements that requires

Continued

anticipate that there will be additional costs associated with calculating notional values. While some funds may not currently calculate one or more of the adjustments to notional value required by the rule, we do not expect that doing so will entail significant costs. The inputs required for these calculations are widely available, including on most platforms that allow for trading these derivatives, and they can be automated with widely used and accessible software. The level of sophistication required to implement these calculations is significantly lower than that needed to manage the risk of the derivatives instruments in question. We understand, however, that meeting the requirements of this aspect of the final amendments could require reprogramming of internal systems for funds not currently subject to the names rule, and reprogramming of existing systems used for monitoring names rule compliance by funds currently subject to the names rule. However, we anticipate that the marginal contributions to cost of calculating the adjusted notional value will be minimal given that these same systems will need to be updated to comply with the rule generally.

The goal of the treatment of derivatives under the final rule is to align the value of the derivative being used for compliance with the 80% requirement with the exposure that this derivative provides to investors. There are inherent trade-offs in achieving this goal, however, because derivatives instruments are so varied in their purposes and details of execution. On the one hand, a uniform standard has the danger of being inappropriate in certain cases that could alter the incentives for its use. On the other hand, allowing greater flexibility runs the risk of being too permissive in a way which could undermine the purpose of this aspect of the amended rule.

Many commenters were particularly concerned with the costs associated with a uniform derivatives valuation approach that limits their flexibility to choose a valuation that would be most appropriate. Some of these commenters suggested alternatives, such as additional flexibility to decide whether to incorporate the required adjustments or whether the notional value or some other value would best represent a particular derivative's exposure, which they stated could alleviate these costs.[549] One particular concern shared by many commenters was that derivatives used to hedge risk exposures unrelated to the name of the fund could cause the fund to fail an 80% test.[550] As discussed above, the final amendments require currency derivatives used as a hedge to be excluded from the 80% test calculation, and this approach addresses certain of the concerns commenters raised. However, this exception is limited to only currency hedges, and there are other possible hedges (such as those on interest rates) whose notional values will remain in the denominator, and not the numerator, of an 80% test calculation. As a result, the final amendments may disincentivize some funds from using derivatives to hedge risks other than those related to currency risk in the part of a fund's portfolio that is not used to satisfy the 80% requirement.

The final rule will also allow funds to include derivatives in their 80% basket for the purposes of complying with an 80% investment policy test so long as those derivatives provide exposure to one or more risk factors associated with the name. While in most cases, this will more accurately account for the derivative's effect on a portfolio's exposure to risks associated with the name, there may be instances in which this will overstate the amount of exposure a derivative creates. For example, in certain cases, a derivative may be modifying the risk of another asset in the portfolio rather than creating a new exposure. It may be possible for a fund to count both the derivative (at its notional value) and the underlying asset in the 80% basket for the purposes of compliance with an 80% test, even though a more useful valuation might rightfully treat these as a single asset for the purposes of representing risk exposures. This double counting could, in these instances, make the 80% test more lenient than intended. To the extent that this reduces the investor protection intended in the rule, this would create a cost to investors. This cost is mitigated by the rule's codification of the effect of compliance with an 80% investment policy since a fund's name may still be misleading even if the fund technically complies with the 80% investment policy requirement.[551]

Unlisted Registered Closed-End Funds and BDCs. Under the current rule, unless a fund's name suggests that it is a tax-exempt fund, an unlisted registered closed-end fund's or BDC's 80% investment policy must either be a fundamental policy or subject to a requirement in the rule to provide shareholders 60-days' advance notice of any change in the policy. Under the final rule amendments, unlisted registered closed-end funds and BDCs will not be permitted to change their 80% investment policies without shareholder approval unless, among other things, the fund provides a 60-day notice and a tender or repurchase offer that is not oversubscribed.[552]

Funds that currently rely on a 60-day notice period thus have two options for complying with the final amendments. Some funds may choose to seek shareholder approval to change their 80% investment policy. These funds would incur costs including legal and accounting fees incurred in connection with preparing proxy materials, the costs of printing and mailing the proxy materials, the cost of an external proxy solicitor, if one is used, and the cost of holding an annual or special meeting of the shareholders.[553]

Other funds may instead opt to make a repurchase or tender offer if doing so

the calculation of notional amounts. More generally, however, funds that use derivatives typically consider notional amounts, and not solely their market value, when entering into derivatives contracts or when considering the economic effects of a derivatives contract within an existing portfolio.

[549] *See, e.g.,* ICI Comment Letter; T. Rowe Comment Letter; Dechert Comment Letter.

[550] *See, e.g.,* Dechert Comment Letter; Fidelity Comment Letter; ICI Comment Letter.

[551] *See supra* section II.A.5.

[552] This will only impact existing funds if they currently rely on a 60-day notice period, since funds whose 80% investment policy is a fundamental policy already require a shareholder vote to change the policy.

[553] In 2019, the ICI surveyed its member firms with respect to the costs of obtaining shareholder approval for proposals requiring funds to obtain a quorum of greater than 50% to approve. The ICI reports that 64 member firms with over $18 trillion of US-registered fund assets responded. Cost estimates for 145 separate campaigns totaled $373 million. The ICI also reports that: (1) 22 campaigns had costs greater than, or equal to, $1 million, (2) eight had costs greater than or equal to $10 million, and (3) the most expensive campaign was $107 million. The ICI report does not disaggregate data on the cost of obtaining shareholder approval for changes to a fund's fundamental investment policies. *See* Comment Letter of the Investment Company Institute regarding the SEC Roundtable on the Proxy Process (File No. 4–725) (Dec. 23, 2019), *available at https://www.sec.gov/comments/4-725/4725-6580709-201124.pdf.* In a 2002 rulemaking related to fund mergers, we estimated the cost of obtaining shareholder approval to be $75,000. We did not receive any comments on that estimate. *See* Investment Company Mergers, Investment Company Act Release No. 25666 (July 18, 2002). Adjusting for inflation, $75,000 at the beginning of 2002 would imply a cost of approximately $128,800 as of May 2023. *See* Bureau of Labor Statistics CPI Inflation Calculator, *available at https://www.bls.gov/data/inflation_calculator.htm.* While this estimate is significantly lower than the average estimate from ICI, the distribution of costs in their sample is heavily skewed by a relatively small number of very expensive campaigns. The Commission estimate is more analogous to the median of that distribution. Further, the kinds of votes included in the ICI survey are much broader than those considered here and contain votes on more contentious issues over which funds may spend more resources on marketing and other costs.

is cheaper or otherwise more advantageous to the fund's sponsor than holding a shareholder vote. The costs incurred would include legal and accounting fees associated with preparing offer documents and filing documents with the Commission such as Schedule TO, the cost of disseminating offer materials and information, and underwriting costs. There may also be costs associated with the fund needing to fulfill the offer and thus no longer having an adequate capital stock to take advantage of some investment opportunities. Some commenters noted that many of the funds subject to this requirement already make periodic tender or repurchase offers and so allowing this alternative would significantly reduce their costs.[554] For such funds, if the proposed change in the investment policy would not create an oversubscription to their regular tender or repurchase offer, the cost of compliance may be minimal. Exercising this option will be more costly for funds that are not already regularly providing tender or repurchase offers.[555]

The cost of the final rule will therefore be the difference between the cost of either seeking shareholder approval or making a tender or repurchase offer and the cost of issuing notice under the baseline. Instead of incurring these costs some funds may instead choose simply not to change their policy when faced with these costs. The value of any foregone investment opportunities that would have benefited investors if the fund had changed its investment policy would be a cost of the final rule.

The Proposing Release would have required that 80% investment policies for unlisted registered closed-end funds and BDCs be fundamental policies, with no alternative. While unlisted registered closed-end funds and BDCs generally offer a periodic repurchase tender offer, these offers are limited and unlikely to provide recourse to investors in the case where a large number of investors are dissatisfied with the change. Even discretionary repurchases as permitted under 17 CFR 270.23c–3(c) are generally limited to 25% of the common stock outstanding.[556] This amount could be too low to address the investor protection the rule is designed to address. In the Proposing Release, we were concerned that a large tender offer for all, or substantially all, of the outstanding shares could prove even more costly to these funds than a shareholder vote and could result in the fund's liquidation.

Some commenters highlighted the costs of the proposed approach,[557] and stated that an alternative in which investors were able to liquidate would be valuable.[558] We believe that the costs of the final rule are lower than those of the proposed rule, since these funds may now, instead, offer a repurchase opportunity, and funds can choose the lower-cost alternative.

Effect of Compliance with an 80% Investment Policy. The amended rule states that a fund's name may be materially deceptive or misleading under section 35(d) even if the fund adopts an 80% investment policy and otherwise complies with the rule's requirement to adopt and implement the policy.[559] The Commission has previously stated that the names rule's 80% investment policy requirement is not intended to create a safe harbor for fund names, and the final amendments will codify this view to make it clear.[560] Because the provision will codify an existing Commission position that that 80% investment policy is not intended to create a safe harbor for fund names and restate the existing scope and effect of section 35(d), we do not anticipate that the provision creates new costs.

Some commenters stated that they believed that this provision created new requirements that were not clear from previous statements by the Commission. These comments largely addressed a fund's responsibilities to monitor the indexes that they track [561] and relatively small positions that commenters questioned whether, in response to an example in the 2022 Proposal, would be ''antithetical'' to those suggested by a fund's name.[562] To the extent that funds comply with the final rules in a way that may be costlier for names with certain terms, this represents a cost of the rule's scope expansion, and not from a separate provision under the final amendments.[563]

Prospectus Disclosure. The final amendments to funds' registration forms—specifically, Form N–1A, Form N–2, Form N–8B–2, and Form S–6—require each fund that is required to adopt and implement an 80% investment policy to include disclosure in its prospectus that defines the terms used in its name, including the specific criteria the fund uses to select the investments that the terms describe, if any.[564] We received one comment stating that the costs of prospectus disclosure were underestimated.[565]

The final amendments require funds to tag most of the new prospectus disclosure in Inline XBRL.[566] This will impose on Form N–1A and Form N–2 filers the cost of adding new data tags for the new disclosures on Form N–1A and Form N–2, but will not include any initial implementation costs associated with structuring data, because those forms are already subject to structuring requirements. Thus, notwithstanding one commenter's statement that the costs associated with Inline XBRL tagging as proposed would be significant, we do not believe the Inline

[554] *See, e.g.,* Stradley Comment Letter; Dechert Comment Letter; ICI Comment Letter.

[555] We are unable to quantify the total of these costs because we do not have data on the magnitude of many of the sources of these costs, such as underwriting costs, which are privately negotiated. Further, these costs are likely to vary largely depending on the specific circumstances of the fund. However, the SEC has previously estimated the PRA burden of a Schedule TO at approximately $9,000 per response. *See* Filing Fee Disclosure and Payment Methods Modernization, Investment Company Act Release No. 34396 (Oct. 13, 2021) [86 FR 70166 (Dec. 9, 2021)].

[556] *See* 17 CFR 270.23c–3(a)(3), (b)(5), and (c).

[557] *See, e.g.,* Invesco Comment Letter; Stradley Comment Letter; SIFMA AMG Comment Letter.

[558] *See, e.g.,* ICI Comment Letter; Simpson Thacher Comment Letter; Dechert Comment Letter.

[559] Final rule 35d–1(c).

[560] *See* Proposing Release, *supra* footnote 2, at n.101.

[561] *See, e.g.,* Fidelity Comment Letter; Dechert Comment Letter; SIFMA Comment Letter.

[562] *See, e.g.,* ICI Comment Letter; J.P. Morgan Asset Management Comment Letter; Capital Group Comment Letter; *see also supra* footnote 537.

[563] *See supra* the text following footnote 525 through the text accompanying footnote 537 for a discussion of these costs.

[564] *See* instruction to Item 4(a)(1) of Form N–1A; instruction to Item 9(b)(1) of Form N–1A; instruction 2 to Item 8(2) of Form N–2; instruction 2 to Item 11 of Form N–8B–2, and instruction 1(a) of the Instructions as to the Prospectus of Form S–6. Based on the results of the PRA analysis provided in Tables 2, 3, 4, and 5 *infra* it is estimated that the annual internal costs, plus initial costs annualized over a 3-year period, attributable to information collection requirements associated with this aspect of the final amendments will be $53,694,312. The annual external costs are estimated to be $12,453,730. However, as we understand that including the prospectus disclosure that the final amendments would require is currently a common practice, the PRA estimates likely overestimate the costs associated with the final amendments for those funds whose disclosure is currently in line with the disclosure the amendments would require. *See infra* section V.C.

[565] *See* BlackRock Comment Letter.

[566] *See supra* footnote 508. Based on the results of the PRA analysis provided in Table 7 *infra* it is estimated that the ongoing external costs attributable to Inline XBRL tagging requirements will be $749,550 for Form N–1A, Form N–2, Form N–8B–2 and Form S–6 filers, and the ongoing internal costs, plus initial costs annualized over a 3-year period, will be $1,562,678 for those filers. Form N–8B–2 and Form S–6 filers (*i.e.,* UITs) are not subject to any current Inline XBRL requirements (or Inline XBRL requirements with compliance dates in the future) and will thus incur initial implementation costs associated with structuring disclosures in Inline XBRL (such as 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). For Form N–1A and Form N–2 filers, who are subject to current Inline XBRL requirements, the PRA estimate does not incorporate any such implementation costs.

XBRL tagging requirement would impose significant costs on Form N–1A and Form N–2 filers.[567] For UITs and their sponsors, as noted by another commenter, the cost of adding new Inline XBRL tags for the new disclosures on Form N–8B–2 and Form S–6 is more likely to entail initial implementation costs because UITs are not currently subject to Inline XBRL requirements.[568] As discussed in further detail below, notwithstanding this commenter's recommendation to except UITs from Inline XBRL tagging requirements, we are including all funds (including UITs) within the scope of tagging requirements under the final rule.[569]

Plain English/Established Industry Use Requirement. For funds that are required to adopt an 80% investment policy, the final amendments would require that any terms used in the fund's name that suggest either an investment focus, or that the fund is a tax-exempt fund, must be consistent with those terms' plain English meaning or established industry use.[570] To the extent that funds are currently using terms in their names that are not consistent with either, funds would bear costs to either change their name or their investment policy so that they can define the terms in such a way that would comply with this provision. These costs will be similar to those described above for funds changing their name or investment policies and practices for other reasons.

New Form N–PORT Reporting Requirements. The final amendments include new Form N–PORT reporting items regarding the 80% investment policy that a fund will be required to adopt in compliance with the names rule.[571] As proposed, the final rule requires N–PORT funds that are required to adopt an 80% investment policy to report on Form N–PORT: (1) whether each investment in the fund's portfolio is in the fund's 80% basket; (2) the value of the fund's 80% basket, as a percentage of the value of the fund's assets. The final amendments also add a new reporting item, in which funds will report the definitions of terms used in the fund's name including specific criteria a fund uses to select the investments the term describes, if any.[572]

Under the baseline, funds covered by the rule likely already tracked whether a particular asset was a part of the fund's 80% basket, as well as the total value of the 80% basket as a share of the total assets of the fund, as an aspect of their compliance practices. However, we recognize that reporting these items on Form N–PORT could necessitate periodic reassessments that might not otherwise occur. It may also require modifications to compliance systems and the use of third-party service providers.

Although the final amendments will not increase the frequency of public disclosure, they will increase the amount of information available about certain funds' portfolio investments. Form N–PORT data, however, is made public only for the third month of each quarter, and on a 60-day delayed basis. We do not believe that quarterly public disclosure with a 60-day lag will have a significant, additional competitive impact.

The proposed rule required reporting information for each month of the quarter, while the final rule instead requires reporting information only for the last day of the third month of the quarter. The proposed rule also would have required certain information to be reported on Form N–PORT that is not included in the final Form N–PORT amendments (the number of days that that the value of the fund's 80% basket fell below 80% of the value of the fund's total assets during the reporting period), although the final reporting requirements include a new reporting item that was not included in the proposal (the definitions of terms used in the fund's name and criteria for selecting the investments the name describes, if any). The final rule should, on balance, have lower costs compared to the proposal because of the reduced amount of information reported on net, and efficiency gains in aligning a fund's compliance review with its reporting obligations.[573]

The compliance cost associated with the new Form N–PORT reporting requirements includes the cost of adding new data tags for the newly reported items.[574] It does not include any initial implementation costs associated with structuring data, because the form is already subject to structuring requirements.

Recordkeeping. The final rule requires funds to maintain certain records if the fund is required to adopt an 80% investment policy.[575] The final rule does not prescribe the particular form of documentation required to be maintained but would instead provide flexibility in how a fund documents the information delineated in the recordkeeping requirements. However, a fund that is subject to the requirement to adopt an 80% investment policy generally should maintain appropriate documentation that would be sufficient for a third party to verify the matter covered by each record and would be readily available to Commission staff.[576]

We anticipate that much of the recordkeeping required in this rule can be at least partially automated for most funds.[577] For example, we anticipate that records relating to the value of the fund's 80% basket and whether a particular investment is included in that basket can be automated for most funds, though for some funds this process may necessitate more manual steps as outlined above. For those records that can be automated, we believe that the marginal contribution to the costs of automating these systems above and beyond those which would be required to otherwise comply with the rule are relatively small, since the systems that retain this information will be similar to those necessary to ensure compliance at the time of investment or on a quarterly reassessment. We recognize, however, that some records, such as those documenting the reasons for any departures from the 80% investment policy, are unlikely to be easily automated.

The final rule differs from the proposed amended rule in ways that may reduce costs in comparison to the proposal. First, under the final amendments funds are required to reassess the characteristics of individual assets on only a quarterly rather than ongoing basis. Since it may be difficult for some funds to fully automate the creation of a record with the basis for an asset's inclusion in the 80% basket,

[567] *See* SIFMA Comment Letter.

[568] *See supra* text accompanying footnote 337; Invesco Comment Letter.

[569] *See infra* section IV.E.4.

[570] *See supra* footnote 341 and accompanying text.

[571] Based on the results of the PRA analysis provided in Table 6, it is estimated that the ongoing annual internal costs, plus initial costs annualized over a 3-year period, attributable to information collection requirements for reporting about an 80% investment policy are $8,059,912. The annual external costs are estimated to be $11,216,380.

[572] Based on the results of the PRA analysis provided in Table 6, it is estimated that the ongoing annual internal costs, plus initial costs annualized over a 3-year period, attributable to information collection requirements for investments to be included in a fund's 80% basket are $56,419,384. The annual external costs are estimated to be $11,216,380.

[573] *See supra* section II.E.

[574] *See supra* footnote 571.

[575] *See* final rule 35d–1(b)(3). The recordkeeping requirements will apply to UITs only at the time of initial deposit, and with respect to any notice sent to shareholders.

[576] Based on the results of the PRA analysis provided in Table 1, it is estimated that the internal annual costs, plus initial costs annualized over a 3-year period, attributable to recordkeeping requirements would be $30,450 per fund, with an additional $565 of external annual costs.

[577] *See supra* footnote 419 and accompanying text.

particularly if its 80% investment policy relies on managerial judgment, this change could substantially lower the cost. However, to the extent that funds hold particular assets for less than two consecutive days, this change will not provide much cost mitigation since funds are also required to keep such records at the time of investment.

Further, this rule as initially proposed would have additionally required funds that are not required to adopt an 80% investment policy to also maintain records of their analysis in that determination. Since the final rule will omit this requirement, the cost of complying with the rule will be lower for these funds than under the proposal.

Notice Requirement. The names rule requires that unless the 80% investment policy is a fundamental policy of the fund, notice must be provided to fund shareholders of any change in the fund's 80% investment policy.[578] The final amendments would incorporate some modifications to the current notice requirement that are designed to better address the needs of shareholders who have elected electronic delivery and to incorporate additional specificity about the content and delivery of the notice. We do not believe that these alterations would materially increase the cost to prepare the notice.[579]

Quantified Compliance Costs. We estimate that the initial costs to establish and implement practices designed to meet the requirements of the final amendments as described above will range from $50,000 to $500,000 per fund, depending on the particular facts and circumstances of the fund.[580] We believe the costs would be closer to the lower end of the range for funds whose current practices are more similar to the requirements of the final rule.[581]

The direct estimated costs of compliance are broadly attributable to the following activities: (1) reviewing the final rule's requirements; (2) determining whether to change a fund's name or comply with the new requirements, as applicable; (3) developing new (or modifying existing) practices, reporting, and recordkeeping requirements to align with the requirements of the final rule; (4) integrating and implementing those practices, reporting, and recordkeeping requirements to the rest of the funds' activities; and (5) preparing new training materials and administering training sessions for staff in affected areas.

The estimated range in this section is aimed at quantifying the full direct compliance cost associated with the final amendments' provisions. As a result, the estimates in this section encompass more costs than do the estimates discussed below in section V for purposes of the Paperwork Reduction Act of 1995 (''PRA''). Further, note that the estimated range of costs above is the same as that included in the economic analysis in the proposing release. Keeping the estimated range the same reflects our assessment that the funds with the highest compliance costs, such as those whose entire portfolio turns over on a nearly daily basis, will face costs similar to those that would have been incurred under the proposed rule. The low end of the range is reflective of a fund that only incurs cost associated with analyzing the requirements of the rule.

However, the final amendments are different from the proposed amendments in many ways that mitigate costs for most but not all funds. Compared to the Proposing Release, we believe that the largest reduction in cost comes from changing the provisions that would have effectively required continual, manual monitoring of whether funds' portfolio investments are consistent with the fund's 80% investment policy. This is consistent with many commenters' concerns.[582] Since this is not required under the final rule unless all assets are traded daily, and other changes have also been made to mitigate costs, we believe that the typical cost for a fund to comply with the final rule will, while still contained within the same range, be significantly lower than the cost of compliance under the approach that the Proposing Release described.

Some funds may change their name rather than comply with the amended rule. For these funds, we estimate that the total direct burden, including analyzing the rule and deciding to change their name, is a one-time cost range of $75,000 to $250,000. Funds that decide to change their name rather than comply with the new requirements will also incur indirect costs associated with changing fund names, which include a potential loss in market share. However, this will translate to a cost to investors only to the extent that there is a decrease in efficiency resulting from investors being less able to find appropriate funds as a result of the rule.

Without providing specifics, some commenters requested the Commission analyze Commission rules and proposals holistically.[583] The Commission's economic analysis in each adopting release considers the incremental benefits and costs for the specific rule—that is the benefits and costs stemming from that rule compared to the baseline. One commenter stated that the Commission should consider ''practical realities such as the implementation timelines as well as operational and compliance requirements.'' [584] The Commission acknowledges that resource limitations can lead to higher compliance costs in some cases when two or more rules affecting the same parties have overlapping compliance periods. In determining compliance periods, the Commission considers the benefits of the rules as well as the costs of delayed compliance periods and potential overlapping compliance periods.

In this regard, some commenters [585] mentioned the recent Shareholder

[578] Final rule 35d–1(a)(2)(ii).

[579] Like the current rule, based on the results of the PRA analysis provided in Table 1, it is estimated that the internal annual costs, plus initial costs annualized over a 3-year period, attributable to notice requirements would be $8,500 per fund, for those funds providing notices. We also estimate an additional $565 in external annual costs attributable to notice requirements.

[580] We believe that the low end of this range is reflective of a fund that incurs costs only to analyze the application of the rule, or that is covered by the rule and already has practices in place that could be readily adapted to meet the final rule's requirements. In the latter case the fund would incur costs associated with analyzing its current practices relative to the final rule's requirements.

[581] We believe the costs would be closer to the lower end of the range for funds that belong to large fund families because certain aspects of the costs, such as most aspects of system automation or the costs of reviewing rule requirements, are fixed costs that could be spread across multiple funds.

[582] *See, e.g.,* J.P. Morgan Asset Management Comment Letter; T. Rowe Comment Letter; ICI Comment Letter.

[583] *See, e.g.,* ICI Comment Letter III (''The Commission has issued a wide range of interconnected rule proposals . . . [that] in the aggregate warrant further analysis by the Commission. . . . The Commission's failure to consider the Interconnected Rules holistically is a widespread concern among other market participants.''); USCOC Comment Letter (urging the Commission to ''determine the cumulative impact of its regulatory agenda upon economic activity or capital formation''). Commenters also specifically suggested the Commission consider the interaction between the final rule and the ESG Disclosure Proposal and/or its proposal relating to outsourcing by investment advisers. *See* Dechert Comment Letter, ICI Comment Letter, and AIC Comment Letter; *see also* Outsourcing by Investment Advisers, Investment Advisers Act Release No. 6176 (Oct. 26, 2022) [87 FR 68816 (Nov. 16, 2022)]. These proposals have not been adopted and thus have not been considered as part of the baseline here. To the extent those proposals are adopted in the future, the baseline in those subsequent rulemakings will reflect the regulatory landscape that is current at that time.

[584] ICI Comment Letter III. *See also* USCOC Comment Letter (''Regulated entities would have to divert substantial resources to comply with a host of new rules in a condensed time frame.'').

[585] *See, e.g.,* ICI Comment Letter III.

Reports Final Rule [586] and the recent Money Market Funds Final Rule.[587] Overlapping compliance periods for these rules may result in economic costs for some entities that are also in the scope of the final amendments.[588] For the reasons discussed above, we have adopted longer compliance periods relative to the proposal.[589] In analyzing the costs of this final rule relative to the proposal, we believe the potential for heightened costs is mitigated by those longer compliance periods. The costs from overlapping compliance periods for smaller entities are even further mitigated by the longer compliance period for those entities relative to the compliance period for larger entities. Moreover, commenters raised concerns about the costs of overlapping compliance periods in the context of the proposal and, as discussed above, we have taken steps to reduce costs of the final rule in several ways from the proposal.[590]

As a result, we believe that for both larger and smaller entities, any higher costs due to overlapping compliance periods raised in the context of the proposal may generally be mitigated under the final rules. We therefore do not believe that the overlap between the final rules, the Shareholder Reports Final Rule, and the Money Market Funds Final Rule will significantly increase the compliance costs of the final rule for small or large entities.

3. Effects on Efficiency, Competition and Capital Formation

To the extent the final amendments will help ensure that fund names are more appropriately representative of a fund's investment focus, we predict that investors will benefit. Developing a dollar figure for this predicted benefit is complex, however. We do not observe investors' decision-making and resources expended in the management of their investment portfolio, nor do we observe the cost to investors from being invested in a fund that does not match their preferences. To the extent fund names would be more appropriately representative of the fund investment focus under the final amendments and to the extent those more appropriately representative fund names will allow investors to more easily select funds that better match their preferences, however, we would expect the efficiency of investment to increase. Conversely, if, as a result of the final rules, some funds change their names and investment policies in ways that lead to less efficient matching between funds and some investors or increase search costs for some investors, capital allocation efficiency may decrease. For example, some funds may decide to use more generic names so as not to convey an investment focus with their name. If these funds previously had names that conveyed information that investors found more useful, then investors will either face higher costs in finding the funds best suited to their goals, or choose funds less tailored to those goals.

Additionally, the final amendments may disincentivize some funds from investing in assets with characteristics that do not readily lend themselves to popular investment focuses and incentivize investment in assets that do. Depending on whether any such change aligns with the preferences of investors or runs counter to their preferences, capital allocation efficiency may increase or decrease.

To the extent the final amendments increase efficiency of investment in the fund market, then we may observe a change in investment in funds. For example, if there are investors who currently do not invest in certain funds (or invest less than they would have) because they lack confidence that funds' names accurately convey funds' investment focuses, then to the extent the final amendments lower those costs and enhance investor protections, we would expect to observe more investors entering the funds market.[591] The increased demand for securities could, in turn, facilitate capital formation. We note, however, that to the extent increased investment in funds reflects substitution from other investments, the effect on capital formation would be attenuated.

More investors entering the funds market could also increase competition, to the extent that competition in a market is related to the size of the market. The final amendments may affect competition through an additional channel: certain funds may have established reputations for making investments consistent with the investment focus the fund's name suggests. Investors wishing to invest in funds with specific investment focuses may have greater confidence investing in funds with established reputations for investing in a way consistent with the investment focus the fund's name suggests.[592] There may be investors who do not invest in funds lacking established reputations for making investments consistent with the focuses their names suggest (or invest less than they would have) because those investors are less confident that such funds will make investments consistent with their names. We would expect the investor protections offered by the final amendments, which are designed to ensure that funds' names accurately convey funds' investment focuses, could enhance the ability of funds without established reputations to compete with those funds with established reputations. This could, in turn, lead to increased investment for funds without established reputations.[593]

However, the compliance costs of the rule may also result in negative competitive effects by causing firms to close their funds and reducing the competitive alternatives investors have. Relative to the proposed rule, the final rule took steps to mitigate these costs in several ways. For example, relative to

[586] *See* Tailored Shareholder Reports for Mutual Funds and Exchange-Traded Funds; Fee Information in Investment Company Advertisements, Investment Company Act Release No. 34731 (Oct. 26, 2022) [87 FR 72758 (Nov. 25, 2022)] (''Shareholder Reports Final Rule''). The compliance date for those rules will be in July 2024. Certain fund managers, such as managers to mutual funds and ETFs, that will manage funds subject to the final rule are also generally subject to different aspects of the Shareholder Reports Final Rule.

[587] *See* Money Market Fund Reforms; Form PF Reporting Requirements for Large Liquidity Fund Advisers; Technical Amendments to Form N–CSR and Form N–1A, Investment Company Act Release No. 34959 (Jul. 12, 2023) [88 FR 51404 (Aug. 3, 2023)] (''Money Market Fund Final Rule''). The compliance dates for these rules vary between Oct. 2023 and Oct. 2024. Certain fund managers, namely managers to money market funds, who will be subject to the final rule will also be subject to the Money Market Funds Final Rule.

[588] The Commission also considered the fact that, to the extent recently adopted rules address matters related to those in the final rules, the benefits of the final rules may be impacted to the extent recently adopted rules already offer certain investor protections or to the extent that recently adopted rules and the final rules offer synergies. However, we do not believe that there are significant interacting effects with recently adopted rules with respect to benefits in this case, because recently adopted rules do not address the same set of issues as those addressed in the final rule.

[589] As discussed above, the tiered compliance period we are adopting is designed to strike the appropriate balance between allowing funds adequate time to adjust their compliance practices, and allowing investors and shareholders to benefit from the amended names rule framework. *See supra* section II.H; *see also infra* section IV.D.3.

[590] For example, as discussed throughout this section, relative to the proposed rule the final rule has fewer recordkeeping tasks, fewer items on Form N–PORT, and removes the need for daily assessments of portfolio compliance with an 80% investment policy for assets that are not actively traded. *See supra* section IV.D.2.

[591] For example, by decreasing potential greenwashing concerns, the final amendments, in turn, may increase investor confidence in selecting funds with names implying an ESG strategy and increase capital formation among ESG issuers.

[592] Investors may believe that these funds have an incentive to protect the value of their reputations by continuing to invest in ways consistent with their names. *See* Klein, Benjamin and Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance,* Journal of Political Economy 89, 615–641 (1981) (''Klein Paper'').

[593] This argument assumes that fund reputation and investor protections provided by regulatory requirements are substitute mechanisms for providing assurances to investors.

the proposed rule, the final rule has fewer recordkeeping tasks, fewer items on Form N–PORT, and removes the need for daily assessments of portfolio compliance with an 80% investment policy for assets that are not actively traded.[594]

In addition, as stated above, some commenters requested the Commission consider interactions between the economic effects of the proposed rule and other recent Commission rules, as well as practical realities such as implementation timelines.[595] As discussed above, the Commission acknowledges that overlapping compliance periods may in some cases increase costs.[596] This may be particularly true for smaller entities with more limited compliance resources. This effect can negatively impact competition because these entities may be less able to absorb or pass on these additional costs, making it more difficult for them to remain in business or compete. However, in addition to mitigating the overall costs of the final rules relative to the proposal,[597] we believe we have mitigated the potential for heightened costs by adopting longer compliance periods for all entities relative to the proposal, and even longer compliance periods for smaller entities. The compliance periods for the rules mentioned by commenters, the Shareholder Reports Final Rule and the Money Market Funds Final Rule,[598] culminate in approximately July–October 2024 while the compliance dates for the final rule are [FILL IN date 24 months following amendments' effective date] for larger entities, and [FILL IN date 30 months following amendments' effective date] for smaller entities. We therefore do not expect the risk of negative competitive effects from increased compliance costs from simultaneous compliance periods to be significant.

Finally, to the extent that the final amendments disincentivize some funds from investing in assets with characteristics that do not readily lend themselves to popular investment focuses that fund names suggest and incentivizes investment in assets that do, the final amendments could affect capital formation. For example, it may be relatively more difficult for funds to conclude that certain issuers—for example, firms that are newer, smaller, or whose strategies and performance objectives are not as well publicized or as clearly articulated—should appropriately be included in a fund's 80% basket, and therefore funds that are within the scope of the 80% investment policy requirement may invest relatively less in these issuers. These issuers could consequently face increased costs of capital. Conversely, assets whose appropriate inclusion in a fund's 80% basket is relatively easier for a fund to determine (for example, because they exhibit quantifiable criteria that assist in this determination) may receive more fund attention and consequently face reduced costs of capital.

E. Reasonable Alternatives Considered

1. Disclosure-Based Framework

The final rule expands the scope of names that require an 80% investment policy. For certain categories of names, we considered whether a disclosure-based framework would be more appropriate. Specifically, we considered whether a fund whose name suggests a particular investment focus should be required to have additional disclosure in that fund's prospectus describing the investment strategy in lieu of the requirement to maintain an 80% investment policy.[599] Such a requirement could have been accompanied either by no scope expansion at all for the 80% investment policy requirement or by a less-encompassing scope expansion. The additional disclosure could have included definitions of the terms in the name of the fund, criteria for investment selection, or other information that would clarify for investors how a fund's name relates to the investment strategy pursued by the fund.

We are cognizant of the differential cost and benefits of this alternative relative to the adopted expansion of the 80% investment policy requirement. In particular, funds whose names include terms that are defined at least partially using managerial judgment are likely to face higher costs and lower benefits from an 80% test relative to funds with names that include more objective terms.[600]

However, we also considered the costs associated with excluding certain terms or types of terms from the requirement. Excluding certain types of funds names, or terms used in fund names, from the requirement would incentivize funds to follow strategies associated with these exclusions and thus limit the investment options available to investors. This, however, may be balanced by the effect of investors seeking funds covered by the amended rule. In addition, to the extent that investor behavior is affected by the name of the fund itself, additional prospectus disclosure on its own would not provide additional investor protection. There is significant evidence from academic literature that a fund's name does affect investor behavior above and beyond what can be explained by any observable aspect of the fund's actual investment strategy.[601]

2. Alternatives to 90-Day Temporary Departure Limit

The final amendments require a fund to invest consistent with its 80% investment policy under normal circumstances. In the event that a fund identifies that its portfolio is no longer invested consistent with its 80% investment policy, a fund must return to compliance as soon as is reasonably practicable and in no more than 90 consecutive days. Separately, if the fund decides to invest in a manner not consistent with the 80% investment policy under other-than-normal circumstances, the fund is not required to come back into compliance as soon as reasonably practicable but must come back into compliance within 90 consecutive days. As an alternative, we considered whether to require instead that, if a temporary departure persists past 30 days, the fund's board must approve, or be informed in writing about, the temporary departure. We also considered whether to adopt a limit greater than 90 days. In the context of requiring board approval, we also considered requiring a majority of the independent directors to approve the departure. In the context of requiring board notification, we considered requiring a written report or notification that includes a recommendation from the fund's adviser to be provided to the board immediately or at the next regularly scheduled board meeting.

Collectively, these alternatives may provide more flexibility for funds to address the conditions that necessitate temporary departures than the final amendments. Either they would not limit the duration for which a fund could engage in a temporary departure, provided that the board either approves or is notified of the departure, or they would increase the allowable length of time that a fund could depart from its

[594] *See supra* section IV.D.2.

[595] *See supra* section IV.D.

[596] *See supra* section IV.D.2.

[597] *See supra* footnote 594 and accompanying text.

[598] *See supra* section IV.D.2; *see also, e.g.,* ICI Comment Letter III.

[599] This approach was suggested by many commenters (*see, e.g.,* ICI Comment Letter, Dechert Comment Letter; Cato Institute Comment Letter) and offered by Commissioner Peirce (*see* statement, *available at https://www.sec.gov/news/statement/peirce-fund-names-statement-052522*).

[600] For a fuller discussion, *see supra* section IV.D.2.

[601] *See supra* section IV.C.

80% investment policy. These approaches could provide funds with more flexibility to reduce loss during market crises and manage liquidity risk, which could, in turn, reduce any adverse effects that a fund's trading activity may have on the markets for the investments in its portfolio.

Conversely, these alternatives may have been less effective than the final amendments at addressing the concerns highlighted above regarding portfolio ''drift'' or extended-length intentional departures. That is, fund managers and boards may not fully internalize investors' preferences for certain elements of a portfolio, such as risk and diversification benefits, that a fund name suggests, and so could be willing to extend departures for longer than would be optimal for investors. For example, a fund board could determine to engage in a departure for longer than 90 days to address a market disruption, but this action might frustrate the expectation of investors who may expect the fund to invest consistent with its named investment focus even during market disruptions, and therefore may choose to rebalance investments on their own rather than relying upon the fund to do so. We also believe that the alternative that includes board notification or approval would increase burdens on fund boards, particularly if we were to require the approval or notification be immediate. Further, in determining not to use a longer time frame for this requirement, we considered the fact that in practice funds may be out of compliance for more than 90 days, since funds will be required to reassess their portfolio assets' inclusion in the fund's 80% basket no less than quarterly and funds may unknowingly be out of compliance between assessments.

3. Permit But Not Require the Use of Derivatives' Notional Values for Purposes of Names Rule Compliance

As an alternative, we considered permitting, but not requiring, funds to value derivatives using notional values for purposes of assessing names rule compliance. As discussed in section II.A.3 above, an approach where a fund uses notional values for these purposes could allow a fund to use a name that effectively communicates its investments where it would not be able to do so under the current rule. However, allowing a fund to use derivatives instruments' market values for purposes of assessing names rule compliance could result in a fund being in compliance with the fund's 80% investment policy despite the fund having significant exposure to investments that are not suggested by the fund's name. Because we believe the use of notional values better reflects the investment exposure of derivatives investments than market values for purposes of assessing names rule compliance in most cases, we are requiring, rather than permitting, the use of notional values.

4. Exclude Unit Investment Trusts From Requirements for Tagging Prospectus Disclosure

Under the final amendments, the new prospectus disclosure of term definitions and investment selection criteria submitted by UITs on Form N–8B–2 and Form S–6 will be tagged in Inline XBRL. Alternatively, we could have changed the scope of the tagging requirement for the new prospectus disclosures by excepting UITs from this requirement. Such an exception was suggested by one commenter, who noted that UITs are not currently required to tag any filings in Inline XBRL.[602] Under this alternative, UITs would submit their prospectus disclosures in unstructured HTML or ASCII, and forgo the initial Inline XBRL implementation costs (such as 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) and ongoing Inline XBRL compliance burdens that would result from the tagging requirement.[603] However, narrowing the scope of tagging requirements to exclude UITs would diminish the extent of informational benefits that would accrue as a result of the disclosure requirements by making UITs' disclosures comparatively costlier to process and analyze.[604] As such, we are not excluding UITs from Inline XBRL tagging requirements.

[602] *See supra* footnote 433.

[603] *See infra* section V.E. Funds file registration statements and amendments using the Commission's EDGAR electronic filing system, which generally requires filers to use ASCII or HTML for their document submissions, subject to certain exceptions. EDGAR Filer Manual (Volume II) version 66 (June 2023), at 5–1; *see* 17 CFR 232.301 (incorporating EDGAR Filer Manual into Regulation S–T). To the extent UITs are part of the same fund family as other types of funds that are subject to Inline XBRL requirements, they may be able to leverage those other funds' existing Inline XBRL tagging experience and software, which would mitigate the initial Inline XBRL implementation costs that UITs will incur under the final amendments.

[604] In addition, one commenter noted that UITs can avail themselves of the same applications and processes used by other fund types that report information using Inline XBRL. *See supra* footnote 433.

V. Paperwork Reduction Act Analysis

A. Introduction

Certain provisions of the final rules and form amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[605] We are submitting the final collections of information to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[606] The titles for the collections of information are: (1) ''Rule 35d–1 under the Investment Company Act of 1940, Investment Company Names'' (OMB Control No. 3235–0548); (2) ''Form N–1A under the Investment Company Act of 1940 and Securities Act of 1933, registration statement of Open-End Management Investment Companies'' (OMB Control No. 3235–0307); (3) ''Form N–2 under the Investment Company Act of 1940 and Securities Act of 1933, Registration Statement of Closed-End Management Companies'' (OMB Control No. 3235–0026); (4) ''Form N–8B–2, Registration Statement of Unit Investment Trusts Which Are Currently Issuing Securities'' (OMB Control No. 3235–0186); (5) ''Form S–6, Registration Under the Securities Act of 1933 of Unit Investment Trusts Registered on Form N–8B–2'' (OMB Control No. 3235–0184); (6) ''Form N–PORT under the Investment Company Act of 1940'' (OMB Control No. 3235–730); and (7) ''Investment Company Interactive Data'' (OMB Control No. 3235–0642). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The Commission published notice soliciting comments on the collection of information requirements in the Proposing Release and submitted the proposed collections of information to OMB for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The Commission received some comments that specifically addressed the estimated PRA burdens and costs in the Proposing Release, as well as some comments that discussed the overall burdens of implementing aspects of the proposal associated with collections of information. We discuss these comments below along with discussing updated estimates of the collection of information burdens associated with the final amendments to rule 35d–1, Form N–1A, Form N–2, Form N–8B–2, Form S–6, Form N–PORT; and the interactive data requirements under the final

[605] 44 U.S.C. 3501 *et seq.*

[606] 44 U.S.C. 3507(d); 5 CFR 1320.11.

amendments. A description of the final amendments, including the need for the information and its use, as well as a description of the likely respondents, may be found in sections I and II above, and a discussion of the economic effects of the final amendments may be found in section IV above.

B. Rule 35d–1

Rule 35d–1 is designed to address certain broad categories of investment company names that, in the Commission's view, are likely to mislead an investor about a company's investments and risks. The final amendments will expand the scope of funds covered by the 80% investment policy requirement of rule 35d–1. In addition to those fund names currently subject to the rule, the final amendments specify that any fund with a name suggesting that the fund focuses its investments in investments that have, or whose issuers have, particular characteristics will have to adopt an 80% investment policy.

We are also adopting amendments to the names rule's notice requirement. These amendments are designed to specify further the content and delivery of the notice, and address more directly the needs of investors who elect electronic delivery. The final amendments will require notices not only to describe a change in the fund's 80% investment policy, but also a change to the fund's name that accompanies the investment policy change.

The final amendments also include certain new recordkeeping requirements. These amendments will newly require a fund that is required to adopt an 80% investment policy to maintain a written record documenting its compliance with the rule, including among other things the fund's record of which assets are invested in the fund's 80% basket, the basis for including each such asset in the fund's 80% basket, and certain information regarding departures from the fund's 80% investment policy. A fund also will be required to keep records of any notice sent to the fund's shareholders pursuant to the rule. In a modification to the proposal, the final amendments will *not* require funds that do not adopt an 80% policy to maintain a record of the fund's analysis that such policy is not required under the names rule.[607]

Rule 35d–1, including the final amendments to the rule, contains collection of information requirements. These collection of information requirements include, as detailed in the chart below, the notice requirement and recordkeeping requirements for funds that are required to adopt an 80% investment policy. Compliance with these requirements is mandatory. Responses to these requirements will not be kept confidential.

The Commission received only one comment that specifically addressed the PRA analysis for the proposed amendments to rule 35d–1, stating that the Commission had ''significantly underestimated'' the costs related to preparing and providing notices to shareholders.[608] The Commission received other comments that did not specifically address the PRA analysis but suggested that the Commission had generally underestimated the compliance costs associated with the proposed notice and recordkeeping requirements.[609] Some commenters stated that the costs of providing notices would likely increase in light of the rule's increase in scope.[610] With respect to the proposed recordkeeping requirements, commenters stated that funds would face significant compliance costs related to the requirement to document each investment included in the 80% basket.[611] Some commenters also stated that the proposed recordkeeping requirements may not be easily automated, including the requirement to include a basis for including each investment in the 80% basket, and the reasons for departure from the fund's 80% investment policy.[612]

We have adjusted the proposal's estimated annual burden hours and total time costs to reflect these comments and to reflect changes from the proposal. Specifically, we are increasing the estimated annual burden associated with the recordkeeping requirement to reflect that certain records may not easily lend themselves to automation. The final estimate also reflects that funds will be required under the final amendments to reassess the characteristics of investments in the fund's 80% basket on a quarterly basis, in contrast to the proposed rule, which would have required funds to engage in continual compliance testing to reassess the characteristics of investments in the fund's 80% basket.[613] Because we are not adopting the proposed recordkeeping requirement for funds that are not required to adopt 80% investment policies, the burdens associated with that requirement are omitted from the final estimates below. We have also adjusted the proposal's estimated annual burden hours and total time costs to reflect updated wage rates. Because funds already have in place systems required to provide notice to shareholders, we do not believe that per-fund costs of providing notice to shareholders will materially increase as result of the rule's increased scope under the final amendments. We also do not believe that per-fund costs of providing notice will increase as a direct result of exception under the final amendments related to unlisted registered closed-end funds and BDCs because we believe that the costs associated with providing notice under this exception are comparable to the costs that a fund not relying on this exception would incur by providing notices associated with the shareholder vote that would otherwise be required for a change to the fund's investment policy. The proposed estimate of funds that would provide notices under the names rule over-estimated the number of unlisted registered closed-end funds and BDCs that would provide notices, as it did not subtract unlisted registered closed-end funds and BDCs from the overall estimate of registered closed-end funds and BDCs (even though the proposal did not anticipate that unlisted registered closed-end funds and BDCs would provide notices under the names rule, as they would have to conduct a shareholder vote in connection with a change in an 80% investment policy). We are therefore not changing our analysis in our estimates of the final rules' PRA burdens to increase the proposed estimate, even though the final amendments (unlike the proposal) would permit unlisted registered closed-end funds and BDCs to send notices to shareholders in connection with a change in an 80% investment policy instead of holding a shareholder vote.

The table below summarizes our PRA initial and ongoing annual burden estimates associated with the final notice and recordkeeping amendments to rule 35d–1.

[607] *See supra* section II.F.

[608] ICI Comment Letter.

[609] ICI Comment Letter; T. Rowe Comment Letter; SIFMA AMG Comment Letter; Seward & Kissel Comment Letter.

[610] ICI Comment Letter; SIFMA AMG Comment Letter; T. Rowe Comment Letter; Dechert Comment Letter.

[611] ICI Comment Letter; T. Rowe Comment Letter; SIFMA Comment Letter; Seward & Kissel Comment Letter.

[612] Invesco Comment Letter; Seward & Kissel Comment Letter.

[613] *See supra* section II.A.2.

TABLE 1—PRA ESTIMATES FOR RULE 35d–1 AMENDMENTS

	Initial hours	Annual hours [1]	Wage rate [2]	Internal time costs	Annual external cost burden
Currently Aproved Burdens					
Notice Requirement	0	20 hours [3]	$425 (estimate of wage rate in most recently approved supporting statement).	$8,500	
Number of Funds		× 38 funds [4]		× 38 funds	
Current Burden Estimates		760 hours		$323,000	$0
Proposed Estimated Burdens					
Notice Requirement	0	20 hours [5]	$425 (blended rate for attorneys)	$8,500	[7] 496
Number of Funds		× 34 funds [6]		× 34 funds	
Total New Burden for Notice Requirement (I)		680 hours		$289,000	16,864
Recordkeeping for Funds with an 80% Policy [8]	[9] 9	50 hours	$356 (1:1 blend for compliance attorney and senior programmer).	$17,800	496
Number of Funds		× 10,394 funds		× 10,394 funds	
Total New Burden for Recordkeeping For Funds Required to Adopt 80% Policy (II).		519,700 hours		$185,013,200	5,155,424
Recordkeeping For Funds Not Required to Adopt 80% Policy.	0	1 hour	$425 (blended rate for attorneys)	$425	496
		× 3,465 funds [10]		× 3,465 funds	
Total New Burden for Recordkeeping For Funds Not Required to Adopt 80% Policy (III).		3,465 hours		$1,472,625	1,718,640
Total Proposed Estimated Burdens Including Amendments					
Total New Annual Burden (I + II + III)		523,845 hours		$186,774,825	6,890,910
Final Estimated Burdens					
Notice Requirement	0	20 hours [5]	$425 (blended rate for attorneys)	$8,500	[11] 565
Number of Funds		× 34 funds [6]		× 34 funds	
Total New Burden for Notice Requirement (I)		680 hours		$289,000	19,210
Recordkeeping for Funds with an 80% Policy [8]	[9] 9	75 hours [12]	$406 (1:1 blend for compliance attorney and senior programmer).	$30,450	565
Number of Funds		× 10,291 funds		× 10,291 funds	
Total New Burden for Recordkeeping (II)		771,825 hours		$313,360,950	5,814,415
Total Final Estimated Burdens Including Amendments					
Total New Annual Burden (I + II)		772,505 hours		$313,649,950	5,833,625

Notes:

[1] Includes initial burden estimates annualized over a 3-year period.

[2] The estimated wage figures are based on published rates for the professionals described in this chart, modified to account for an 1800-hour work-year and inflation. The estimated figures for the proposed and final burdens were multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. *See* Securities Industry and Financial Markets Association's Report on Management & Professional Earnings in the Securities Industry 2013.

[3] This estimate assumed that these notices are typically short, one-page documents that are sent to shareholders with other written materials. The Commission anticipated that each respondent would only incur these burden hours once.

[4] The currently-approved burden takes into account the Commission's previous estimate, across approximately 13,182 open-end funds and 676 closed-end funds then registered with the Commission, that there are approximately 11,502 funds that have names covered by the rule or 83% of funds covered by the rule (13,858 funds × 83% = 11,502). The Commission estimated that 1% of these funds, or 115 funds, would, within the next three years, provide a notice to shareholders pursuant to rule 35d–1. Therefore, over the course of 3 years, the Commission estimated that, on average approximately 38 funds per year would provide a notice to shareholders under rule 35d–1.

[5] The final amendments would make some changes to the current notice requirement, including requiring funds to provide additional specificity about the content and delivery of notice. Because funds already have in place systems required to provide notice to shareholders, the Commission continues to believe, as in the proposal, that these proposed alterations would not increase the burden hours needed to prepare the notice. Although the final rules, unlike the proposed rules, would permit unlisted registered closed-end funds and BDCs to make changes to their 80% investment policies without a shareholder vote under certain circumstances, including that a fund provide certain notice to shareholders, we have not increased our estimates as a result of this provision. The costs associated with providing notice under this exception are comparable to the costs that a fund would incur by providing notices associated with the shareholder vote that would otherwise be required for a CEF/BDC to change its 80% investment policy under the final rule.

[6] The currently-approved PRA burden for rule 35d–1 was based on the Commission's estimate that 83% of funds were covered by rule 35d–1. The Commission at proposal estimated that 75% of funds would have names subject to the 80% investment policy. The prior PRA burden was based on an estimate using a different analytical approach than the Commission employed at proposal, based on its updated economic analysis. Based on that analysis, the Commission estimated that 62% of funds were subject to rule 35d–1 at the time of proposal and that the proposed rule amendments would increase this estimate to 75% of funds. The Commission estimated, across approximately 14,532 open-end and closed-end funds registered with the Commission, that there were approximately 10,394 funds that have names that would be covered by the proposed rule amendments, or 75% of funds covered by the rule amendments. The Commission estimated that 1% of these 10,394 funds, or 103 funds, would within the next three years provide a notice to shareholders pursuant to the proposed rule amendments. Therefore, over the course of 3 years, the Commission estimated that, on average approximately 34 funds per year would provide a notice to shareholders under the proposed rule amendments. The Commission now estimates, pursuant to its current economic analysis, that 60% of funds are currently subject to the 80% investment policy requirement, and that 76% of funds would be subject to this requirement under the final amendments. The Commission estimates, across approximately 13,541 open-end and closed-end funds registered with the Commission, that there are approximately 10,291 funds that have names that would be covered by the final rule amendments, or 76% of funds covered by the rule amendments (9,533 mutual funds (other than money market funds) + 2,735 non-UIT ETFs + 355 money market funds = 12,975 open end funds + 748 registered closed-end funds + 125 BDCs + 45 UITs = 13,541 funds × 76% = 10,291 funds). The Commission estimates that 1% of these 10,291 funds, or 103 funds, would within the next three years provide a notice to shareholders pursuant to the final rule amendments. Therefore, over the course of 3 years, the Commission estimates that on average approximately 34 funds per year would provide a notice to shareholders under the final rule amendments.

[7] This estimate was based on the estimated wage rate of $496, for 1 hour of outside legal services. The Commission's estimate of the relevant wage rates for external time costs, such as outside legal services, took into account staff experience, a variety of sources including general information websites, and adjustments for inflation.

[8] For funds that adopt an 80% investment policy under the proposed rule, the recordkeeping requirements under proposed rule 35d–1(b)(3) would require records documenting the fund's compliance under paragraphs (a) and (b) of proposed rule 35d–1. Written records documenting the fund's compliance include: the fund's record of which assets are invested in the 80% basket and the basis for including each such asset in the fund's 80% basket; the percentage of the value of the fund's assets that are invested in the 80% basket; the reasons for any departures from the fund's 80% investment policy (including why the fund determined that circumstances are other-than-normal); the dates of any departures from the 80% investment policy; and any notice sent to the fund's shareholders pursuant to proposed rule 35d–1(e). The Commission based its proposed estimate on its understanding that these records would generally need to be made daily, but that the vast majority of records would be automated. The Commission stated that it understood, however, that some records, specifically, records documenting the reasons for any departures from the 80% investment policy, may not be automated and may require a fund to spend more time to make. The proposed PRA estimates took these considerations into account. The recordkeeping requirements under the final rule are substantially similar to the proposed requirements, but do not include the proposed requirement for funds that do not adopt an 80% investment policy to maintain a record of their analysis that such a policy is not required.

[9] This estimate initial burden for the proposed recordkeeping requirement accounts for the time the Commission estimates that fund will need to establish recordkeeping procedures for the records that must be kept.

[10] The Commission at proposal estimated that, across approximately 14,532 open-end and closed-end funds registered with the Commission, there were approximately 3,465 funds that have names that would be not covered by the proposed rule amendments, or 25% of funds covered by the rule amendments.

[11] This estimate is based on the estimated wage rate of $565, for 1 hour of outside legal services. The Commission's estimate of the relevant wage rates for external time costs, such as outside legal services, takes into account staff experience, a variety of sources including general information websites, and adjustments for inflation.

[12] The Commission's estimates of the internal annual time burdens associated with the recordkeeping requirement under the final rules have been increased by 50% from the proposal to account for records that may not be easily automatable. This estimate reflects that funds will be required under the final amendments to reassess the characteristics of investments in the fund's 80% basket on a quarterly—as opposed to continual—basis. Therefore, while we recognize that some records may not be able to be automated, as commenters discussed, we are not increasing the proposed estimates to the degree that commenters suggested would be appropriate in light of the final rule's comparatively less-burdensome approach to reassessing investments in the fund's 80% basket.

C. Prospectus Disclosure

We are adopting amendments to funds' registration forms—specifically, Form N–1A, Form N–2, Form N–8B–2, and Form S–6—that will require each fund that is required to adopt and implement an 80% investment policy to include disclosure in its prospectus that defines the terms used in its name, including the specific criteria the fund uses to select the investments that the term describes, if any. These amendments are designed to help investors better understand how a fund's investment strategy corresponds with the investment focus that the fund's name suggests as well as to provide additional information about how the fund's management seeks to achieve the fund's objective. While this is not currently required in a fund's prospectus, we understand that including similar disclosure is currently common industry practice, and believe that that the impact that the final amendments will have on funds subject to the names rule will generally be minor. Therefore, the PRA estimates for the final prospectus disclosure amendments likely overestimate the costs for those funds whose disclosure is currently in line with the disclosure the amendments would require.

The final amendments to Form N–1A, Form N–2, Form N–8B–2, and Form S–6 all contain collection of information requirements. Compliance with the disclosure requirements of each form is mandatory. Responses to these disclosure requirements will not be kept confidential.

The Commission received one comment stating that the costs of prospectus disclosure were underestimated.[614] We have adjusted the proposal's estimated annual burden hours and total time costs to reflect updated wage rates, and in light of developments in our analysis with respect to estimating the burdens associated with initial disclosure-related burdens.

The table below summarizes our PRA initial and ongoing annual burden estimates associated with the amendments to Form N–1A, Form N–2, Form N–8B–2, and Form S–6.

1. Form N–1A

TABLE 2—FORM N–1A PRA ESTIMATES

	Initial hours	Annual hours[1]	Wage rate[2]	Internal time costs	Annual external cost burden
Currently Aproved Burdens					
Preparing and Filing Reports on Form N–1A Generally.	.....	278	$284 (estimate of wage rate in most recently approved supporting statement).	$78,952	$21,849.
Number of Responses	.....	6,002[3]	.....	6,002	6,002.
Current Burden Requirement	.....	1,672,077 hours	.....	$474,392,078	$132,940,008.
Propoproposed Burdens					
Proposed New Names Rule Disclosure ..	7	10 hours	$356 (1:1 blend of attorney and senior programmer).	$3,560	$992.[6]
Number of funds	.....	× 9,731 funds[4]		× 9,731 funds	× 9,731 funds.
Total Proposed Estimated Burdens Including Amendments					
Total New Annual Burden	.....	97,310 hours	.....	$34,643,250	$9,653,152.
Final Estimated Burdens					
New Names Rule Disclosure	[5] 15	12 hours	$406 (1:1 blend of attorney and senior programmer).	$4,872	$1,130.[6]
Number of funds		× 9,593 funds[7]		× 9,593 funds	× 9,593 funds.
Total Final Estimated Burdens Including Amendments					
Total New Annual Burden	.....	115,116 hours	.....	$46,737,096	$10,840,090.

Notes:

[1] Includes initial burden estimates annualized over a 3-year period.

[2] The estimated wage figures are based on published rates for the professionals described in this chart, modified to account for an 1800-hour work-year and inflation. The estimates for the proposed and final burdens were multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. *See* Securities Industry and Financial Markets Association's Report on Management & Professional Earnings in the Securities Industry 2013.

[3] The currently-approved burden was based on the Commission's estimate that included all open-end funds, including ETFs, then registered on Form N–1A.

[4] The currently-approved PRA burden for rule 35d–1 was based on the Commission's estimate that 83% of funds were covered by rule 35d–1. This estimate assumed that 75% of funds would be covered by our proposed rule amendments. The prior PRA burden was based on an estimate using a different analytical approach than we are now employing. The Commission estimated at proposal that 62% of funds were currently subject to rule 35d–1, and that the proposed rule amendments would increase this estimate to 75% of funds. The Commission estimated, across approximately 12,975 open-end funds including ETFs registered with the Commission, that there are approximately 9,731 open-end funds that have names that would have been covered by the proposed rule amendments, or 75% of open-end funds covered by the rule amendments (10,223 mutual funds (other than money market funds) + 2,320 non-UIT ETFs + 432 money market funds = 12,975 open end funds × 75% = 9,731 open-end funds).

[614] *See supra* footnote 565.

[5] The estimated initial burden has been increased based on developments in our analysis with respect to estimating the burdens associated with initial disclosure-related burdens. This burden has been increased to reflect internal review processes that we understand are conventional when updating prospectus disclosures to reflect a new disclosure requirement, as well as the time that we understand, based on staff experience with the disclosure review process, drafting disclosure in response to new disclosure requirements typically takes.

[6] The estimated burdens at proposal were based on the estimated wage rate of $496/hour, and at adoption are based on the estimated wage rate of $565/hour, for 2 hours, for outside legal services. The Commission's estimates of the relevant wage rate 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.

[7] Based on our current analysis, we estimate that 60% of funds are currently subject to rule 35d–1, and that the final amendments will increase this estimate to 76% of funds. The Commission estimates, across approximately 12,623 open-end funds including ETFs registered with the Commission, that there are approximately 9,467 open-end funds that have names that will be covered by the final amendments (9,533 mutual funds (other than money market funds) + 2,735 non-UIT ETFs + 355 money market funds = 12,623 × 76% = 9,593 open-end funds).

2. Form N–2

TABLE 3—FORM N–2 PRA ESTIMATES

	Initial hours	Annual hours [1]	Wage rate [2]	Internal time costs	Annual external cost burden
Currently Aproved Burdens					
Preparing and Filing Reports on Form N–2 Generally.	.....	2,426	$400 (estimate of wage rate in most recently approved supporting statement).	$970,533	$160,523.
Number of Responses	.....	298	.....	298	298.
Current Burden Requirement	.....	722,948 hours	.....	$289,218,834	$47,835,854.
Proposed Burdens					
Proposed New Names Rule Disclosure	7	10 hours	$356 (1:1 blend of attorney and senior programmer).	$3,560	$992.[5]
Number of Funds	.....	× 626 funds [3]		× 626 funds	× 626.
Total Proposed Estimated Burdens Including Amendments					
Total New Annual Burden	.....	6,260 hours	.....	$2,228,560	$620,992.
Final Estimated Burdens					
New Names Rule Disclosure	[4] 15	12 hours	$406 (1:1 blend of attorney and senior programmer).	$4,872	$1,130.[5]
Number of Funds	.....	× 663 funds [6]		× 663 funds	× 663.
Total Final Estimated Burdens Including Amendments					
Total New Annual Burden	.....	7,956 hours	.....	$3,230,136	$749,190.

Notes:

[1] Includes initial burden estimates annualized over a 3-year period.

[2] The estimated wage figures are based on published rates for the professionals described in this chart, modified to account for an 1800-hour work-year and inflation. The estimates for the proposed and final burdens were multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. *See* Securities Industry and Financial Markets Association's Report on Management & Professional Earnings in the Securities Industry 2013.

[3] The currently-approved PRA burden for rule 35d–1 was based on the Commission's estimate that 83% of funds were covered by rule 35d–1. We now estimate that 75% of funds would be covered by our proposed rule amendments. The prior PRA burden was based on an estimate using a different analytical approach than we are now employing. The Commission estimated that 62% of funds were currently subject to rule 35d–1, and that the proposed rule amendments would increase this estimate to 75% of funds. The Commission estimated, across approximately 835 closed-end funds registered with the Commission, that there were approximately 626 closed-end funds that had names that would be covered by the proposed rule amendments, or 75% of closed-end funds covered by the rule amendments (736 registered closed-end funds +99 BDCs = 835 Form N–2 registrants × 75% = 626 Form N–2 registrants).

[4] The estimated initial burden has been increased based on developments in our analysis with respect to estimating the burdens associated with initial disclosure-related burdens. This burden has been increased to reflect internal review processes that we understand are conventional when updating prospectus disclosures to reflect a new disclosure requirement, as well as the time that we understand, based on staff experience with the disclosure review process, drafting disclosure in response to new disclosure requirements typically takes.

[5] The estimated burdens at proposal were based on the estimated wage rate of $496/hour, and at adoption are based on the estimated wage rate of $565/hour, for 2 hours, for outside legal services. The Commission's estimates of the relevant wage rate 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.

[6] Based on our current analysis, we estimate that 60% of funds are currently subject to rule 35d–1, and that the final amendments will increase this estimate to 76% of funds. The Commission estimates, across approximately 873 closed-end funds registered with the Commission, that approximately 663 closed-end funds have names that will be covered by the final rule, or 76% of closed-end funds (748 registered closed-end funds + 125 BDCs = 873 Form N–2 registrants × 76% = 663 Form N–2 registrants).

3. Form N–8B–2

TABLE 4—FORM N–8B–2 PRA ESTIMATES

		Annual hours [1]	Wage rate [2]	Cost of internal burden per portfolio	Annual cost burden per portfolio
Currently Aproved Burdens					
Preparing and Filing Reports on Form N–8B–2 Generally.	UITs	10 hours	$351 (estimate of wage rate in most recently approved supporting statement).	$3,510	$10,000.
	UIT ETFs	18 hours	$351 (estimate of wage rate in most recently approved supporting statement).	$6,318	$0.
Number of Responses	.....	1 [3]	.....	1	1.
Current Burden Requirement	.....	28 hours	.....	$9,828	$10,000.

TABLE 4—FORM N–8B–2 PRA ESTIMATES—Continued

		Annual hours [1]	Wage rate [2]	Cost of internal burden per portfolio	Annual cost burden per portfolio
Proposed Burdens					
Proposed New Names Rule Disclosure	7	10 hours	$356 (1:1 blend of compliance attorney and senior programmer).	$3,560	$992.[6]
Number of Responses		× 1 UIT [4]		× 1 UIT	× 1 UIT.
Total Estimated Burdens Including Amendments					
Total New Annual Burden		10 hours		$3,560	$992.
Final Estimated Burdens					
New Names Rule Disclosure	15 [5]	12 hours	$406 (1:1 blend of compliance attorney and senior programmer).	$4,872	$1,130.[6]
Number of Responses		× 1 UIT [4]		× 1 UIT	× 1 UIT.
Total Final Estimated Burdens Including Amendments					
Total New Annual Burden		12 hours		$4,872	$1,130.

Notes:
[1] Includes initial burden estimates annualized over a 3-year period.
[2] The estimated wage figures are based on published rates for the professionals described in this chart, modified to account for an 1800-hour work-year and inflation. The estimates for the proposed and final burdens were multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. *See* Securities Industry and Financial Markets Association's Report on Management & Professional Earnings in the Securities Industry 2013.
[3] Based on Commission records, in 2016, 2017, 2018, and 2019, during that four-year period, the Commission received 1 filing, submitted in 2019, on Form N–8B–2. The cumulative 4-year average is, therefore, 0.25 filings per year.
[4] The Commission's proposed estimate was 1 annual filing and we continue to assume 1 filing annually.
[5] The estimated initial burden has been increased based on developments in our analysis with respect to estimating the burdens associated with initial disclosure-related burdens. This burden has been increased to reflect internal review processes that we understand are conventional when updating prospectus disclosures to reflect a new disclosure requirement, as well as the time that we understand, based on staff experience with the disclosure review process, drafting disclosure in response to new disclosure requirements typically takes.
[6] The estimated burdens at proposal were based on the estimated wage rate of $496/hour, and at adoption are based on the estimated wage rate of $565/hour, for 2 hours, for outside legal services. The Commission's estimates of the relevant wage rate 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. Form S–6

TABLE 5—FORM S–6 PRA ESTIMATES

	Initial hours	Annual hours [1]	Wage rate [2]	Internal costs	Annual external costs
Currently Aproved Burdens					
Draft and Update Disclosures on Form S–6 [3].	24	18 hours	$356 (1:1 blend of compliance attorney and senior programmer).	$6,408	$27,265.
Number of Responses		2,498		2,498	2,498.
Current Burden Requirement		107,359		$16,007,184	$68,107,970.
Proposed Burdens					
Proposed New Names Rule Disclosure	7	10 hours	$356 (1:1 blend of compliance attorney and senior programmer).	$3,560	$992.[6]
Number of Responses		785 filings.		× 785 filings [4]	× 785 filings
Total Proposed Estimated Burdens Including Amendments					
Total New Annual Burden		7,850 hours		$2,794,600	$778,720.
Final Estimated Burdens					
New Names Rule Disclosure	[5] 15	12 hours	$406 (1:1 blend of compliance attorney and senior programmer).	$4,872	$1,130.[6]
Number of Responses		× 764 filings [7]		× 764 filings	764 filings.
Total Final Estimated Burdens Including Amendments					
Total New Annual Burden		9,168 hours		$3,722,208	$863,320.

Notes:
[1] Includes initial burden estimates annualized over a 3-year period.
[2] The estimated wage figures are based on published rates for the professionals described in this chart, modified to account for an 1800-hour work-year and inflation. The estimates for the proposed and final burdens were multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. *See* Securities Industry and Financial Markets Association's Report on Management & Professional Earnings in the Securities Industry 2013.
[3] Form S–6 incorporates the disclosure requirements of Form N–8B–2 for UITs on an ongoing basis. Because Form S–6 incorporates the requirements of Form N–8B–2, the amendments would indirectly affect these entities. UITs that have made their initial deposit of securities prior to the effective date of any final rule would be required to update their disclosure on Form S–6 to comply with the amended requirements of Form N–8B–2. As discussed above, UITs formed after the adoption of any final rules would be required to comply with the proposed disclosure requirements upon formation when those UITs file Form N–8B–2 with the Commission.

[4] The currently-approved PRA burden for rule 35d–1 was based on the Commission's estimate that 83% of funds were covered by rule 35d–1. The Commission estimated that 75% of funds would be covered by our proposed rule amendments, based on this proposal's economic analysis above. The prior PRA burden was based on an estimate using a different analytical approach than we are now employing. The Commission estimated that 62% of funds are currently subject to rule 35d–1 and that our proposed rule amendments would increase this estimate to 75% of funds. The Commission estimated 49 non-separate account and non-ETF UITs registered with the Commission. However, the Commission based its estimate on the belief that using the number of filings instead of registrants would form a more accurate estimate of annual disclosure burdens. The Commission estimated 1,047 filings based on the average number of filings made on Form S–6 from 2018 to 2020. The Commission therefore estimated that there would be approximately 785 filings for funds that have names that would be covered by the proposed rule amendments, or 75% of the filings for UITs covered by the rule amendments (1,047 filings × 75% = 785 filings).

[5] The estimated initial burden has been increased based on developments in our analysis with respect to estimating the burdens associated with initial disclosure-related burdens. This burden has been increased to reflect internal review processes that we understand are conventional when updating prospectus disclosures to reflect a new disclosure requirement, as well as the time that we understand, based on staff experience with the disclosure review process, drafting disclosure in response to new disclosure requirements typically takes.

[6] The estimated burdens at proposal were based on the estimated wage rate of $496/hour, and at adoption are based on the estimated wage rate of $565/hour, for 2 hours, for outside legal services. The Commission's estimates of the relevant wage rate 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.

[7] Based on our current analysis, we estimate that 60% of funds are currently subject to rule 35d–1, and that the final amendments will increase this estimate to 76% of funds. The Commission estimates 45 non-separate account and non-ETF UITs registered with the Commission. However, consistent with the Commission's methodology at proposal, we believe that using the number of filings instead of the number of registrants will form a more accurate estimate of annual disclosure burdens. The Commission estimates 1,005 filings based on the average number of filings made on Form S–6 from 2020 to 2022. The Commission therefore estimates that there will be approximately 764 filings for funds that have names that will be covered by the final amendments, or 76% of the filings for UITs covered by the rule amendments (1,005 filings × 76% = 764 filings).

D. Form N–PORT Reporting Requirements

We are adopting amendments to Form N–PORT to include new reporting items for N–PORT funds regarding the 80% investment policy that such a fund adopts in compliance with the names rule. As proposed, the final amendments require N–PORT funds that are required to adopt an 80% investment policy to report on Form N–PORT: (1) whether each investment in the fund's portfolio is in the fund's 80% basket; and (2) the value of the fund's 80% basket, as a percentage of the value of the fund's assets.

The final amendments contain some modifications from the proposal.[615] First, the final Form N–PORT amendments modify the proposed reporting approach by requiring reported information for the third month of each calendar quarter, instead of for every month. This modified reporting frame corresponds with the period for review that will otherwise be mandated by the final amendments. Secondly, the final amendments add a new reporting item, in which funds will be required to report the definitions of terms used in a fund's name. Lastly, we are not adopting the proposed requirement that funds report the number of days that that the value of the fund's 80% basket fell below 80% of the value of the fund's total assets during the reporting period.

Form N–PORT, including the final amendments, contains collection of information requirements. Compliance with the requirements of the form is mandatory. Responses to these reporting requirements will be kept confidential, subject to the provisions of applicable law, for reports filed with respect to the first two months of each quarter. Responses to the new Form N–PORT reporting requirements for the third month of the quarter will not be kept confidential, but made public sixty days after the quarter end.

The Commission did not receive public comment regarding the PRA estimates for the amendments to Form N–PORT in the proposing release, but it did receive comments on the overall costs and burdens associated with this aspect of the proposal. Some commenters stated that the costs and operational burdens of the proposed requirement for N–PORT funds subject to the 80% investment policy requirement to indicate whether each of its portfolio investments is included in the fund's 80% basket would be significant.[616] Commenters specifically expressed concern about the costs and burden of reporting this information for each investment on a monthly basis.[617] Some commenters also stated that the proposed new reporting item would require the build-out of new systems, for daily testing and validation of names rule compliance information, and for mapping this information over for reporting on Form N–PORT.[618] Commenters also stated that funds may need to hire third-party vendors for supplemental and specially-tailored data on their portfolio investments, in order to comply with the proposed new reporting requirements.[619] With respect to the proposed requirement that a fund report the number of days that the value of the fund's 80% basket fell below 80% of the value of the fund's total assets during the reporting period, commenters stated that monitoring individual securities on a daily basis for name rule compliance would be operationally onerous.[620]

We have adjusted the proposal's estimated annual burden hours and total time costs to reflect these comments as well as the changes from the proposed requirements. We recognize that complying with the new reporting requirements will entail compliance activities, and potentially systems and operational modifications as well as the use of third-party service providers, and that reporting will be required for each of a fund's portfolio holdings. As a result, we have adjusted the estimated initial and annual hours associated with the requirement for funds to report whether each of its investments is part of its 80% basket. On the other hand, we expect that the modified reporting time frame will reduce the burdens associated with the final amendments' collection of information requirements. The burdens associated with the proposal will also be reduced because we are not adopting the proposed requirement to report the number of days that the value of the 80% basket fell below 80% of the value of the fund's total assets. We do not anticipate the new reporting item under the final amendments requiring funds to include definitions of terms used in a fund's name will entail significant costs because this reporting requirement leverages the same disclosure that funds will also, under the final amendments, be required to include in their prospectuses. Moreover, any costs associated with this requirement should be recurring costs only to the extent a fund determines to change its name or its definition of the terms used in its name.

The table below summarizes the estimates for internal burdens associated with the new requirements under the final amendments to Form N–PORT.

[615] *See supra* section II.E.

[616] *See, e.g.,* MFS Comment Letter; J.P. Morgan Asset Management Comment Letter; T. Rowe Comment Letter.

[617] *See* MFS Comment Letter.

[618] *See, e.g.,* T. Rowe Comment Letter; Invesco Comment Letter; Seward & Kissel Comment Letter.

[619] *See, e.g.,* ICI Comment Letter; SIFMA AMG Comment Letter.

[620] *See, e.g.,* J.P. Morgan Asset Management Comment Letter.

TABLE 6—FORM N–PORT PRA ESTIMATES

	Initial hours	Annual hours [1]	Wage rate [2]	Internal time costs	Annual external cost burden
Currently Aproved Burdens					
Preparing and Filing Reports on Form N–PORT Generally.	.....	44,500	$344.19 (estimate of wage rate in most recently approved supporting statement).	$15,316,455	$4,684,296.
Number of Responses	.....	2,696	.....	2,696	2,696.
Current Burden Requirement	.....	1,839,903 hours	.....	$654,658, 288	$113,858,133.
Proposed Burdens					
New Reporting About 80% Investment Policy [3].	4	9 hours	$356 (blend of compliance attorney and senior programmer).	$3,204	$992.[4]
Number of Funds	.....	× 9,996 funds [3]	.....	× 9,996 funds	× 9,996 funds.
Total New Burden for New Reporting About 80% Investment Policy (I).	.....	89,964 hours	.....	$32,027,184	$9,916,032.
Investments to be Included in a Fund's 80% Basket [4].	4	10 hours ..... × 9,996 funds [4]	$356 (rate for compliance attorney and senior programmer).	$3,560 ..... × 9,996 funds	$992.[6] × 9,996 funds.
Number of Funds					
Total New Burden for Investments to be Included in a Fund's 80% Basket (II).	.....	99,960 hours	.....	$35,585,760	$9,916,032.
Total Proposed Estimated Burdens Including Amendments					
Total New Annual Burden (I + II)	.....	189,924 hours	.....	$67,612,944	$19,832,064.
Final Estimated Burdens					
New Reporting About 80% Investment Policy [3].	4	2 hours	$406 (blend of compliance attorney and senior programmer).	$812	$1,130.[4]
Number of Funds	.....	× 9,926 funds [3]	.....	× 9,926 funds	× 9,926 funds.
Total New Burden for New Reporting About 80% Investment Policy (I).	.....	19,852 hours	.....	$8,059,912	$11,216,380.
Investments to be Included in a Fund's 80% Basket [4].	15	14 hours	$406 (rate for compliance attorney and senior programmer).	$5,684	$1,130.[6]
Number of Funds	.....	× 9,926 funds [6]	× 9,926 funds	× 9,926 funds..	
Total New Burden for Investments to be Included in a Fund's 80% Basket (II).	.....	138,964 hours	.....	$56,419,384	$11,216,380.
Total Final Estimated Burdens Including Amendments					
Total New Annual Burden (I + II)	.....	158,816 hours	.....	$64,479,296	$22,432,760.

Notes:

[1] Includes initial burden estimates annualized over a 3-year period.

[2] The estimated wage figures are based on published rates for the professionals described in this chart, modified to account for an 1800-hour work-year and inflation. The estimates for the proposed and final burdens were multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. *See* Securities Industry and Financial Markets Association's Report on Management & Professional Earnings in the Securities Industry 2013.

[3] This burden corresponds to the requirement for a fund to report the value of its 80% basket as a percentage of the value of its assets. The proposed estimate also reflects the burden associated with the requirement for funds to report the number of days that the value of the 80% basket fell below 80% of the value of the fund's total assets. Because we are not adopting this requirement under the final rule, the final annual hours burden estimate has been reduced by 33% compared to the proposed estimate. The final annual hours estimate has also been reduced by a factor of 3 to reflect the modified reporting timeframe under the final amendments (*i.e.,* quarterly as opposed to monthly). Accordingly, the adjustment from proposed annual hours burden estimate to the final estimate reflects the following calculation: 9 hours × (⅔) = 6 hours/3 = 2 hours.

[4] This burden corresponds to the requirement for funds that are required to adopt 80% policies to indicate, with respect to each portfolio investment, whether the investment is included in the fund's calculation of assets in the fund's 80% basket; and for the final estimate (but not the proposed estimate), the requirement for funds to report definitions of the terms used in their names. Our final estimate of the initial hours burden has been increased by a factor of 2 compared to the proposed estimate to reflect costs associated with systems and operational modifications that may be required for compliance with these requirements. Our final estimate of the annual hours burden also reflects these increased costs compared to the proposed estimate; however it has been reduced in order to reflect the modified reporting timeframe under the final amendments (*i.e.,* quarterly as opposed to monthly), resulting in an overall estimate for the annual hours burden that is lower that the proposed estimate. Specifically, the adjustment from the proposed annual hours burden estimate to the final estimate reflects the following calculation: 10 hours × 2 = 20 hours/3 = 6.67 (rounded to 7 hours).

[3] The currently-approved PRA burden for rule 35d–1 was based on the Commission's estimate that 83% of funds were covered by rule 35d–1. The Commission estimated that 75% of funds would be covered by our proposed rule amendments. The prior PRA burden was based on an estimate using a different analytical approach than we are now employing. The Commission estimated that 62% of funds are currently subject to rule 35d–1 and that the proposed rule amendments would increase this estimate to 75% of funds. The Commission estimated, across approximately 14,001 open-end and closed-end funds registered with the Commission, not including money market funds, that there would have been approximately 10,394 funds that have names that would be covered by the proposed rule amendments, or 75% of funds covered by the rule amendments (10,223 mutual funds (other than money market funds) + 2,320 non-UIT ETFs = 12,543 open end funds + 736 registered closed-end funds + 49 UITs = 13,328 funds × 75% = 9,996 funds).

[4] *See id.*

[5] The estimated burdens at proposal were based on the estimated wage rate of $496/hour, and at adoption are based on the estimated wage rate of $565/hour, for 2 hours, for outside legal services. The Commission's estimates of the relevant wage rate 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.

[6] Based on our current analysis, we estimate that that 60% of funds are currently subject to rule 35d–1, and that the final amendments will increase this estimate to 76% of funds. The Commission estimates, across approximately 13,061 open-end and closed-end funds registered with the Commission, not including money market funds, that there will be approximately 10,318 funds that have names that will be covered by the proposed rule amendments, or 76% of the funds covered by the rule amendments (9,533 mutual funds (other than money market funds) + 2,735 non-UIT ETFs + = 12,268 open end funds + registered closed-end funds + 45 UITs = 13,061 funds × 76% = 10,318 funds).

E. Investment Company Interactive Data

We are adopting amendments to Form N–2, Form N–8B–2, and Form S–6, as well as rules 485 and 497 under the Securities Act and rule 11 and 405 of Regulation S–T, to require certain new structured data reporting requirements for funds.[621] The final amendments

[621] The Investment Company Interactive Data collection of information do not impose any

Continued

include new structured data requirements that will require funds to tag the information in their registration statements about their fund name using Inline XBRL.[622] The purpose of these information collections is to make information regarding fund names easier for investors to analyze and to help automate regulatory filings and business information processing, and to improve consistency across all types of funds with respect to the accessibility of fund name information they provide to the market.

Funds filing registration statements on Form N–2 already submit certain information using Inline XBRL format. Based on filing data as of December 2022, we estimate that 663 funds filing registration statements on these forms would be subject to the proposed interactive data amendments. UITs filing initial registration statements on Form N–8B–2 and post-effective amendments on Form S–6 are not currently subject to requirements to submit information in structured form. Because these UITs have not previously been subject to Inline XBRL requirements, we assume that these funds will experience additional burdens related to one-time costs associated with becoming familiarized with Inline XBRL reporting. These costs will include, for example, the acquisition of new software or the services of consultants, and the training of staff. Based on filing data as of December 30, 2020, we estimate that 796 filings would be subject to these proposed amendments. In our most recent Paperwork Reduction Act submission for Investment Company Interactive Data, we estimated a total aggregate annual hour burden of 323,724 hours, and a total aggregate annual external cost burden of $16,041,450. Compliance with the interactive data requirements is mandatory, and the responses will not be kept confidential.

The Commission did not receive public comment regarding the PRA estimates for the investment company interactive data requirements. We have adjusted the proposal's estimated annual burden hours and total time costs, however, to reflect updated wage rates.

The table below summarizes our PRA initial and ongoing annual burden estimates associated with the proposed amendments to Form N–1A, Form N–2, Form N–8B–2, and Form S–6, as well as Regulation S–T.

TABLE 7—INVESTMENT COMPANY INTERACTIVE DATA PRA ESTIMATES

	Internal initial burden hours	Internal annual burden hours [1]	Wage rate [2]	Internal time costs	Annual external cost burden
Proposed Burdens					
Names rule information for current XBRL filers [3].	1	1 hour [4]	$356 (blended rate for compliance attorney and senior programmer).	$356	$50.[5]
Number of funds		× 626 funds [6]		× 626 funds	× 626 funds.
Names rule information for new XBRL filers [7].	9	4 hours [8]	$356 (blended rate for compliance attorney and senior programmer).	$1,424	$900.[9]
Number of filings		× 785 filings [10]		× 785 filings	× 785 filings.
Total new aggregate annual burden.		3,766 hours [11]		$1,340,696 [12]	$737,800.[13]
Total Proposed Estimated Burdens Including Amendments					
Current aggregate annual burden estimates.		+ 252,602 hours			+ $15,350,750.
Revised aggregate annual burden estimates.		256,368 hours			$16,088,550.
Final Estimated Burdens					
Names rule information for current XBRL filers [3].	1	1 hour [4]	$406 (blended rate for compliance attorney and senior programmer).	$406	$50.[5]
Number of funds		× 663 funds [6]		× 663 funds	× 663 funds.
Names rule information for new XBRL filers [7].	9	4 hours [8]	$406 (blended rate for compliance attorney and senior programmer).	$1,625	$900.[9]
Number of filings		× 796 filings [14]		× 796 filings	× 796 filings.
Total new aggregate annual burden.		3,847 hours [11]		$1,562,678 [12]	$749,550.[13]
Total Final Estimated Burdens Including Amendments					
Current aggregate annual burden estimates.		+ 323,724 hours			+ $16,041,450.
Revised aggregate annual burden estimates.		324,571 hours			$16,791,000

Notes:
[1] Includes initial burden estimates annualized over a 3-year period.
[2] *See supra* table 1 regarding estimated wage rates.

separate burden aside from that described in our discussion of the burden estimates for this collection of information. The amendments we are adopting to rules 485 and 497 under the Securities Act, as well as rules 11 and 405 to Regulation S–T, are conforming amendments that have no associated PRA burden. While the new names-related information that open-end funds will be required to disclose under our final amendments to Form N–1A also will be required to be tagged using Inline XBRL, the final amendments to Form N–1A will create no additional PRA burden. The final rule amends Item 4 of Form N–1A; Form N–1A registrants are already required to submit the information that they provide in response to Item 4 using Inline XBRL. *See supra* footnote 115. Therefore, the burdens associated with tagging Item 4 disclosure are already accounted for under the current Investment Company Interactive Data collection of information.

[622] *See supra* section II.B; *see also* instruction to Item 4(a)(1) of Form N–1A; instruction to Item 9(b)(1) of Form N–1A; instruction to Item 8(2) of Form N–2; instruction to Item 11 of Form N–8B–2.

[3] This estimate represents the average burden for a filer on Form N–2 that is currently subject to interactive data requirements.
[4] This estimate included initial burden estimates annualized over a three-year period, plus 0.67 hour of ongoing annual burden hours. The estimate of 1 hour was based on the following calculation: ((1 initial hour/3) + 0.67 hour of additional ongoing burden hours) = 1 hour.
[5] The Commission estimated an incremental external cost for filers on Form N–2, as they already submit certain information using Inline XBRL.
[6] Based on filing data as of December 30, 2020, the Commission estimated 626 funds, including BDCs, filing on Form N–2. Based on filing data as of December 2022, we have adjusted that estimate to 663 funds.
[7] This estimate represents the average burden for a filer on Form N–8B–2 and Form S–6 that is not currently subject to interactive data requirements.
[8] Includes initial burden estimates annualized over a three-year period, plus 1 hour of ongoing annual burden hours. The estimate of 10 hours is based on the following calculation: ((27 initial hours/3) + 1 hour of additional ongoing burden hours) = 10 hours.
[9] This estimate assumes an external cost for filers on Form N–8B–2 and Form S–6 of $900 to reflect one-time compliance and initial set-up costs. Because these filers have not been previously been subject to Inline XBRL requirements, this estimate reflects that these funds would experience additional burdens related to one time-costs associated with becoming familiar with Inline XBRL reporting. These costs would include, for example, the acquisition of new software or the services of consultants.
[10] The Commission estimated 49 non-separate account and non-ETF UITs registered with the Commission. However, the Commission based the proposed estimate on the belief that the number of filings instead of registrants would form a more accurate estimate of annual burdens. The Commission estimated 1,047 filings based on the average number of filings made on Form S–6 from 2018 to 2020, and therefore estimated that there are approximately 785 filings for funds that have names that would have been covered by the proposed rule amendments, or 75% of the filings for UITs covered by the rule amendments (1,047 filings × 75% = 785 filings).
[11] With respect to the proposed estimate, 3,766 hours = (626 funds × 1 hour = 626 hours) + (785 filings × 4 hours = 3,140 hours). With respect to the final estimate, 3,847 hours = (663 funds × 1 hours = 663 hours) + (796 filings × 4 hours = 3,184 hours).
[12] With respect to the proposed estimate, $1,340,696 internal time cost = (626 funds × $356 = $222,856) + (785 filings × $1,424 = $1,117,840). With respect to the final estimate, $1,562,678 internal time cost = (663 funds × $406 = $269,178) + (796 filings × $1,625 = $1,293,500).
[13] With respect to the proposed estimate, $737,800 annual external cost = (626 funds × $50 = $31,300) + (785 filings × $900 = $706,500). With respect to the final estimate, $749,550 annual external cost = (663 funds × $50 = $33,150) + (796 filings × $900 = $716,400).
[14] Based on our current analysis, we estimate that 76% of funds will be subject to rule 35d–1 under the final amendments, and therefore estimate that 796 filings for funds that have names that will be covered by the final amendments (1,047 filings × 76% = 796 filings).

VI. Final Regulatory Flexibility Analysis

The Commission has prepared the following Final Regulatory Flexibility Analysis (''FRFA'') in accordance with section 604 of the Regulatory Flexibility Act (''RFA'').[623] It relates to final amendments to rule 35d–1 and Forms N–1A, N–2, N–8B–2, S–6, and N–PORT, as well as final conforming amendments to rules 11 and 405 of Regulation S–T and rules 485 and 497 under the Securities Act (collectively, ''final amendments'').

A. Need for and Objectives of the Rule and Form Amendments

Section 35(d) of the Act prohibits a registered investment company from adopting as part of its name or title any word or words that the Commission finds are materially deceptive or misleading. Rule 35d–1 addresses certain broad categories of investment company names that are likely to mislead an investor about a company's investments and risks. We are adopting final amendments designed to increase investor protection by improving, and broadening the scope of, the requirement for certain funds to adopt a policy to invest at least 80% of their assets in accordance with the investment focus that the fund's name suggests, updating the rule's notice requirements, and establishing recordkeeping requirements. The Commission also is adopting enhanced prospectus disclosure requirements for terminology used in fund names and additional requirements for funds to report information on Form N–PORT regarding compliance with the names-related regulatory requirements. The reasons for, and objectives of, the final amendments are discussed in more detail in sections I and II above.

B. Significant Issues Raised by Public Comments

In the Proposing Release, the Commission requested comment on every aspect of the Initial Regulatory Flexibility Analysis (''IRFA''), including the number of small entities that would be affected by the proposed rule and form amendments, the existence or nature of the potential impact of the proposals on small entities discussed in the analysis, and how to quantify the impact of the proposed amendments. The Commission also requested comment on the proposed compliance burdens and the effect these burdens would have on small entities.

Although the Commission did not receive comments specifically addressing the IRFA, one commenter stated that many small or innovative funds would be ''disproportionately'' burdened by the legal and compliance costs of the expanded scope of fund names that would be subject to the proposed amendments.[624] In addition, the Commission received comments stating that the proposed requirement that funds use a derivatives instrument's notional amount to determine the fund's compliance with its 80% investment policy would create costly technical and operational challenges for small fund groups.[625]

Smaller funds may incur costs associated with the final amendments as funds comply with all aspects of the final amendments, including the specific aspects that commenters discussing small entities highlighted.[626] As discussed above, compliance costs associated with the final amendments, particularly those that expand the current scope of the names rule, would vary based on a fund's current practices with respect to adopting policies to invest a particular percentage of fund assets in investments that have, or whose issuers have, particular characteristics. With respect to potential costs incurred to comply with other aspects of the amendments that commenters discussing small entities identified, we expect that funds would incur costs to review the final amendments' requirements and modify, as necessary, their investing practices, policies and procedures, and recordkeeping practices to comply with these requirements, or may decide to instead change their names.

C. Small Entities Subject to Rule Amendments

For purposes of Commission rulemaking in connection with the Regulatory Flexibility Act, an investment company is a small entity if, together with other investment companies in the same group of related investment companies, it has net assets of $50 million or less as of the end of its most recent fiscal year (''small fund'').[627] Commission staff estimates that, as of December 2022, approximately 34 registered open-end mutual funds (including one money market fund), 9 registered ETFs, 27 registered closed-end funds, 3 UITs, and

[623] 5 U.S.C. 603(a).

[624] *See* Freeman Capital Management Comment Letter. *But see* PIABA Comment Letter (stating that most instances of misleading fund names involve small and medium funds).

[625] *See* Dechert Comment Letter; ICI Comment Letter; Center for American Progress Comment Letter.

[626] *See supra* sections IV.D.2 and V for a discussion of costs associated with the final amendments.

[627] *See* rule 0–10(a) under the Act [17 CFR 270.0–10(a)].

10 BDCs (collectively, 83 funds) are small entities.[628]

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The final amendments include reporting, recordkeeping, and other compliance requirements. First, the final amendments expand the types of fund names subject to the names rule's 80% investment policy requirement, and any fund that has or adopts a newly covered name will need to adopt an 80% investment policy.[629] The final amendments also include other changes to the current names rule, such as permitting a fund to engage in temporary departures from an 80% investment requirement for a limited period of time under other than normal circumstances, which will also necessitate an update to funds' existing practices regarding names rule compliance. Funds will be required to review their portfolio investments to determine whether they continue to be consistent with the fund's 80% investment policy at least quarterly. The final amendments also specify that a fund's name may be materially deceptive or misleading under section 35(d) even if the fund adopts an 80% investment policy and otherwise complies with the rule's requirement to adopt and implement the policy. The final amendments further require a fund that is required to adopt an 80% investment policy to maintain certain records documenting its compliance with the rule, including, the fund's record of which assets are invested in accordance with the investment focus that the fund's name suggests (or consistent with the tax-exempt treatment its name suggests).

The final amendments also require disclosure in the fund's prospectus regarding the definitions of terms used in the fund's name, including a requirement that funds must tag new information that will be included using Inline XBRL. Under the final amendments, funds (other than money market funds and BDCs) that are required to adopt an 80% investment policy also newly must report certain information on Form N–PORT regarding names rule matters. This will necessitate that certain funds either must change their names or adjust their investment strategies, and thus potentially their portfolio investments, to ensure compliance. Lastly, the final amendments include exceptions for certain UITs. We discuss the specifics of these burdens in the Economic Analysis and Paperwork Reduction Act sections above. These sections also discuss the professional skills that we believe compliance with the final amendments will require.

1. 80% Investment Policy Requirements—Scope Expansion and Other Amendments

All funds, including small funds, that have names that include terms suggesting that the fund focuses its investments in investments that have, or whose issuers have, particular characteristics will be required to adopt an 80% investment policy under the final amendments.[630] Further, in order to comply with this element of the final amendments, a fund may have to engage in a name change or change its portfolio investments so that the fund's name reflects its 80% basket or vice-versa. Funds that have an existing 80% investment policy will need to change their practices to comply with the names rule to address other aspects of the final amendments: (1) changes to how the rule addresses temporary departures from the 80% investment requirement, (2) changes to address derivatives in calculating compliance with the 80% investment policy requirement, (3) the plain English/established industry use requirement, and (4) updates to the rule's notice requirement. Lastly, a fund that is an unlisted registered closed-end fund or BDC may be required to amend its existing 80% investment policy so that it is a fundamental policy and, on a going-forward basis, engage in shareholder votes to change its 80% investment policy.[631]

These requirements are designed to help ensure that a fund's investment activity is consistent with the investment focus its name communicates and, thus, the investor expectations the name creates. These requirements will impose burdens on all funds, including those that are small entities.

While we expect larger funds or funds that are part of a large fund complex to incur higher costs related to these requirements in absolute terms relative to a smaller fund or a fund that is part of a smaller fund complex, we generally expect a smaller fund to find it more costly, per dollar managed, to comply with the final requirements because it will not be able to benefit from a larger fund complex's economies of scale. Smaller funds may be more likely than larger funds with significant in-house resources to hire outside assistance in connection with understanding and assisting in compliance with the final amendments—for example, retaining outside counsel to analyze the implications of the final amendments' scope expansion on existing fund names. And a larger fund complex may be able to develop a process with in-house or outside counsel or utilize existing systems to make these changes more efficiently across all of their funds that a smaller fund with less resources may find too costly. For example, a larger unlisted BDC or closed-end fund may be able to use existing procedures to develop a method of soliciting shareholder votes regarding name changes that smaller unlisted BDCs or closed-end funds do not have.[632] Notwithstanding the economies of scale experienced by larger versus smaller funds, we generally do not expect the costs of compliance associated with the new requirements to be meaningfully different for smaller versus larger funds. The costs of compliance will vary only based on fund characteristics tied to their name. That is, whether a fund would now need to adopt, or change, its 80% investment policy, or its practices to comply with the names rule, will be as a consequence of that fund having a name that suggests an investment focus under the final amendments, not based upon the size of the fund.

2. Effect of Compliance With an 80% Investment Policy

We are adopting a new provision in the names rule providing that a fund's name may be materially deceptive or misleading under section 35(d) even if the fund adopts an 80% investment

[628] This estimate is derived from an analysis of data obtained from Morningstar Direct as well as data reported to the Commission for the period ending June 2022.

[629] While the final rule amendments will add BDCs to the definition of ''fund'' under the rule, we do not anticipate that this addition will have a significant impact on small entities. BDCs are currently subject to the requirements of section 35(d) pursuant to section 59 of the Act. We understand that BDCs currently comply with the names rule because they are subject to the requirements of section 35(d). *See also supra* footnote 13.

[630] *See supra* section VI.C for a discussion of the number of small entities subject to the amendments.

[631] As discussed above, under the final amendments such funds will be permitted to make changes to their 80% policies without this vote if the fund conducts a tender or repurchase offer in advance of the change, the fund provides at least 60 days' prior notice of any change in the policy in advance of that offer, and that offer is not oversubscribed, and in the event of a tender offer, the fund purchases shares at their net asset value.

[632] The final amendments' approach that permits unlisted registered closed-end funds and BDCs to make changes to their 80% investment policies without a shareholder vote under certain circumstances could, however, result in fewer costs to smaller unlisted registered closed-end funds and BDCs, to the extent that this additional permissible approach to changing their 80% investment policies is less costly than obtaining a shareholder vote. *See supra* sections II.A.4; IV.D.2.

policy and otherwise complies with the rule's requirement to adopt and implement the policy. The final provision makes clear that a fund name may be materially deceptive or misleading even where the fund complies with its 80% investment policy, for example, potentially where a fund complies with its 80% investment policy but invests in a way such that the source of a substantial portion of the fund's risks or returns is materially different from that which an investor reasonably would expect based on the fund's name. This new provision is consistent with prior Commission statements that the 80% investment requirement under the names rule is not intended to create a safe harbor from liability under section 35(d) for materially deceptive or misleading fund names.

This provision applies to all funds subject to the names rule's 80% investment policy requirement, including those that are small entities. However, because this provision restates section 35(d), we believe that it will not result in any additional costs beyond those already attendant on compliance with the Act itself.

3. Recordkeeping Requirements

The recordkeeping requirements are designed to help ensure compliance with the rule's requirements and aid in oversight. A fund that will be required to adopt an 80% investment policy under the final amendments will be required to maintain a written record documenting its compliance under the 80% investment policy provisions of the rule. Specifically, the written records documenting the fund's compliance that these funds will be required to maintain include: (1) the fund's record of which assets are invested in accordance with the investment focus the fund's name suggests (or, as applicable, consistent with the tax treatment suggested by a tax-exempt fund's name) and the basis for including each such asset in the 80% basket; (2) the value of the fund's 80% basket, as a percentage of the value of the fund's assets; (3) the reasons for any departures from the 80% investment policy; (4) the dates that the fund identifies any departures from the 80% investment policy; and (5) any notice sent to the fund's shareholders pursuant to the rule. The records under this requirement must be maintained for at least six years following the creation of each required record (or, in the case of notices, following the date the notice was sent), the first two years in an easily accessible place.

These requirements impose burdens on all funds, including those that are small entities. We expect that smaller funds—and more specifically, smaller funds that are not part of a fund complex—may not have recordkeeping systems that will meet all the elements that will be required under the final amendments. Also, while we expect larger funds or funds that are part of a large fund complex to incur higher costs related to the requirements in absolute terms relative to a smaller fund or a fund that is part of a smaller fund complex, we expect a smaller fund to find it more costly, per dollar managed, to comply with the requirements because it will not be able to benefit from a larger fund complex's economies of scale.

4. Disclosure and Reporting Requirements

The requirement for a fund that is subject to the 80% investment policy requirement to define the terms used in the fund's name, including the specific criteria the fund uses to select the investments the term describes, if any, in the fund's prospectus is designed to help investors better understand how the fund's investment strategies correspond with the investment focus that the fund's name suggests as well as to provide additional information about how the fund's management seeks to achieve the fund's objective. The final amendments require funds to tag this disclosure in Inline XBRL.

The final amendments also require funds (other than money market funds and BDCs) that will be required to adopt an 80% investment policy to report certain new information on Form N–PORT: (1) the percentage of the value of the fund's assets that are invested in accordance with the investment focus that the fund's name suggests (or consistent with the tax treatment suggested by a taxexempt fund's name); (2) with respect to each portfolio investment, whether the investment is included in the fund's calculation of assets in the fund's 80% basket; and (3) the definitions of the terms used in the fund's name, including the specific criteria the fund uses to select the investments that the term describes, if any. These Form N–PORT reporting requirements are designed to provide investors with information that may allow them to make better investment choices consistent with their investment preferences, as well as to increase the effectiveness of the Commission's oversight of a fund's compliance with the names rule.

These requirements will impose burdens on all funds, including those that are small entities. While we expect larger funds or funds that are part of a large fund complex to incur higher costs related to these requirements in absolute terms relative to a smaller fund or a fund that is part of a smaller fund complex, we expect a smaller fund to find it more costly, per dollar managed, to comply with these requirements because it would not be able to benefit from a larger fund complex's economies of scale. Notwithstanding the economies of scale experienced by larger versus smaller funds, we do not expect the costs of compliance associated with the new Form N–PORT requirements to be meaningfully different for smaller versus larger funds. The costs of compliance vary only based on fund characteristics tied to their name. For example, a fund whose investments move relatively more frequently in and out of the fund's 80% basket may incur a higher burden to comply with the requirement to report whether each portfolio investment is included in the fund's 80% basket, than a fund whose investments' inclusion in the 80% basket is relatively more stable. Furthermore, based on our experience implementing tagging requirements that use the XBRL, we recognize that some funds that will be affected by the requirement, particularly filers with no Inline XBRL tagging experience, likely will incur initial costs to acquire the necessary expertise and/or software as well as ongoing costs of tagging required information in Inline XBRL. The incremental effect of any fixed costs, including ongoing fixed costs, of complying with the Inline XBRL requirement may be greater for smaller filers. However, we believe that smaller funds in particular may benefit more from any enhanced exposure to investors that could result from these requirements. If reporting the disclosures in structured data language increases the availability of, or reduces the cost of collecting and analyzing, key information about funds, smaller funds may benefit from improved coverage by third-party information providers and data aggregators.

5. Treatment of UITs

The final rule amendments provide that the 80% investment policy and recordkeeping requirements will apply to UITs only at the time of initial deposit. This modification is designed to accommodate the practical realities that UITs would encounter if required to comply with the new provisions in the final amendments that require periodic review and potential rebalancing of a fund's portfolio. As a result, UITs that have names that are implicated by the final amendments and whose initial deposit occurs after the compliance date

of the final amendments will need to adopt an appropriate 80% investment policy, including making such a policy fundamental or providing notice to investors in the event of a change of the policy, if appropriate. However, such UITs will not be required to engage in the monitoring and other requirements associated with the final amendments' temporary departure requirements nor will they be required to keep records under the final amendments beyond the initial deposit. All UITs will be subject to the rule's other requirements under the final amendments, as applicable, as well as those of the Federal securities laws generally, including section 35(d) of the Investment Company Act. This treatment will be available to UITs of all sizes, including smaller UITs.

E. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish our stated objective, while minimizing any significant economic impact on small entities. We considered the following alternatives for small entities in relation to our proposal: (1) exempting funds that are small entities from the proposed reporting, recordkeeping, and other compliance requirements, to account for resources available to small entities; (2) establishing different reporting, recordkeeping, and other compliance requirements or frequency, to account for resources available to small entities; (3) clarifying, consolidating, or simplifying the compliance and reporting requirements under the proposal for small entities; and (4) using performance rather than design standards.

We do not believe that exempting small funds from the provisions of the final amendments will permit us to achieve our stated objectives. Only those investment companies that have certain names, such as those suggesting an investment focus or particular tax treatment, will be required to comply with most of the aspects of the final amendments. Further, consistent with the current rule, the 80% investment requirement in the final amendments allows a fund to maintain up to 20% of its assets in other investments. A fund seeking maximum flexibility with respect to its investments will continue to be free to use a name that does not require the fund to adopt an 80% investment policy.

We estimate that 82% of funds have investment policies specifying a minimum percentage of investments consistent with a certain investment focus and, of these, approximately 67% have an investment policy requiring at least 80% of fund investments be consistent with a certain investment focus.[633] This estimate indicates that some funds, including some small funds, will not bear the costs of adopting a new 80% investment policy, though such funds will likely need to update existing policies to account for elements of the final amendments. However, for small funds that will be more significantly affected by the final amendments, providing an exemption for them could subject investors in small funds to a higher degree of risk than investors to large funds that will be required to comply with the 80% investment policy and related elements of the final amendments.

We also do not believe, as a general matter, that it is appropriate to subject small funds to different reporting, recordkeeping, and other compliance requirements or frequency. Similar to the concerns discussed above, if the final rules were to include different requirements for small funds, this could raise investor protection concerns for investors in small funds in that a small fund would not be subject to requirements addressing materially deceptive and misleading fund names that are as robust as those requirements on a large fund. Also, this would result in the Commission and other market participants having less transparency and insight with respect to those smaller funds' 80% investment policies and related investments. However, as discussed in detail above, we do agree that additional time for smaller entities, which would include small funds, to come into compliance with the final rules would be appropriate to the extent that these entities may face additional or different challenges in coming into compliance with the amendments than larger entities. As result, small funds will have an additional six months to come into compliance with the final rules relative to larger entities.

We do not believe that clarifying, consolidating, or simplifying the compliance requirements under the final amendments for small funds, beyond that already required for all funds, would permit us to achieve our stated objectives. Again, this approach would raise investor protection concerns for investors in small funds and, as discussed above, the final amendments apply most of the rule's requirements and corresponding compliance burdens—only to certain fund names that are required to adopt an 80% investment policy.

The costs associated with the final amendments will vary depending on the fund's particular circumstances, and thus the amendments may result in different burdens on funds' resources. In particular, we expect that a fund that has a name that will be required to adopt an 80% investment policy under the final amendments will have higher costs than those that do not. Thus, to the extent a fund that is a small entity has a name that will not require the fund to adopt an 80% investment policy under the final amendments, we believe it will incur relatively low compliance costs. Further, some funds with names that will be newly subject to the 80% investment policy requirement may already have adopted an investment policy that requires them to invest 80% or more of the value of their assets in investments consistent with the name, or otherwise may already have investments that reflect the name's focus totaling 80% or more of the value of the fund's assets. These funds will not have to bear the burden of adjusting their portfolios or changing their name, and the burden of adopting an investment policy consistent with the names rule's requirements also could be relatively lower for these funds. However, we believe that it is appropriate for the costs associated with the final amendments to correlate with the costs of ensuring that the fund's name reflects its investments (and thus the expectations fostered with investors), as opposed to adjusting these costs to account for a fund's size, in light of how the final amendments are designed to further our investor protection objectives.

Finally, with respect to the use of performance rather than design standards, the final amendments generally use performance standards for all funds subject to the amendments, regardless of size. We believe that providing funds with the flexibility permitted in the final amendments with respect to designing 80% investment policies is appropriate because of the fact-specific nature of the investment focus of funds.

Statutory Authority

The Commission is adopting the amendments to rule 35d–1 under the authority set forth in sections 8, 30, 31, 34, 35, 38, 59, and 64 of the Investment Company Act of 1940 [15 U.S.C. 80a–8, 80a–29, 80a–30, 80a–33, 80a–34, 80a–37, 80a–58, and 80a–63]. The Commission is adopting amendments to Form N–1A, Form N–2, Form N–8B–2, Form S–6, and Form N–PORT under the authority set forth in sections 8, 30, 35, and 38 of the Investment Company Act

[633] *See supra* footnotes 468 and 469.

of 1940 [15 U.S.C. 80a–8, 80a–18, 80a–34, and 80a–37], sections 5, 6, 7, 8, 10, and 19 of the Securities Act of 1933 [15 U.S.C. 77e, 77f, 77g(a), 77h, 77j, and 77s(a)], and sections 10, 13, 15, 23, and 35A of the Exchange Act [15 U.S.C. 78j, 78m, 78o, 78w, and 78*ll*]. The Commission is adopting amendments to rules 11 and 405 of Regulation S–T under the authority set forth in section 23 of the Exchange Act [15 U.S.C. 78w]. The Commission is adopting amendments to rules 485 and 497 under the authority set forth in sections 10 and 19 of the Securities Act [15 U.S.C. 77j and 77s].

List of Subjects

17 CFR Part 230

Investment companies, Reporting and recordkeeping requirements, Securities.

17 CFR Part 232

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

17 CFR Part 239

Reporting and recordkeeping requirements, Securities.

17 CFR Parts 270 and 274

Investment companies, Reporting and recordkeeping requirements, Securities.

Text of Rule and Form Amendments

For the reasons set out in the preamble, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

■ 1. The authority citation for part 230 continues to read, in part, as follows:

Authority: 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l,* 78m, 78n, 78*o,* 78*o*–7 note, 78t, 78w, 78*ll*(d), 78mm, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, and Pub. L. 112–106, sec. 201(a), sec. 401, 126 Stat. 313 (2012), unless otherwise noted.

* * * * *

Sections 230.400 to 230.499 issued under secs. 6, 8, 10, 19, 48 Stat. 78, 79, 81, and 85, as amended (15 U.S.C. 77f, 77h, 77j, 77s).

* * * * *

■ 2. Amend § 230.485 by revising paragraph (c)(3) to read as follows:

§ 230.485 Effective date of post-effective amendments filed by certain registered investment companies.

* * * * *

(c) * * *

(3) A registrant's ability to file a post-effective amendment, other than an amendment filed solely for purposes of submitting an Interactive Data File, under paragraph (b) of this section is automatically suspended if a registrant fails to submit any Interactive Data File (as defined in § 232.11 of this chapter) required by the registration form on which the registrant is filing the post-effective amendment. A suspension under this paragraph (c)(3) shall become effective at such time as the registrant fails to submit an Interactive Data File as required by the relevant registration form. Any such suspension, so long as it is in effect, shall apply to any post-effective amendment that is filed after the suspension becomes effective, but shall not apply to any post-effective amendment that was filed before the suspension became effective. Any suspension shall apply only to the ability to file a post-effective amendment pursuant to paragraph (b) of this section and shall not otherwise affect any post-effective amendment. Any suspension under this paragraph (c)(3) shall terminate as soon as a registrant has submitted the Interactive Data File required by the relevant registration form.

* * * * *

■ 3. Amend § 230.497 by revising paragraphs (b), (c), (d), and (e) to read as follows:

§ 230.497 Filing of investment company prospectuses—number of copies.

* * * * *

(b) For unit investment trusts filing on § 274.12 of this chapter (Form N–8B–2) or § 239.16 of this chapter (Form S–6), within five days after the effective date of a registration statement or the commencement of a public offering after the effective date of a registration statement, whichever occurs later, 10 copies of each form of prospectus used after the effective date in connection with such offering shall be filed with the Commission in the exact form in which it was used. A registrant must submit an Interactive Data File (as defined in § 232.11 of this chapter) if required by the form on which it files its registration statement.

(c) For investment companies filing on §§ 239.15A and 274.11A of this chapter (Form N–1A), §§ 239.17a and 274.11b of this chapter (Form N–3), §§ 239.17b and 274.11c of this chapter (Form N–4), or §§ 239.17c and 274.11d of this chapter (Form N–6), within five days after the effective date of a registration statement or the commencement of a public offering after the effective date of a registration statement, whichever occurs later, 10 copies of each form of prospectus and form of Statement of Additional Information used after the effective date in connection with such offering shall be filed with the Commission in the exact form in which it was used. A registrant must submit an Interactive Data File (as defined in § 232.11 of this chapter) if required by the form on which it files its registration statement.

(d) After the effective date of a registration statement no prospectus which purports to comply with section 10 of the Act and which varies from any form of prospectus filed pursuant to paragraph (b) or (c) of this section shall be used until 10 copies thereof have been filed with, or mailed for filing to, the Commission. A registrant must submit an Interactive Data File (as defined in § 232.11 of this chapter) if required by the Form on which it files its registration statement.

(e) For investment companies filing on Form N–1A, Form N–3, Form N–4, or Form N–6, after the effective date of a registration statement, no prospectus that purports to comply with Section 10 of the Act (15 U.S.C. 77j) or Statement of Additional Information that varies from any form of prospectus or form of Statement of Additional Information filed pursuant to paragraph (c) of this section shall be used until five copies thereof have been filed with, or mailed for filing to the Commission. A registrant must submit an Interactive Data File (as defined in § 232.11 of this chapter) if required by the Form on which it files its registration statement.

* * * * *

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 4. The general authority citation for part 232 continues to read as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78*l,* 78m, 78n, 78*o*(d), 78w(a), 78*ll,* 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, 80b–4, 80b–6a, 80b–10, 80b–11, 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 5. Amend § 232.11 by revising the definition of ''Related Official Filing'' to read as follows:

§ 232.11 Definition of terms used in this part.

* * * * *

Related Official Filing. The term *Related Official Filing* means the ASCII or HTML format part of the official filing with which all or part of an Interactive Data File appears as an exhibit or, in the case of a filing on Form N–1A (§§ 239.15A and 274.11A of this chapter), Form N–2 (§§ 239.14 and 274.11a–1 of this chapter), Form N–3

(§§ 239.17a and 274.11b of this chapter), Form N–4 (§§ 239.17b and 274.11c of this chapter), Form N–6 (§§ 239.17c and 274.11d of this chapter), Form N–8B–2 (§ 274.12 of this chapter), Form S–6 (§ 239.16 of this chapter), and Form N–CSR (§ 274.128 of this chapter), and, to the extent required by § 232.405 (Rule 405 of Regulation S–T) for a business development company as defined in Section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48)), Form 10–K (§ 249.310 of this chapter), Form 10–Q (§ 249.308a of this chapter), and Form 8–K (§ 249.308 of this chapter), the ASCII or HTML format part of an official filing that contains the information to which an Interactive Data File corresponds.

* * * * *

■ 6. Amend § 232.405 by:
■ a. Revising the introductory text;
■ b. Revising paragraphs (a)(2), (a)(3)(i) introductory text, (a)(3)(ii), and (a)(4);
■ c. Revising paragraphs (b)(1) introductory text, (b)(2) introductory text, and (b)(2)(iv) and (v);
■ d. Adding paragraph (b)(2)(vi); and
■ e. Revising the last sentence in Note 1 to § 232.405.

The revision and addition read as follows.

§ 232.405 Interactive Data File submissions.

This section applies to electronic filers that submit Interactive Data Files. Section 229.601(b)(101) of this chapter (Item 601(b)(101) of Regulation S–K), General Instruction F of § 249.311 (Form 11–K), paragraph (101) of Part II—Information Not Required to be Delivered to Offerees or Purchasers of § 239.40 of this chapter (Form F–10), § 240.13a–21 of this chapter (Rule 13a–21 under the Exchange Act), paragraph 101 of the Instructions as to Exhibits of § 249.220f of this chapter (Form 20–F), paragraph B.(15) of the General Instructions to § 249.240f of this chapter (Form 40–F), paragraph C.(6) of the General Instructions to § 249.306 of this chapter (Form 6–K), § 240.17Ad–27(d) of this chapter (Rule 17Ad–27(d) under the Exchange Act), Note D.5 of § 240.14a–101 of this chapter (Rule 14a–101 under the Exchange Act), Item 1 of § 240.14c–101 of this chapter (Rule 14c–101 under the Exchange Act), General Instruction I of § 249.333 of this chapter (Form F–SR), General Instruction C.3.(g) of §§ 239.15A and 274.11A of this chapter (Form N–1A), General Instruction I of §§ 239.14 and 274.11a–1 of this chapter (Form N–2), General Instruction C.3.(h) of §§ 239.17a and 274.11b of this chapter (Form N–3), General Instruction C.3.(h) of §§ 239.17b and 274.11c of this chapter (Form N–4), General Instruction C.3.(h) of §§ 239.17c and 274.11d of this chapter (Form N–6), General Instruction 2.(*l*) of § 274.12 of this chapter (Form N–8B–2), General Instruction 5 of § 239.16 of this chapter (Form S–6), and General Instruction C.4 of §§ 249.331 and 274.128 of this chapter (Form N–CSR) specify when electronic filers are required or permitted to submit an Interactive Data File (§ 232.11), as further described in note 1 to this section. This section imposes content, format, and submission requirements for an Interactive Data File, but does not change the substantive content requirements for the financial and other disclosures in the Related Official Filing (as defined in § 232.11 of this chapter).

(a) * * *

(2) Be submitted only by an electronic filer either required or permitted to submit an Interactive Data File as specified by Item 601(b)(101) of Regulation S–K, General Instruction F of § 249.311 (Form 11–K), paragraph (101) of Part II—Information Not Required to be Delivered to Offerees or Purchasers of § 239.40 of this chapter (Form F–10), § 240.13a–21 of this chapter (Rule 13a–21 under the Exchange Act), paragraph 101 of the Instructions as to Exhibits of § 249.220f of this chapter (Form 20–F), paragraph B.(15) of the General Instructions to § 249.240f of this chapter (Form 40–F), paragraph C.(6) of the General Instructions to § 249.306 of this chapter (Form 6–K), Rule 17Ad–27(d) under the Exchange Act, Note D.5 of Rule 14a–101 under the Exchange Act), Item 1 of Rule 14c–101 under the Exchange Act, General Instruction I to § 249.333 of this chapter (Form F–SR), General Instruction C.3.(g) of §§ 239.15A and 274.11A of this chapter (Form N–1A), General Instruction I of §§ 239.14 and 274.11a–1 of this chapter (Form N–2), General Instruction C.3.(h) of §§ 239.17a and 274.11b of this chapter (Form N–3), General Instruction C.3.(h) of §§ 239.17b and 274.11c of this chapter (Form N–4), General Instruction C.3.(h) of §§ 239.17c and 274.11d of this chapter (Form N–6), General Instruction 2.(*l*) of § 274.12 of this chapter (Form N–8B–2), General Instruction 5 of § 239.16 of this chapter (Form S–6), or General Instruction C.4 of §§ 249.331 and 274.128 of this chapter (Form N–CSR), as applicable;

(3) * * *

(i) If the electronic filer is not a management investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a *et seq.*), a separate account as defined in Section 2(a)(14) of the Securities Act (15 U.S.C. 77b(a)(14)) registered under the Investment Company Act of 1940, a business development company as defined in Section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48)), a unit investment trust as defined in Section 4(2) of the Investment Company Act of 1940 (15 U.S.C. 80a–4), or a clearing agency that provides a central matching service, and is not within one of the categories specified in paragraph (f)(1)(i) of this section, as partly embedded into a filing with the remainder simultaneously submitted as an exhibit to:

* * * * *

(ii) If the electronic filer is a management investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a *et seq.*), a separate account (as defined in Section 2(a)(14) of the Securities Act (15 U.S.C. 77b(a)(14)) registered under the Investment Company Act of 1940, a business development company as defined in Section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48)), a unit investment trust as defined in Section 4(2) of the Investment Company Act of 1940 (15 U.S.C. 80a–4), or a clearing agency that provides a central matching service, and is not within one of the categories specified in paragraph (f)(1)(ii) of this section, as partly embedded into a filing with the remainder simultaneously submitted as an exhibit to a filing that contains the disclosure this section requires to be tagged; and

(4) Be submitted in accordance with the EDGAR Filer Manual and, as applicable, § 229.601(b)(101) of this chapter (Item 601(b)(101) of Regulation S–K), General Instruction F of § 249.311 of this chapter (Form 11–K), paragraph (101) of Part II—Information Not Required to be Delivered to Offerees or Purchasers of § 239.40 of this chapter (Form F–10), § 240.13a–21 of this chapter (Rule 13a–21 under the Exchange Act), paragraph 101 of the Instructions as to Exhibits of § 249.220f of this chapter (Form 20–F), paragraph B.(15) of the General Instructions to § 249.240f of this chapter (Form 40–F), paragraph C.(6) of the General Instructions to § 249.306 of this chapter (Form 6–K), Rule 17Ad–27(d) under the Exchange Act, Note D.5 of Rule 14a–101 under the Exchange Act, Item 1 of Rule 14c–101 under the Exchange Act, General Instruction I to § 249.333 of this chapter (Form F–SR), General Instruction C.3.(g) of §§ 239.15A and 274.11A of this chapter (Form N–1A), General Instruction I of §§ 239.14 and 274.11a–1 of this chapter (Form N–2), General Instruction C.3.(h) of §§ 239.17a and 274.11b of this chapter (Form N–3), General Instruction C.3.(h) of §§ 239.17b

and 274.11c of this chapter (Form N–4), General Instruction C.3.(h) of §§ 239.17c and 274.11d of this chapter (Form N–6); Instruction 2.(*l*) of § 274.12 of this chapter (Form N–8B–2); General Instruction 5 of § 239.16 of this chapter (Form S–6); or General Instruction C.4 of §§ 249.331 and 274.128 of this chapter (Form N–CSR).

(b) * * *

(1) If the electronic filer is not a management investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a *et seq.*), a separate account (as defined in Section 2(a)(14) of the Securities Act (15 U.S.C. 77b(a)(14)) registered under the Investment Company Act of 1940, a business development company as defined in Section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48)), a unit investment trust as defined in Section 4(2) of the Investment Company Act of 1940 (15 U.S.C. 80a–4), or a clearing agency that provides a central matching service, an Interactive Data File must consist of only a complete set of information for all periods required to be presented in the corresponding data in the Related Official Filing, no more and no less, from all of the following categories:

* * * * *

(2) If the electronic filer is an open-end management investment company registered under the Investment Company Act of 1940, a separate account (as defined in section 2(a)(14) of the Securities Act) registered under the Investment Company Act of 1940 (15 U.S.C. 80a *et seq.*), a unit investment trust as defined in Section 4(2) of the Investment Company Act of 1940 (15 U.S.C. 80a–4), or a clearing agency that provides a central matching service, an Interactive Data File must consist of only a complete set of information for all periods required to be presented in the corresponding data in the Related Official Filing, no more and no less, from the information set forth in:

* * * * *

(iv) Items 2, 4, 5, 10, 11, and 18 of §§ 239.17c and 274.11d of this chapter (Form N–6);

(v) Any disclosure provided in response to Item 18 of §§ 249.331 and 274.128 of this chapter (Form N–CSR), or

(vi) Item 11 of § 274.12 of this chapter (Form N–8B–2) pursuant to Instruction 2, including to the extent required by § 239.16 of this chapter (Form S–6); as applicable.

* * * * *

Note 1 to § 232.405:

* * * For an issuer that is a management investment company or separate account registered under the Investment Company Act of 1940 (15 U.S.C. 80a *et seq.*), a business development company as defined in Section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48)), or a unit investment trust as defined in Section 4(2) of the Investment Company Act of 1940 (15 U.S.C. 80a–4), General Instruction C.3.(g) of Form N–1A (§§ 239.15A and 274.11A of this chapter), General Instruction I of Form N–2 (§§ 239.14 and 274.11a–1 of this chapter), General Instruction C.3.(h) of Form N–3 (§§ 239.17a and 274.11b of this chapter), General Instruction C.3.(h) of Form N–4 (§§ 239.17b and 274.11c of this chapter), General Instruction C.3.(h) of Form N–6 (§§ 239.17c and 274.11d of this chapter), General Instruction 2.(*l*) of Form N–8B–2 (§ 274.12 of this chapter), General Instruction 5 of Form S–6 (§ 239.16 of this chapter), and General Instruction C.4 of Form N–CSR (§§ 249.331 and 274.128 of this chapter), as applicable, specifies the circumstances under which an Interactive Data File must be submitted.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 7. The general authority citation for part 239 continues to read as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78*l,* 78m, 78n, 78*o*(d), 78*o*–7 note, 78u–5, 78w(a), 78*ll,* 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a13, 80a–24, 80a–26, 80a–29, 80a–30, 80a–37, and sec. 71003 and sec. 84001, Pub. L. 114–94, 129 Stat. 1321, unless otherwise noted.

* * * * *

■ 8. Amend Form S–6 (referenced in §§ 239.16) by adding General Instruction 5.

Note: Form S–6 is attached as Appendix A to this document. Form S–6 will not appear in the Code of Federal Regulations.

* * * * *

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

■ 9. The general authority citation for part 270 continues to read as follows:

Authority: 15 U.S.C. 80a–1 *et seq.,* 80a–34(d), 80a–37, 80a–39, and Pub. L. 111–203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

■ 10. Section 270.35d–1 is revised to read as follows:

§ 270.35d–1 Investment company names.

(a) *Materially deceptive and misleading fund names.* For purposes of section 35(d) of the Act (15 U.S.C. 80a–34(d)), a materially deceptive and misleading name of a fund includes:

(1) *Names suggesting guarantee or approval by the United States Government.* A name suggesting that the fund or the securities issued by it are guaranteed, sponsored, recommended, or approved by the United States Government or any United States Government agency or instrumentality, including any name that uses the words ''guaranteed'' or ''insured'' or similar terms in conjunction with the words ''United States'' or ''U.S. Government.''

(2) *Names suggesting an investment focus.* A name that includes terms suggesting that the fund focuses its investments in: a particular type of investment or investments; a particular industry or group of industries; particular countries or geographic regions; or investments that have, or whose issuers have, particular characteristics (*e.g.,* a name with terms such as ''growth'' or ''value,'' or terms indicating that the fund's investment decisions incorporate one or more environmental, social, or governance factors), unless:

(i) The fund has adopted a policy to invest, under normal circumstances, at least 80% of the value of its assets in investments in accordance with the investment focus that the fund's name suggests. For a name suggesting that the fund focuses its investments in a particular country or geographic region, investments that are in accordance with the investment focus that the fund's name suggests are investments that are tied economically to the particular country or geographic region suggested by its name;

(ii) The policy described in paragraph (a)(2)(i) of this section is a fundamental policy, or the fund has adopted a policy to provide the fund's shareholders with at least 60 days' prior notice of any change in the policy described in paragraph (a)(2)(i) of this section, and any change in the fund's name that accompanies the change, that meets the provisions of paragraph (e) of this section; and

(iii) Any terms used in the fund's name that suggest that the fund focuses its investments as described in paragraph (a)(2)(i) of this section are consistent with those terms' plain English meaning or established industry use.

(3) *Tax-exempt funds.* A name suggesting that the fund's distributions are exempt from Federal income tax or from both Federal and State income tax, unless:

(i) The fund has adopted a fundamental policy:

(A) To invest, under normal circumstances, at least 80% of the value of its assets in investments the income from which is exempt, as applicable,

from Federal income tax or from both Federal and State income tax; or

(B) To invest, under normal circumstances, its assets so that at least 80% of the income that it distributes will be exempt, as applicable, from Federal income tax or from both Federal and State income tax; and

(ii) Any terms used in the fund's name that suggest that the fund invests its assets as described in paragraph (a)(3)(i) of this section are consistent with those terms' plain English meaning or established industry use.

(b) *Operation of policies and related recordkeeping.* (1) The requirements of paragraph (a)(2)(i) and (a)(3)(i) of this section apply at the time a fund invests its assets, provided that:

(i) The fund must review its portfolio investments' inclusion in the fund's 80% basket, as defined in paragraph (g) of this section, at least quarterly. If, subsequent to an investment, the fund identifies that the requirements of paragraph (a)(2)(i) or (a)(3)(i) of this section, as applicable, are no longer met, the fund must make future investments in a manner that will bring the fund into compliance with those paragraphs as soon as reasonably practicable, and in all circumstances within 90 consecutive days of the fund's identification that those requirements are no longer met;

(ii) If the fund departs from the requirements of paragraph (a)(2)(i) or (a)(3)(i) of this section, as applicable, in other-than-normal circumstances, the fund must come back into compliance with the requirements of those paragraphs within 90 consecutive days, measured from the time of the initial departure; and

(iii) A fund may temporarily invest less than 80% of the value of its assets in accordance with the fund's investment focus as otherwise required by paragraph (a)(2)(i) or (a)(3)(i) of this section, as applicable, to reposition or liquidate the fund's assets in connection with a reorganization, to launch the fund, or when notice of a change in a fund's policy as described in paragraph (a)(2)(ii) of this section has been provided to fund shareholders.

(2) For the purpose of determining the fund's compliance with an investment policy adopted under paragraph (a)(2)(i) or (a)(3)(i)(A) of this section, in addition to any derivatives instrument that the fund includes in its 80% basket because the derivatives instrument provides investment exposure to investments suggested by the fund's name, a fund may include in its 80% basket a derivatives instrument that provides investment exposure to one or more of the market risk factors associated with the investment focus that the fund's name suggests.

(3) A fund must maintain written records documenting its compliance under paragraphs (a) and (b) of this section, as applicable. A fund must maintain written records, at the time a fund invests its assets, documenting: whether the investment the fund makes is included in the fund's 80% basket and, if so, the basis for including such investment in the fund's 80% basket; and the value of the fund's 80% basket, as a percentage of the value of the fund's assets. A fund must maintain written records documenting its review of its portfolio investments' inclusion in the fund's 80% basket, as described in paragraph (b)(1)(i) of this section, including whether each investment is included in the fund's 80% basket and the basis for including such investment in the 80% basket. If during the review of portfolio investments' inclusion in the fund's 80% basket or otherwise, the fund identifies that the requirements of paragraph (a)(2)(i) or (a)(3)(i) of this section, as applicable, are no longer met, the fund must maintain written records documenting: the date this was identified; and the reason for any departure from the policies described in paragraphs (a)(2)(i) and (a)(3)(i) of this section. If the fund departs from the requirements of paragraph (a)(2)(i) or (a)(3)(i) of this section, as applicable, in other-than-normal circumstances as described in paragraph (b)(1)(ii) of this section, or as described in paragraph (b)(1)(iii) of this section, the fund must keep records documenting: the date of any departure from the policies described in paragraphs (a)(2)(i) and (a)(3)(i) of this section; and the reason for any such departure (including why the fund determined that circumstances are other-than-normal). A fund must maintain records of any notice sent to the fund's shareholders pursuant to paragraph (d) of this section. Written records documenting the fund's compliance under paragraphs (a) and (b) of this section must be maintained for a period of not less than six years following the creation of each required record (or, in the case of notices, following the date the notice was sent), the first two years in an easily accessible place.

(c) *Effect of compliance with policy adopted under paragraph (a)(2)(i) or (a)(3)(i).* A fund name may be materially deceptive or misleading under section 35(d) of the Act even if the fund adopts and implements a policy under paragraph (a)(2)(i) or (a)(3)(i) of this section and otherwise complies with the requirements of paragraph (a)(2) or (a)(3) of this section, as applicable.

(d) *Notice.* A policy to provide a fund's shareholders with notice of a change in a fund's policy as described in paragraph (a)(2)(ii) of this section must provide that:

(1) The notice will be provided in plain English separately from any other documents (provided, however, that if the notice is delivered in paper form, it may be provided in the same envelope as other written documents);

(2) The notice will contain the following prominent statement, or similar clear and understandable statement, in bold-face type: ''Important Notice Regarding Change in Investment Policy [and Name]'', provided that:

(i) If the notice is provided in paper form, the statement also will appear on the envelope in which the notice is delivered; and

(ii) If the notice is provided electronically, the statement also will appear on the subject line of the email communication that includes the notice or an equivalent indication of the subject of the communication in other forms of electronic media; and

(3) The notice must describe, as applicable, the fund's policy adopted under paragraph (a)(2)(i) of this section, the nature of the change to the policy, the fund's old and new names, and the effective date of any policy and/or name changes.

(e) *Unit investment trusts.* The requirements of paragraphs (a)(2)(i), (a)(3)(i), and (b)(3) of this section shall apply to any unit investment trust (as defined in section 4(2) of the Act (15 U.S.C. 80a–4(2)) only at the time of initial deposit of portfolio securities.

(f) *Unlisted registered closed-end funds and business development companies.* Notwithstanding the requirements of paragraph (a)(2)(ii) of this section, if the fund is a closed-end company or business development company, and the fund does not have shares that are listed on a national securities exchange, any policy adopted pursuant to paragraph (a)(2) of this section can be changed only if authorized by the vote of the majority of the outstanding voting securities of such fund unless:

(1) The fund conducts a tender or repurchase offer to allow shareholders to redeem shares, in accordance with all applicable Commission rules, in advance of any change in such policy;

(2) The fund provides the fund's shareholders with at least 60 days' prior notice of any change in such policy in advance of the tender or repurchase offer described in paragraph (f)(1) of this section;

(3) The tender or repurchase offer described in paragraph (f)(1) of this section is not oversubscribed; and

(4) In the event of a tender offer, the fund purchases shares at their net asset value.

(g) *Definitions.* For purposes of this section:

Assets means net assets, plus the amount of any borrowings for investment purposes. In determining the value of a fund's assets for purposes of this section, a fund must value each derivatives instrument using the instrument's notional amount (which must be converted to 10-year bond equivalents for interest rate derivatives and delta adjusted for options contracts) and must value each physical short position using the value of the asset sold short. The fund may reduce the value of its assets by excluding any cash and cash equivalents, and U.S. Treasury securities with remaining maturities of one year or less, up to the notional amount of the derivatives instrument(s) and the value of asset(s) sold short, and also exclude any closed-out derivatives positions if those positions result in no credit or market exposure to the fund. A fund must exclude from this calculation derivatives instruments used to hedge currency risks associated with one or more specific foreign-currency-denominated equity or fixed-income investments held by the fund, provided that such currency derivatives are entered into and maintained by the fund for hedging purposes and that the notional amounts of such derivatives do not exceed the value of the hedged investments (or the par value thereof, in the case of fixed-income investments) by more than 10 percent.

Derivatives instrument means any swap, security-based swap, futures contract, forward contract, option, any combination of the foregoing, or any similar instrument.

Eighty percent (80%) basket means investments that are invested in accordance with the investment focus that the fund's name suggests (or as described in paragraph (a)(3)(i) of this section).

Fund means a registered investment company or a business development company, including any separate series thereof.

Fundamental policy means a policy that a fund adopts under section 8(b)(3) of the Act (15 U.S.C. 80a–8(b)(3)) or, in the case of a business development company, a policy that is changeable only if authorized by the vote of a majority of the outstanding voting securities of the fund.

Launch means a period, not to exceed 180 consecutive days, starting from the date the fund commences operations.

Oversubscribed means shareholders have tendered or requested repurchase of a greater number of shares than the fund has offered to purchase in accordance with applicable Commission rules.

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

■ 11. The authority for part 274 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78*l,* 78m, 78n, 78*o*(d), 80a–8, 80a–24, 80a–26, 80a–29, and 80a–37 unless otherwise noted.

■ 12. Amend Form N–1A (referenced in §§ 239.15A and 274.11A) by revising paragraph (a)(1) of Item 4 and adding new instruction 8 to paragraph (b)(1) of Item 9.

Note: Form N–1A is attached as Appendix B to this document. Form N–1A will not appear in the Code of Federal Regulations.

■ 13. Amend Form N–2 (referenced in §§ 239.14 and 274.11a–1) by revising Item 8.

Note: Form N–2 is attached as Appendix C to this document. Form N–2 will not appear in the Code of Federal Regulations.

■ 14. Amend Form N–8B–2 (referenced in § 274.12) by adding new General Instruction 2.(*l*) and by revising the Instruction to Item 11.

Note: Form N–8B–2 is attached as Appendix D to this document. Form N–8B–2 will not appear in the Code of Federal Regulations.

■ 15. Amend Form N–PORT (referenced in § 274.150) by revising General Instruction A, Part B, and Part C.

Note: Form N–PORT is attached as Appendix E to this document. Form N–PORT will not appear in the Code of Federal Regulations.

By the Commission.

Dated: September 20, 2023.

Vanessa A. Countryman,

Secretary.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendix A—Form S–6

Form S–6

* * * * *

General Instructions

* * * * *

Instruction 5. Interactive Data

(a) An Interactive Data File (as defined in § 232.11 of this chapter) is required to be submitted to the Commission in the manner provided by § 232.405 of this chapter (Rule 405 of Regulation S–T) for any registration statement or post-effective amendment thereto filed on Form S–6 that includes or amends information provided in response to Instruction 2 to Item 11 of Form N–8B–2 (as provided on this Form pursuant to Instruction 1(a) of the Instructions as to the Prospectus of this Form).

(1) Except as required by paragraph (a)(2), the Interactive Data File must be submitted as an amendment to the registration statement to which the Interactive Data File relates. The amendment must be submitted on or before the date the registration statement or post-effective amendment that contains the related information becomes effective.

(2) In the case of a post-effective amendment to a registration statement filed pursuant to paragraphs (b)(1)(i), (ii), (v), or (vii) of § 230.485 of this chapter (Rule 485 under the Securities Act), the Interactive Data File must be submitted either with the filing, or as an amendment to the registration statement to which the Interactive Data Filing relates that is submitted on or before the date the post-effective amendment that contains the related information becomes effective.

(b) An Interactive Data File is required to be submitted to the Commission in the manner provided by Rule 405 of Regulation S–T for any form of prospectus filed pursuant to paragraphs (b) or (d) of Rule 497 under the Securities Act that includes information provided in response to Instruction 2 to Item 11 of Form N–8B–2 (as provided on this Form pursuant to Instruction 1(a) of the Instructions as to the Prospectus of this Form) that varies from the registration statement. The Interactive Data File must be submitted with the filing made pursuant to Rule 497.

(c) All interactive data must be submitted in accordance with the specifications in the EDGAR Filer Manual.

* * * * *

Appendix B—Form N–1A

Form N–1A

* * * * *

Item 4. Risk/Return Summary: Investments, Risks, and Performance

Include the following information, in plain English under rule 421(d) under the Securities Act, in the order and subject matter indicated:

(a) Principal Investment Strategies of the Fund.

(1) Based on the information given in response to Item 9(b), summarize how the Fund intends to achieve its investment objectives by identifying the Fund's principal investment strategies (including the type or types of securities in which the Fund invests or will invest principally) and any policy to concentrate in securities of issuers in a particular industry or group of industries.

Instruction: If the Fund is subject to paragraph (a)(2)(i) or (a)(3)(i) of rule 35d–1 [17 CFR 270.35d–1], the Fund's disclosure provided in response to Item 4(a)(1) must summarize the definitions of the terms used

in its name, including the specific criteria the Fund uses to select the investments the term describes, if any. For purposes of this instruction, ''terms'' means any word or phrase used in a Fund's name, other than any trade name of the Fund or its adviser, related to the Fund's investment focus or strategies.

* * * * *

Item 9. Investment Objectives, Principal Investment Strategies, Related Risks, and Disclosure of Portfolio Holdings

* * * * *

(b) * * * Instructions

* * * * *

8. If the Fund is subject to paragraph (a)(2)(i) or (a)(3)(i) of rule 35d–1 [17 CFR 270.35d–1], the Fund's disclosure provided in response to Item 9(b)(1) must include the definitions of the terms used in its name, including the specific criteria the Fund uses to select the investments the term describes, if any. For purposes of this instruction, ''terms'' means any word or phrase used in a Fund's name, other than any trade name of the Fund or its adviser, related to the Fund's investment focus or strategies.

Appendix C—Form N–2

Form N–2

* * * * *

Part A—Information Required in a Prospectus

* * * * *

Item 8. General Description of the Registrant

* * * * *

2. * * *

b. * * *

Instructions

1. Concentration, for purposes of this Item, is deemed 25 percent or more of the value of the Registrant's total assets invested or proposed to be invested in a particular industry or group of industries. The policy on concentration should not be inconsistent with the Registrant's name.

2. If the Fund is subject to paragraph (a)(2)(i) or (a)(3)(i) of rule 35d–1 [17 CFR 270.35d–1], the Fund's disclosure provided in response to Item 8(2)(b)(2) must include definitions of the terms used in its name, including the specific criteria the Fund uses to select the investments the term describes, if any. For purposes of this instruction, ''terms'' means any word or phrase used in a Fund's name, other than any trade name of the Fund or its adviser, related to the Fund's investment focus or strategies.

* * * * *

Appendix D—Form N–8B–2

Form N–8B–2

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General Instructions for Form N–8B–2

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2. Preparation and Filing of Registration Statement

(l) Interactive Data

(1) An Interactive Data File as defined in rule 11 of Regulation S–T [17 CFR 232.11] is required to be submitted to the Commission in the manner provided by rule 405 of Regulation S–T [17 CFR 232.405] for any registration statement on Form N–8B–2 that includes information provided in response to Item 11 pursuant to Instruction 2 of that Item. The Interactive Data File must be submitted with the filing to which it relates on the date such filing becomes effective.

(2) All interactive data must be submitted in accordance with the specifications in the EDGAR Filer Manual.

* * * * *

II. General Description of the Trust and Securities of the Trust

* * * * *

Information Concerning the Securities Underlying the Trust's Securities

* * * * *

Instructions:

1. The registrant need disclose information only with respect to an issuer that derived more than 15% of its gross revenues from the business of a broker, a dealer, an underwriter, or an investment adviser during its most recent fiscal year. If the registrant has issued more than one class or series of securities, the requested information must be disclosed for the class or series that has securities that are being registered.

2. If the trust is subject to paragraph (a)(2)(i) or (a)(3)(i) of rule 35d–1 [17 CFR 270.35d–1], the trust's disclosure provided in response to item 11 must include definitions of the terms used in its name, including the specific criteria used to select the investments the term describes, if any. For purposes of this instruction, ''terms'' means any word or phrase used in a trust's name, other than any trade name of the trust or its depositor, related to the trust's investment focus.

* * * * *

Appendix E—Form N–PORT

Form N–PORT

* * * * *

General Instructions

A. Rule as To Use of Form N–PORT

Form N–PORT is the reporting form that is to be used for monthly reports of Funds other than money market funds and SBICs under section 30(b) of the Act, as required by rule 30b1–9 under the Act (17 CFR 270.30b1–9). Funds must report information quarterly about their portfolios and each of their portfolio holdings as of the last business day, or last calendar day, of each month, other than the information reported in Items B.9 and C.2.e, which Funds must report quarterly about their portfolios and each of their portfolio holdings as of the last business day, or calendar day, of the third month of the quarter. A registered investment company that has filed a registration statement with the Commission registering its securities for the first time under the Securities Act of 1933 is relieved of this reporting obligation with respect to any reporting period or portion thereof prior to the date on which that registration statement becomes effective or is withdrawn.

Reports on Form N–PORT must disclose portfolio information as calculated by the fund for the reporting period's ending net asset value (commonly, and as permitted by rule 2a–4, the first business day following the trade date). A Fund must maintain in its records the information that is required to be included on Form N–PORT no later than 30 days after the end of each month, other than the information reported in Items B.9 and C.2.e which is required to be maintained no later than 30 days after the end of each quarter. Such information shall be treated as a record under section 31(a)(1) of the Act and rule 31a–1(b) thereunder subject to the requirements of rule 31a–2(a)(2). Reports on Form N–PORT for each month in each fiscal quarter of a fund must be filed with the Commission no later than 60 days after the end of such fiscal quarter. If the due date falls on a weekend or holiday, the filing deadline will be the next business day.

A Fund may file an amendment to a previously filed report at any time, including an amendment to correct a mistake or error in a previously filed report. A Fund that files an amendment to a previously filed report must provide information in response to all items of Form N–PORT, regardless of why the amendment is filed.

* * * * *

Part B: Information About the Fund

* * * * *

Item B.9 Investment Company Act Names Rule Investment Policy. If the Fund is required to adopt a policy as described in rule 35d–1(a)(2)(i) or (a)(3)(i) [17 CFR 270.35d–1(a)(2)(i) or (3)(i)], provide the following:

a. The definitions of the terms used in the Fund's name, including the specific criteria the Fund uses to select the investments the term describes, if any; and

b. The value of the Fund's 80% basket, as defined in rule 35d–1(g)(1), as a percentage of the value of the Fund's assets.

Instruction to Item B.9:

Consistent with rule 35d–1(g)(2), if the Fund uses a derivatives instrument's notional amount (which must be converted to 10-year bond equivalents for interest rate derivatives and delta adjusted for options contracts) and/or values a physical short position using the value of the asset sold short, for purposes of determining the fund's compliance with an investment policy adopted under rule 35d–1(a)(2)(i) or (a)(3)(i)(A), the percentage that the Fund reports in response to Item B.9.b must reflect the use of notional amounts with certain adjustments (and/or the value of the asset sold short) as set forth above. This percentage also must reflect any reduction of the value of the Fund's assets resulting from, as applicable, the fund's exclusion of cash and cash equivalents and U.S. Treasury securities with remaining maturities of one year or less, closed-out derivatives positions,

and currency derivatives instruments, each as provided in rule 35d–1(g)(2).

* * * * *

Part C: Schedule of Portfolio Investments

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Item C.2. Amount of each investment.

* * * * *

e. If the Fund is required to adopt a policy as described in rule 35d–1(a)(2)(i) or (a)(3)(i) [17 CFR 270.35d–1(a)(2)(i) or (3)(i)], is the investment included in the Fund's 80% basket, as defined in rule 35d–1(g), as applicable? [Y/N]

* * * * *

[FR Doc. 2023–20793 Filed 10–10–23; 8:45 am]

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Part III

Environmental Protection Agency

40 CFR Part 705
Toxic Substances Control Act Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 705

[EPA–HQ–OPPT–2020–0549; FRL–7902–02–OCSPP]

RIN 2070–AK67

Toxic Substances Control Act Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing reporting and recordkeeping requirements for per- and polyfluoroalkyl substances (PFAS) under the Toxic Substances Control Act (TSCA). In accordance with obligations under TSCA, as amended by the National Defense Authorization Act for Fiscal Year 2020, EPA is requiring persons that manufacture (including import) or have manufactured these chemical substances in any year since January 1, 2011, to submit information to EPA regarding PFAS uses, production volumes, byproducts, disposal, exposures, and existing information on environmental or health effects. In addition to fulfilling statutory obligations under TSCA, this rule will enable EPA to better characterize the sources and quantities of manufactured PFAS in the United States.

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

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPPT–2020–0549, is available online at *https://www.regulations.gov.* Additional instructions for visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Alie Muneer, Data Gathering and Analysis Division (7406M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–6369; email address: *muneer.alie@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 may apply to you if you have manufactured (defined by statute at 15 U.S.C. 2602(9) to include import) PFAS for a commercial purpose at any time since January 1, 2011. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Construction (NAICS code 23);
- Manufacturing (NAICS code 31 through 33);
- Wholesale trade (NAICS code 42);
- Retail trade (NAICS code 44 through 45); and
- Waste management and remediation services (NAICS code 562).

This list details the types of entities that EPA is aware could potentially be regulated by this action. Other types of entities not listed 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 705.10 and 705.12. 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 is the Agency's authority for taking this action?

EPA is promulgating this rule pursuant to its authority in TSCA section 8(a)(7) (15 U.S.C. 2607(a)(7)). The National Defense Authorization Act for Fiscal Year 2020 (FY 2020 NDAA) (Pub. L. 116–92, section 7351) amended TSCA section 8(a) in December 2019, adding section 8(a)(7), titled ''PFAS Data.'' TSCA section 8(a)(7) requires EPA to promulgate a rule ''requiring each person who has manufactured a chemical substance that is a [PFAS] in any year since January 1, 2011'' to report information described in TSCA section 8(a)(2)(A) through (G). This includes a broad range of information, such as information related to chemical identity and structure, production, use, byproducts, exposure, disposal, and health and environmental effects.

TSCA section 14 imposes requirements for the assertion, substantiation, and review of information that is claimed as confidential business information (CBI).

C. What action is the Agency taking?

In this action, EPA is promulgating reporting and recordkeeping requirements for entities who have manufactured (including imported) a PFAS for commercial purposes at any point since January 1, 2011. This rule takes into consideration comments received on the proposed rule (86 FR 33926, June 28, 2021 (FRL–10017–78)) input from the Small Business Advocacy Review (SBAR) Panel that was convened following publication of the proposed rule, and comments received on the SBAR Panel Report and Initial Regulatory Flexibility Analysis (IRFA), which EPA published with a Notice of Data Availability (NODA) (Ref. 1). Details on the final rule requirements, including modifications from the proposal, are explained in Unit III.

EPA is finalizing this rule both to fulfill its obligations under TSCA section 8(a)(7), as amended by the FY 2020 NDAA, and to create a more comprehensive database of previously manufactured PFAS to improve the Agency's understanding of PFAS in commerce and to support actions to address PFAS exposure and contamination.

D. Why is the Agency taking this action?

TSCA section 8(a)(7) requires EPA to promulgate a rule requiring each person who has manufactured a PFAS in any year since January 1, 2011, to report certain information for each year since January 1, 2011.

E. What are the incremental economic impacts?

EPA has evaluated the costs and benefits of this rulemaking and provided an Economic Analysis of the potential impacts associated with this rule (Ref. 2). The primary benefit of this rule is providing EPA with data on PFAS which have been manufactured, including imported, for commercial purposes since 2011; the Agency is not currently aware of any similar source of information for these substances of interest. Subsequently, EPA will use these data to support activities addressing PFAS under TSCA, as well as activities and programs under other environmental statutes. The additional data on the production, use, exposure, and environmental and health effects of PFAS in the United States may allow EPA to more effectively determine whether additional risk assessment and management measures are needed. This information may lead to reduced costs of risk-based decision making and improved decisions concerning PFAS.

EPA has evaluated the potential costs of this reporting and recordkeeping requirement for manufacturers and article importers. Since the notice of proposed rulemaking for this action

published on June 28, 2021 (86 FR 33926 (FRL–10017–78)), EPA found additional data and received feedback via public comments to update its economic analysis, including estimating the number of PFAS article importers. EPA revised cost estimates from $10.8 million in industry costs detailed in the draft Economic Analysis for the proposed rule to $876 million detailed in the IRFA and NODA (Ref. 1), to $843 million using a 3 percent discount rate and $800 million using a 7 percent discount rate at the final rule stage. The final Economic Analysis (Ref. 2), which is available in the docket, is briefly summarized here. The regulated community is expected to incur one-time burdens and costs associated with rule familiarization, compliance determination, form completion, CBI claim substantiation, recordkeeping, and electronic reporting activities. Industry is estimated to incur a burden of approximately 11.6 million hours, with a cost of approximately $843 million and $800 million under a 3 percent and 7 percent discount rate, respectively. The Agency is expected to incur a cost of $1.6 million. The total social cost is therefore estimated to be approximately $844.8 million and $801.7 million under a 3 percent and 7 percent discount rate, respectively.

II. Background

A. What are PFAS?

PFAS are a group of synthetic chemicals that have been in use since the 1940s and can be found in a wide array of industrial and consumer products (Refs. 2 and 3). PFAS are synthesized for many different uses, ranging from firefighting foams to coatings for clothes and furniture, to food contact substances, to the manufacture of other chemicals and products. They are used in a wide variety of products, including textiles, electronics, wires and cables, pipes, cooking and bakeware, sport articles, automotive products, toys, transportation equipment, and musical instruments, which may be imported into the United States as finished articles (Ref. 2). PFAS can be released to the environment throughout the lifecycle of manufacturing, processing, distribution, use, and disposal (Refs. 3 and 4). There is evidence that exposure to some PFAS in the environment may be linked to harmful health effects in humans and animals, and that continued exposure above specific levels to certain PFAS may lead to adverse health effects (Refs. 2, 3, and 4).

B. What is TSCA section 8(a)(7)?

On December 20, 2019, the National Defense Authorization Act for Fiscal Year 2020 (NDAA) was signed into law (Pub. L. 116–92). Among other provisions, section 7321 of NDAA added TSCA section 8(a)(7) which states that the Administrator shall promulgate a rule in accordance with this subsection requiring each person who has manufactured a chemical substance that is a perfluoroalkyl or polyfluoroalkyl substance (PFAS) in any year since January 1, 2011, to submit to the Administrator a report that includes, for each year since January 1, 2011, the information described in subparagraphs (A) through (G) of paragraph (2). The categories of information described in sections 8(a)(2)(A) through (G) are:

- The common or trade name, chemical identity and molecular structure of each chemical substance or mixture for which a report is required;
- Categories or proposed categories of use for each substance or mixture;
- Total amount of each substance or mixture manufactured or processed, the amounts manufactured or processed for each category of use, and reasonable estimates of the respective proposed amounts;
- Descriptions of byproducts resulting from the manufacture, processing, use, or disposal of each substance or mixture;
- All existing information concerning the environmental and health effects of each substance or mixture;
- The number of individuals exposed, and reasonable estimates on the number of individuals who will be exposed, to each substance or mixture in their places of work and the duration of their exposure; and
- The manner or method of disposal of each substance or mixture, and any change in such manner or method.

Finally, in carrying out TSCA section 8, section 8(a)(5) requires EPA, to the extent feasible, to (A) not require unnecessary or duplicative reporting, (B) minimize compliance costs on small manufacturers and processors, and (C) apply any reporting obligations to those persons likely to have information relevant to effective implementation of TSCA.

C. What did EPA propose?

In the proposed rule, EPA published for the reporting and recordkeeping requirements for PFAS manufacturers under TSCA section 8(a)(7). EPA proposed to require any entity who had commercially manufactured a PFAS that is a TSCA chemical substance at any time since January 1, 2011, to electronically report certain information to EPA regarding PFAS identity, production volumes, industrial uses, commercial and consumer uses, byproducts, worker exposure, disposal, and any existing information related to environmental and health effects. Such information would be reported for each year since 2011 in which a covered PFAS was manufactured, to the extent such information were known to or reasonably ascertainable by the reporter. EPA also proposed a five-year recordkeeping period following the submission date.

EPA also proposed the following structural definition of PFAS: per- and polyfluorinated substances that structurally contain the unit R-(CF_2)–C(F)(R′)R″. Both the CF_2 and CF moieties are saturated carbons and none of the R groups (R, R′, or R″) can be hydrogen. Under the proposal, reporting would have been required for any TSCA chemical substance (including any mixture with a chemical substance) which met the proposed structural definition and had been manufactured for a commercial purpose at any time since January 1, 2011.

EPA did not propose any reporting exemptions or production volume thresholds. The scope of covered chemical substances under the proposed rule included any amounts of PFAS which were known to or reasonably ascertainable by the manufacturer, including PFAS-containing articles, byproducts, and impurities. EPA also did not propose any exemptions or flexibilities for small manufacturers.

EPA proposed a six-month information collection period following the effective date of the final rule, after which the reporting tool would open for a six-month reporting period. Thus, the proposed rule stipulated a reporting deadline one year from the effective date of the final rule.

III. Final PFAS Reporting and Recordkeeping Requirements

In this unit, EPA discusses in detail the final reporting and recordkeeping requirements, including changes from the proposed rule in response to public input.

A. What substances are covered by this rule?

1. The Scope of PFAS for the Purpose of This Rule

Under TSCA section 8(a)(7), EPA must collect information on chemical substances manufactured (including imported) for commercial purposes, including chemical substances present in a mixture, that are ''perfluoroalkyl or

polyfluoroalkyl substances,'' or PFAS. TSCA section 8(a)(7) does not define or characterize ''PFAS.'' EPA has determined that any TSCA chemical substance (as that term is defined by TSCA section 3(2); see Unit IV.A.2.) that falls within the structural definition at 40 CFR 705.3 is subject to reporting under TSCA section 8(a)(7), if it has been manufactured for commercial purposes in any year since January 1, 2011. The proposed definition defined PFAS as a substance that includes the following structure: R-(CF_2)–C(F)(R′)R″, in which both the CF_2 and CF moieties are saturated carbons and none of the R groups (R, R′ or R″) can be hydrogen. EPA found that at least 1,364 substances from both the TSCA Inventory (Inventory) and Low-Volume Exemption (LVE) claims would meet the proposed structural definition. Separately, a count of chemicals meeting the proposed definition on EPA's CompTox Chemicals Dashboard (Ref. 6) found approximately 9,400 structures, though many of those structures are not known TSCA chemical substances and would be out of scope of reporting for this rule, as explained in section III.A.2 of this rule.

EPA determined that a structural definition was more appropriate for this rule than a discrete list of specifically identified substances. Other TSCA requirements have relied on a structural definition when appropriate (*e.g.,* the long-chain perfluoroalkyl carboxylate (LCPFAC) significant new use rule (SNUR) defines covered substances using a structural definition (40 CFR 721.10536) (Ref. 7), and the polymer exemption rule for new chemical pre-manufacture notices (PMNs) defines covered PFAS polymers using structural definitions (40 CFR 723.250)). Additionally, other scientific and regulatory bodies, such as the Organization of Economic Cooperation and Development (OECD) (Refs. 8 and 9), have defined PFAS using various structural definitions. Thus, there is clear precedent for using a structural definition both for TSCA rules and for actions addressing PFAS, and a structural definition is consistent with the text of TSCA section 8(a)(7). EPA also determined that limiting the scope of reporting to a discrete list of chemicals would eliminate reporting on substances of interest to the Agency. Given various reporting exemptions for both existing chemicals (*e.g.,* certain byproducts and research and development (R&D) substances are exempt from reporting in the Chemical Data Reporting (CDR) rule) and new chemicals (*e.g.,* byproducts and impurities that are not listed on the Inventory), and with minimum reporting thresholds under other rules, EPA may be unaware of some TSCA chemical substances which meet this structural definition of PFAS. Providing a discrete list based on substances currently on the Inventory and in LVEs likely limits EPA's ability to capture all substances that meet the structural definition, and which may present properties similar to perfluorooctanoic acid (PFOA), perfluorooctane sulfonic acid (PFOS), and hexafluoropropylene oxide dimer acid (HFPO–DA) and its ammonium salt (popularly known as ''GenX''). Therefore, EPA is defining PFAS for this TSCA section 8(a)(7) rule using a structural definition to avoid inadvertently limiting the scope of reporting to substances on a discrete list.

After reviewing public comments, EPA determined that the proposed definition may not include all substances for which EPA believes reporting of information is necessary (see additional discussion of relevant public comment in Unit IV.A). Therefore, EPA is modifying the definition of PFAS from the proposal. For the purpose of this TSCA section 8(a)(7) reporting rule, EPA is defining ''PFAS'' using a structural definition. PFAS is defined as including at least one of these three structures:

- R-(CF_2)-CF(R′)R″, where both the CF_2 and CF moieties are saturated carbons;
- R–CF_2OCF_2-R′, where R and R′ can either be F, O, or saturated carbons; and
- $CF_3C(CF_3)$R′R″, where R′ and R″ can either be F or saturated carbons.

Manufacturers of substances that do not meet this structural definition are not required to report under this rule. EPA is providing a list of substances that meet this definition, gathered from the Inventory, LVEs, and the CompTox Chemicals Dashboard; this list will be available in the CompTox Chemicals Dashboard at *https://comptox.epa.gov/dashboard.* A substance that is not on this list but still falls under the definition of a ''chemical substance'' under TSCA (see Unit III.A.2) is subject to this rule if the substance has been manufactured for a commercial purpose since 2011.

EPA is modifying the proposed definition first to remove the R group requirements, resulting in the first sub-structure of this rule's definition of PFAS (*i.e.,* R-(CF_2)-CF(R′)R″, where both the CF_2 and CF moieties are saturated carbons). The removal of the R group requirements from the proposed definition will expand the universe of PFAS to include additional substances of potential concern because they are likely to be persistent. While the proposed definition was developed to focus on substances most likely to be persistent in the environment while excluding those substances that are ''lightly'' fluorinated (*i.e.,* the molecule only contains unconnected CF_2 or CF_3 moieties), EPA acknowledges that substances that are not fully fluorinated may still be persistent in the environment. This is because the persistence of organofluoro compounds is more related to the density of C–F bonds within the molecule than simply the existence of fully fluorinated carbons (Ref. 10). The final definition, which does not include the proposed definition's R group requirements focuses the definition on those substances most likely to persist in the environment. The final definition does not include substances that only have a single fluorinated carbon, or unsaturated fluorinated moieties (*e.g.,* fluorinated aromatic rings and olefins). The latter set of substances are more susceptible to chemical transformation than their saturated counterparts, and therefore, are less likely to persist in the environment (Ref. 10). EPA has determined that, for the purpose of this rule, it is unnecessary to extend reporting requirements to substances that only have a single fluorinated carbon or unsaturated fluorinated moieties and are therefore less likely to persist in the environment, unlike substances like PFOA, PFOS, and GenX.

In addition to modifying the proposed definition by removing the R group requirements, EPA determined that the definition should be further expanded by adding two sub-structures that will include certain substances of interest to the Agency and to public commenters. Furthermore, the additional two sub-structures will encompass other chemical substances that are persistent in the environment but were not covered by the proposed definition. The second sub-structure (R–CF_2OCF_2-R′, where R and R′ can either be F, O, or saturated carbons) aims to capture certain fluorinated ethers. EPA believes that these ethers are likely to be found in water; for example, perfluoro-2-methoxyacetic acid (PFMOAA) (Chemical Abstracts Service Registry Number (CASRN) 674–13–5) and other chemicals with structures similar to GenX found in the Cape Fear River. However, they may not have been reported to the Inventory or as an LVE, and therefore would not have been considered when developing the proposed definition, which focused on substances in the known TSCA universe

(*i.e.,* the Inventory and LVEs). Additionally, it is possible that such substances are not on the Inventory due to TSCA reporting exemptions (*e.g.,* byproducts, or certain R&D substances). Based on these ethers' properties and the lack of prior TSCA reporting, EPA believes that data related to the manufacturing of these PFAS is necessary to carry out TSCA section 8(a)(7) and would not be duplicative of other reporting. Thus, EPA is interested in known or reasonably ascertainable information on substances meeting this sub-structure definition, as it meets EPA's threshold of focusing on chemicals more likely to exhibit properties similar to GenX (along with PFOA and PFOS), including their likely presence in the environment.

Finally, the third sub-structure ($CF_3C(CF_3)R'R''$, where R′ and R″ can either be F or saturated carbons) aims to capture a different type of branching for highly fluorinated substances that would not meet the proposed definition due to their non-adjacent fluorinated carbons. These substances are likely to be persistent, and EPA believes that reporting for these more branched substances is necessary to collect the information described in TSCA section 8(a)(2)(A)–(G) for substances with similar persistence properties as PFOA, PFOS, or GenX. For instance, 4,4,4-Trifluoro-2,2,3,3-tetra)kis(trifluoromethyl)butanoic acid (CASRN 1882109–62–7) would not have met the proposed definition due to its non-adjacent fluorinated carbons, but it has the same number of carbon, fluorine, and oxygen atoms as PFOA, and has been identified as an isomer of PFOA under the Stockholm Convention (Ref. 11). Further, this substance, like other substances meeting this sub-structure, has many highly fluorinated moieties such that EPA believes it is likely to be persistent in the environment. EPA is interested in known or reasonably ascertainable information on substances meeting this sub-structure definition, as these chemicals are likely to persist in environments to which they are released.

Under this rule's definition of PFAS, EPA identified additional substances that may be subject to the rule from the Inventory and LVEs, *i.e.,* ''known TSCA chemical substances.'' Specifically, EPA identified an additional 22 chemical substances on the Inventory and 19 LVEs, all of which are now covered under the first sub-structure of this rule's definition. To date, EPA has not identified any additional substances on the Inventory or as an LVE under the second and third sub-structures. This relatively modest increase of 41 known TSCA chemical substances would bring the known universe of TSCA chemical substances meeting this rule's definition of PFAS to 1,462, from 1,364 known TSCA PFAS identified by the proposed definition. However, as discussed previously, a substance's absence on the Inventory or LVEs may be due, at least in part, to several exemptions for Inventory and new chemicals reporting (*e.g.,* byproducts, impurities, certain R&D substances). In the absence of those exemptions, a PFAS meeting the definition under TSCA section 3(2) may be subject to reporting under this rule.

EPA is also affirming that fluoropolymers which meet this rule's definition of PFAS are reportable under this rule; this includes higher molecular weight fluoropolymers. EPA does not believe the requested data on fluoropolymers would be considered duplicative or unnecessary: this information is not reported to EPA otherwise, and any manufacturers' existing information on such fluoropolymers will inform EPA's understanding of such types of PFAS within U.S. commerce, including their downstream uses and their disposal methods.

EPA notes that this definition may not be identical to other definitions of PFAS used within EPA and/or by other organizations. The term ''PFAS'' has been used broadly by many organizations for their individual research and/or regulatory needs. Various programs or organizations have distinct needs or purposes apart from this TSCA section 8(a)(7) reporting rule, and therefore, different definitions of the term ''PFAS'' may be appropriate for other purposes. The Agency notes that this perspective, that different users may have very different needs and no single PFAS characterization or definition meets all needs, is shared by many other organizations, including OECD (see page 29, Ref. 8). EPA has determined the final definition of ''PFAS'' is the most appropriate definition for this TSCA section 8(a)(7) rule and acknowledges that there may be other rules or programs who apply different definitions to meet their own needs.

2. Definition of ''Chemical Substance'' Under TSCA and PFAS in Mixtures

This rule is limited to manufacturers (including importers) of PFAS that are considered a ''chemical substance.'' Under TSCA section 3(2), ''chemical substance'' means any organic or inorganic substance of a particular molecular identity, including: (1) Any combination of such substances occurring in whole or in part as a result of a chemical reaction or occurring in nature, and (2) Any element or uncombined radical. This rule does not require reporting on activities that are excluded from the definition of ''chemical substance'' in TSCA section 3(2)(B).

Even though the definition of chemical substance excludes mixtures, PFAS as a chemical substance may be present in a mixture. Therefore, this rule requires reporting on each chemical substance that is a PFAS, including as a component of a mixture. This rule does not require reporting on components of a mixture that do not fall under the structural definition of PFAS, as explained in Unit III.A.1.

B. Which entities are covered by this rule?

1. Scope of Covered Entities

Anyone who has manufactured (including imported) a PFAS for a commercial purpose in any year since January 1, 2011, is covered by this rule. As noted in Unit III.B.2, ''manufacture for a commercial purpose'' includes the coincidental manufacture of PFAS as byproducts or impurities. EPA believes at least portions of the NAICS codes listed in Unit I.A. may be covered by this rule. This rule extends to manufacturers (including importers) only. Importers of PFAS in articles are considered PFAS manufacturers.

Persons who have only processed, distributed in commerce, used, and/or disposed of PFAS are not required to report under this rule, unless they also have manufactured PFAS for a commercial purpose. If an entity (such as a wastewater treatment plant) is simply processing PFAS they received domestically, and not also manufacturing PFAS, including as a byproduct, then the entity is not covered by this rule. Although EPA received several public comments about extending the rule to cover processors (see Unit IV.), TSCA section 8(a)(7) only refers to manufacturers and expanding the rule to processors would be pursuant to EPA's separate rulemaking authority at TSCA section 8(a)(1), which the Agency is not pursuing at this time.

2. Scope of ''Manufacture for Commercial Purposes''

Pursuant to TSCA section 8(f), the scope of ''manufacturing'' for the purposes of this rule is limited to entities manufacturing for a commercial purpose. EPA is defining ''manufacture for commercial purposes'' to align with definitions used in other rules. Specifically, ''manufacture for

commercial purposes'' includes the import, production, or manufacturing of a chemical substance or mixture containing a chemical substance with the purpose of obtaining an immediate or eventual commercial advantage for the manufacturer. This includes, but is not limited to, the manufacture of chemical substances or mixtures for commercial distribution, including test marketing, or for use by the manufacturer itself as an intermediate or for product research and development. ''Manufacture for commercial purposes'' also includes the coincidental manufacture of byproducts and impurities that are produced during the manufacture, processing, use, or disposal of another chemical substance or mixture. As described in Unit III.B.1, simply *receiving* PFAS from domestic suppliers or other domestic sources is not, in itself, considered manufacturing PFAS for commercial purposes. Entities that process and/or use PFAS only need to report on PFAS they have manufactured (including imported), if any.

However, certain activities are not considered ''manufacture for commercial purposes'' under TSCA section 8(f) (*e.g.,* non-commercial R&D activities such as scientific experimentation, research, or analysis conducted by academic, government, or independent not-for-profit research organizations, unless the activity is for eventual commercial purposes) and are not subject to the reporting requirements in this rule. For example, reporting would not be required for a Federal agency which manufactures or imports PFAS when it is not for any immediate or eventual commercial advantage.

3. Non-Reportable Activities

As discussed in Unit III.B.2, entities who have manufactured PFAS for a commercial purpose include those who have imported PFAS (including in wastes), or those who have coincidentally produced PFAS during the manufacture, processing, use, or disposal of another chemical substance or mixture. EPA noted in the proposed rule that this may include certain waste management companies, if they have imported PFAS in a waste or produced PFAS at their site during the disposal of another chemical substance or mixture. Through public comments and input during the SBAR Panel, EPA understands that entities engaged in certain waste management activities are in the unique position of not having knowledge of PFAS they may have manufactured for commercial purposes. Entities that import municipal solid wastes (MSW) for the purpose of disposal or destruction cannot know or reasonably ascertain that they imported PFAS in the MSW streams. MSW streams are heterogeneous and generally difficult to characterize, in the absence of notification or labeling requirements related to the content of the waste. There were no Federal labeling or notification requirements for PFAS in wastes concurrent with this reporting period, nor are there general labeling practices for PFAS in MSW streams that are sent for disposal or destruction. Additionally, standard analytical methods for PFAS in MSW streams were not available during this reporting period. Because no PFAS was listed as a hazardous waste and subject to notification requirements under the Resource Conservation and Recovery Act (RCRA) or other Federal laws during this rule's lookback period (*i.e.,* since January 1, 2011), and due to general industry practices, EPA understands that importers of MSW streams for disposal or destruction would not have any records or data that they had imported PFAS or any other information relevant to TSCA section 8(a)(7). Therefore, EPA has determined that waste management activities involving importing municipal solid waste streams for the purpose of disposal or destruction are not within scope of this rule's reporting requirements, per EPA's obligations under TSCA section 8(a)(5)(C).

However, EPA is not broadly exempting all waste management facilities from this rule. Facilities that have imported waste containing PFAS, other than in MSW streams for destruction or disposal, are likely to have information relevant to this rule. Other waste management sites may have relevant information regarding PFAS contents in waste they have imported outside of MSW, or for the purpose of recycle or reuse; thus, EPA is required to apply reporting requirements to such entities who may have relevant information, pursuant to TSCA section 8(a)(5)(C). This would include waste management sites who import PFAS-containing waste (including in MSW) for the purpose of recycling or reuse for PFAS-containing products, as well as waste management sites who import PFAS in wastes that are not municipal solid waste streams. In the former activity, entities who import wastes that may contain PFAS, such as some carpets and rugs, for the purpose of recycling or reusing the PFAS-containing material, may be aware of the general nature of those materials and the downstream processing and use information that is responsive to this rule (see Table 14, Ref. 12). In the latter activity, importers of PFAS-containing wastes that are not MSW (such as industrial wastes) may also have knowledge of the contents of the waste they have imported due to labeling or notification practices, including under international agreements affecting transboundary movement of wastes (Ref. 13). Because certain importers of waste (besides MSW that is imported for the purpose of disposal or destruction) are anticipated to know or reasonably ascertain that they have manufactured PFAS, EPA is extending reporting requirements to manufacturers (including importers) of PFAS in wastes, unless they have imported PFAS in municipal solid waste streams for the purpose of disposal or destruction.

C. What is the reporting standard of this rule?

For the purpose of this rule, the reporting standard is information known to or reasonably ascertainable by the manufacturer, which is the standard used in other TSCA section 8 rules, including CDR since 2011 (see TSCA section 8(a)(2)). ''Known to or reasonably ascertainable by'' is defined to include ''all information in a person's possession or control, plus all information that a reasonable person similarly situated might be expected to possess, control, or know'' (40 CFR 704.3). This reporting standard requires reporting entities to evaluate their current level of knowledge of their manufactured products (including imports), as well as evaluate whether there is additional information that a reasonable person, similarly situated, would be expected to know, possess, or control. This standard carries with it an exercise of due diligence, and the information-gathering activities that may be necessary for manufacturers to achieve this reporting standard may vary from case-to-case.

This standard would require that submitters conduct a reasonable inquiry within the full scope of their organization (not just the information known to managerial or supervisory employees). This standard may also entail inquiries outside the organization to fill gaps in the submitter's knowledge. Such activities may, though not necessarily, include phone calls or email inquiries to upstream suppliers or downstream users or employees or other agents of the manufacturer, including persons involved in the research and development, import or production, or marketing of the PFAS. Examples of types of information that are considered to be in a manufacturer's possession or

control, or that a reasonable person similarly situated might be expected to possess, control, or know include: files maintained by the manufacturer such as marketing studies, sales reports, or customer surveys; information contained in standard references showing use information or concentrations of chemical substances in mixtures, such as a Safety Data Sheet (SDS) or a supplier notification; and information from the CAS or from Dun & Bradstreet (D–U–N–S). However, if particular information cannot be derived or reasonably estimated without conducting further customer surveys (*i.e.,* without sending a comprehensive set of identical questions to multiple customers), it would not be ''reasonably ascertainable'' to the submitter. Thus, there is not a need to conduct new surveys for purposes of this rule. As described previously, however, existing survey data may nevertheless be ''known to'' the organization. This information may also include documented knowledge gained through discussions, conferences, and technical publications. In addition, this is the same reporting standard employed in the TSCA section 8(a) CDR rule (40 CFR 711.15). In response to public comments and input received through the SBAR Panel, EPA has also created additional compliance guidance related to this reporting standard, including for small entities and for article importers (Ref. 14). Therefore, EPA anticipates many reporters under this rule are familiar with this reporting standard, and resources are available to support those reporters who may not be familiar with the standard.

In the event that a manufacturer (including importer) does not have actual data (*e.g.,* measurements or monitoring data) to report to EPA, the manufacturer (including importer) should consider whether ''reasonable estimates'' of such information are ascertainable. ''Reasonable estimates'' may rely, for example, on approaches such as mass balance calculations, emissions factors, or best engineering judgment. EPA notes that many of the data elements requested under this rule, including production volumes or environmental release volumes, incorporate a level of estimation by requiring only two significant figures. Other data elements, including worker exposure, are reported as ranges, as with CDR. For instance, a manufacturer may be able to estimate the range of number of workers reasonably likely to be exposed for each commercial use based on the manufacturer's knowledge of the commercial sites' sizes, without specific workplace monitoring data; the manufacturer, would report the estimated range, rather than reporting that the information is not known. In general, EPA believes that industry possesses a greater knowledge than EPA about its own supply chain and operations related to the chemical substances it manufactures and the downstream uses, even if they do not control their customers' sites. However, if manufacturers do not know nor can reasonably make estimates for certain data elements, except for production volumes, they may indicate such information is ''Not Known or Reasonably Ascertainable'' (NKRA) to them in lieu of the requested estimate or range. For instance, if a manufacturer does not know and cannot reasonably ascertain (including, having no basis for a reasonable estimate or assumption based on past experiences for the same or similar substances) how a PFAS is disposed of as a waste in a given year, the manufacturer may submit ''NKRA'' for that information. Reporters are also advised that ''NKRA'' designations cannot be claimed as CBI under TSCA section 14. Reporting NKRA should only happen when data are truly not reasonably ascertainable or are unattainable (*e.g.,* when the appropriate recordkeeping period has lapsed and a past record is no longer available).

EPA has published reporting instructions and a Small Entity Compliance Guide, which include information related to this reporting standard and the activities that small entities, including article importers, may take to meet the due diligence requirement (Ref. 14).

If, after conducting due diligence and reviewing known or reasonably ascertainable existing information, a manufacturer, particularly an importer of articles containing PFAS, may not have knowledge that they have manufactured or imported PFAS and thus need not report under this rule. EPA encourages such an entity to document its activities to provide evidence of due diligence. Additionally, consistent with their own business practices, companies may elect to retain documentation of their conclusion that they were not subject to reporting requirements.

D. What information must be reported under this rule?

1. General Reporting Form

EPA is requiring that PFAS manufacturers submit the following information for each PFAS, for each year in which that substance was manufactured since January 1, 2011, to the extent the information is known or reasonably ascertainable. For the purposes of this rule, EPA is requiring this information to be submitted for each chemical substance that is a PFAS. For mixtures that contain at least one chemical substance that is a PFAS, manufacturers must submit information for each chemical substance in the mixture that is a PFAS. For example, a mixture comprised of PFAS A and PFAS B would result in the submission of two forms containing the information described later in this unit for each PFAS. For chemical substances of unknown or variable compositions, complex reaction products, and biological materials (UVCBs), including polymers, a single form may be submitted for that UVCB. EPA encourages submitters of mixtures and UVCBs that contain PFAS to provide additional information in the optional free text box related to the composition of that mixture or UVCB at the time of manufacture, if known.

EPA is largely finalizing the proposed reporting requirements, with a few modifications based on public comments. Changes to the proposed requirements include: removing the requirements for reporting maximum production volume in the first 12 months and maximum yearly production volume in any 3 years; removing the requirement for reporting the maximum quantity on-site at any time (including storage); modifying the requirement to submit the molecular structure for each substance by making the submission optional for any Class 1 chemical substance on the Inventory (but required for all others); requiring submitters to provide a generic name or description (which indicates, at least, that the substance is fluorinated) in lieu of the specific chemical identity or trade name when neither are known; reporting analytical methods, if any; adding optional comment boxes to provide any additional information or clarification to EPA.

A spreadsheet containing the reporting requirements is also available in the docket (Ref. 15).

2. Streamlined Reporting Form Option for Article Importers

Article importers are not exempt from this rule. Given the reporting exemptions in other TSCA reporting rules, exempting imported articles from the scope of this TSCA section 8(a)(7) reporting rule would perpetuate data gaps in EPA's level of knowledge related to PFAS manufactured for a commercial purpose since 2011. EPA cannot know what requested information is ''reasonably ascertainable'' to all article

importers without knowing the full range of potentially available information to be reported. Thus, EPA does not otherwise have the information outlined in TSCA section 8(a)(7) on PFAS within imported articles, and the Agency cannot justify a broad exemption of imported articles under TSCA section 8(a)(5)(A), which requires EPA, to the extent feasible, to not require unnecessary or duplicative reporting. However, after considering public input on the information that may be known to or reasonably ascertainable by some PFAS article importers, EPA is finalizing a reporting option for article importers to provide data to EPA on a streamlined form, if they do not know or cannot reasonably ascertain information requested on the longer standard form described in Unit III.D.1.

If an article importer determines they have imported a covered substance in an article, they would have the option to provide information to EPA through the streamlined form. The information requested through this streamlined form would still include chemical identity, processing and use information, and production volume, as well as the option to provide any additional information to EPA that the entity may have (*e.g.,* SDS, disposal information).

The production volume requested is the *volume of the imported article,* rather than the PFAS. EPA believes it is more likely that an article importer is able to determine the total imported production volume of articles rather than the volume related to just the PFAS contained within the article. For instance, an article importer may submit as the production volume the total weight of the PFAS-containing imported articles (*e.g.,* in tons or pounds). Alternatively, the article importer could report the production volume in terms of quantity of the article imported (*e.g.,* number of vehicles). The reporter would also be required to specify the unit of measurement reflected in the imported production volume. Based on information provided from article importers during the public comment period and the SBAR Panel, EPA believes that many article importers would have more difficulty providing precise production volumes of just the PFAS within an article. Industry input indicated that the historical documentation provided to article importers would not always or reliably include the weight or concentration of a PFAS contained in the article, making it more difficult for article importers to precisely calculate the production volume of just the PFAS contained within the article. Based on public input on the historical reporting practices and knowledge of PFAS in imported articles, and the fact that this rule is not a product testing requirement, EPA believes that article importers are more easily able to determine the imported production volume of the article itself. EPA acknowledges that it would be preferable to have the production volume of the chemical itself, though having the production volume of the imported article would still confer meaningful information to EPA for the purpose of chemical assessments under TSCA and other programs. Because EPA would rather have data on the production volume of the imported article, rather than many ''NKRA'' responses related to the production volume of the PFAS itself, EPA is requiring article importers to submit the production volume information on the whole article rather than the PFAS contained within the article.

The streamlined article importer form would require the following information to the extent it is known or reasonably ascertainable:

1. Chemical identity:
a. Specific chemical name, or
b. Generic name(s) or description(s) if the specific chemical name(s) is claimed as CBI and/or when a manufacturer knows they have a PFAS but is unaware of its specific chemical identity. A generic name must meet the naming requirements for this rule and indicate the substance is a fluorinated substance (*i.e.,* contain ''fluor'').
2. Chemical identification number:
a. CASRN, or
b. Accession or LVE case number, if applicable, and if the specific CASRN is unknown. EPA notes that this rule does not require manufacturers to obtain a CASRN or other identifier for a substance without such a number for the purpose of complying with this rule.
3. Trade name or common name, if applicable.
4. Representative molecular structure, for any PFAS that is not a Class 1 substance on the Inventory. And optional free text for further clarification on the chemical identity or molecular structure (such as for Class 2 substances, or where the molecular structure is of unknown or variable composition).
5. Import production volume of the imported article and the unit of measurement for that production volume (*e.g.,* quantity of the imported article, pounds, tons).
6. Industrial processing and use:
a. Type of process or use;
b. Sector(s);
c. Functional use category(ies); and
d. Percent of production volume for each use.
7. Consumer and commercial use:
a. indicator for whether this is a consumer and/or commercial product;
b. Product category;
c. Functional use category(ies);
d. Percent production volume for each use;
e. Maximum concentration in any product;
f. Indicator for use in products intended for children;
g. Indicator for imported but never physically at site; and
h. Any optional information the article importer wishes to provide.

Under TSCA section 8(a)(5)(C), EPA must, to the extent feasible, ''apply any reporting obligations to those persons likely to have information relevant to the effective implementation of [TSCA].'' EPA believes that this streamlined reporting form option for any article importer would still provide necessary information to EPA under TSCA section 8(a)(7), while reducing the reporting burden for the data elements that EPA understands may not be known to or reasonably ascertainable by article importers. However, to the extent any additional information requested on the longer forms is known to or reasonably ascertainable by the article importer (*e.g.,* information on disposal of that PFAS, or an SDS or other existing information regarding environmental or health effects), the reporter would have the option and ability to submit that information to EPA through the ''optional'' field. EPA also notes that it is possible that a manufacturer both imports a PFAS within an article, and otherwise manufactures (including imports) the same PFAS beyond an article. In such scenarios, the reporter would still have to provide information on the longer standard form for the non-imported article and would have the option to report on the PFAS within the imported article either on the streamlined form or within the longer standard form. The reporting tool for this rule will enable multiple form options for the same PFAS if appropriate.

3. Streamlined Reporting Form Option for R&D Substances Manufactured Below 10 Kilograms

EPA is also including R&D substances that were manufactured, including imported, for a commercial purpose within the scope of this rule. EPA notes that the scope of ''manufacture for commercial purposes'' encompasses any importing, production, or other manufacturing activities with the purpose of obtaining an immediate or eventual commercial advantage and includes chemicals ''for use by the

manufacturer, including use for product research and development'' (40 CFR 704.3). R&D substances which meet the scope of ''manufacture for commercial purposes'' must be reported under this rule, even if the PFAS itself was not later commercialized. However, R&D substances which have not been manufactured for commercial purposes (such as for scientific experimentation, research, or analysis conducted by academic, government, or independent not-for-profit research institutions, unless the activity is for eventual commercial purposes) would not be within scope of this rule (40 CFR 720.30(i)).

EPA believes that the submission of information related to the commercial manufacture of PFAS as R&D substances is necessary to understand the scope of PFAS manufactured in the United States. With existing R&D reporting exemptions under other TSCA rules (including CDR and PMN submissions), EPA does not have a dataset of PFAS manufactured as R&D substances. Therefore, reporting on such substances is necessary to the effective implementation of TSCA. Further, EPA understands that manufacturers of R&D substances that have been exempt under other reporting rules should have certain documentation available to support those exemption claims, in accordance with their recordkeeping requirements.

However, EPA understands through input from public commenters and the SBAR Panel that much of the information requested for this rule is unknown and not reasonably ascertainable to manufacturers of R&D substances, particularly small entities who may manufacture R&D substances in small quantities. EPA believes that manufacturers of R&D substances in such low quantities are likely to have manufactured those substances purely for laboratory analytical purposes, which may be at their own site or their customers' sites. As such, these manufacturers are aware of the R&D chemical identity and production volume but are unlikely to have any other information requested. However, EPA believes that manufacturers of R&D chemicals manufactured in larger quantities (*i.e.,* greater than 10 kilograms per year) are more likely to have the other information requested, including worker exposure information, disposal information, and health or environmental effects information (such as monitoring or toxicity data). Given EPA's understanding of typical recordkeeping practices of R&D activities, it is likely that a manufacturer with greater quantities of R&D substances would know the requested information on those substances beyond their identities and production volumes. Under TSCA section 8(a)(5)(C), EPA shall, to the extent feasible, apply reporting requirements to those persons likely to have relevant information. Therefore, EPA is providing another streamlined reporting option to manufacturers of R&D substances that were manufactured in volumes under 10 kilograms per year, if they do not know or cannot reasonably ascertain information requested on the longer standard form described in Unit III.D.1.

Information requested on this form, for each R&D PFAS manufactured below 10 kilograms per year, will include the following to the extent it is known or reasonably ascertainable:

1. Chemical identity:
a. Specific chemical name, or
b. Generic name(s) or description(s) if the chemical name(s) is claimed as CBI and/or when a manufacturer knows they have a PFAS but is unaware of its specific chemical identity. A generic name must meet the naming requirements for this rule and indicate the substance is a fluorinated substance (*i.e.,* contain ''fluor'').
2. Chemical identification number:
a. CASRN, or
b. TSCA Accession Number or LVE case number, if applicable, and if the specific CASRN is unknown. EPA notes that this rule does not require manufacturers to obtain a CASRN or other identifier for a substance without such a number for the purpose of complying with this rule.
3. Trade name or common name, if applicable.
4. Representative molecular structure, for any PFAS that is not a Class 1 substance on the Inventory. With optional free text for further clarification on the chemical identity or molecular structure (such as for Class 2 substances, or where the molecular structure is of unknown or variable composition).
5. Production volume:
a. Domestically manufactured.
b. Imported.
6. Indicator for imported but never physically at site.
7. Any optional information the manufacturer wishes to provide.

EPA believes that this streamlined reporting form option for any manufacturer of R&D substances in low volumes (*i.e.,* below 10 kilograms per year) would still provide necessary information to EPA under TSCA section 8(a)(7), while minimizing the cost of compliance for certain small manufacturers, consistent with TSCA section 8(a)(5), for the data elements that EPA understands may not be known to or reasonably ascertainable by such manufacturers. However, to the extent any additional information requested on the longer forms is known to or reasonably ascertainable by the manufacturer (*e.g.,* information on disposal of that PFAS, or existing information regarding environmental or health effects), the manufacturer would be required to submit that information to EPA through the ''optional'' field on the streamlined reporting form.

E. What must be submitted as ''all existing information concerning the environmental and health effects'' of a chemical substance?

Pursuant to TSCA section 8(a)(2)(E), EPA is requiring the submission of ''all existing information concerning the environmental and health effects'' of the chemical substances covered by this rule. ''All existing information concerning environmental and health effects'' is defined as ''any information of any effect of a chemical substance or mixture on health or the environment or both'' (to be codified at 40 CFR 705.3) and is intended to be interpreted broadly. The scope of ''all existing information concerning environmental and health effects'' includes all health and safety studies but is not limited to formal studies. Chemical identity is always part of a health and safety study, and TSCA section 14(b) limits the extent to which health and safety studies and information from studies may be withheld from the public as confidential business information (CBI). Any information that bears on the effects of a PFAS on human health or the environment would be included, including information on the chemical substance developed or generated prior to the year 2011. The codified definition of ''all existing information concerning environmental and health effects'' at 40 CFR 705.3 provides non-exhaustive examples, such as:

- Toxicity information (*e.g.,* long- and short-term tests of mutagenicity, carcinogenicity, teratogenicity; pharmacological effects; acute, subchronic, and chronic effects);
- Ecological or other environmental effects on fish, invertebrates, or other animals and plants, such as bioconcentration or bioaccumulation tests;
- Human and environmental exposure assessments, including workplace exposure, and the impacts of a chemical substance or mixture on the environment; and
- Other data relevant to environmental and health effects including monitoring data to measure the exposure of humans or the

environment or a chemical substance, range-finding studies, preliminary studies, adverse effects reports, and any information, including medical screening or surveillance, such as under the American Conference of Government Industrial Hygienists (ACGIH).

Following public comments, EPA is also clarifying that the scope of ''all existing information concerning environmental and health effects'' is information in the submitter's possession or control. For the purpose of requiring existing information related to health or environmental effects, EPA is adopting the same definition of ''possession or control'' as in the TSCA Pre-Manufacture Notice (PMN) regulations (40 CFR 720.3(y)). Thus, a PFAS manufacturer would not necessarily be searching all information in the public realm but would be submitting information in their possession or control, or other information for which they are responsible. This includes any data or other information in files maintained by the submitter's employees, or the employees of a submitter's subsidiary or partnership which is associated with research and development, test marketing or commercial marketing of the PFAS, regardless of the publication status. EPA is not requiring manufacturers to search open scientific literature to find relevant information on a PFAS that was previously not in their possession or control for the purpose of this rule. EPA believes that implementing such a requirement may result in duplicative information, if multiple PFAS manufacturers are submitting the same studies or other information that are available publicly (including in EPA's scientific literature databases).

EPA considered ways to avoid requiring the submission of potentially duplicative information concerning health and environmental effects (see TSCA section 8(a)(5)(A)), while still fulfilling EPA's obligation under TSCA section 8(a)(7) to require reporting of such information. Such information concerning environmental or health effects may have been submitted to EPA previously under either TSCA section 8(d) rules (as unpublished health and safety information) or TSCA section 8(e) (as a substantial risk notice). If a reporter has already submitted information concerning environmental or health effects to EPA under specific TSCA submissions, they need not re-submit that information if they provide the details of to which program (or under which rule) that information was submitted and in which year (*e.g.,* TSCA section 8(e), in 2010). In the event of a reporter having previously submitted relevant environmental and health effects information, the reporter must ensure that the previous submission included all existing underlying information, including test data. Note that a previous submission of information concerning environmental or health effects does not relieve a manufacturer of providing *all* existing information concerning environmental or health effects that has not previously been submitted to EPA. See Unit III.F for more discussion on how EPA is mitigating potentially duplicative reporting for this rule.

For environmental and health effects information that was previously submitted to EPA as CBI, the reporter would need to resubmit if that information predated the 2016 Lautenberg Act amending TSCA and its CBI submission requirements and reassert the CBI claim (see §§ 705.22(f) and 705.30). If a reporter has submitted environmental and health effects information as CBI since the 2016 Lautenberg Amendments to TSCA were implemented, then the manufacturer must provide EPA with details regarding when, how, and under which title and/or statutory authority the CBI claim was submitted, and the TSCA section 14 certification. In order for a reporter to earn an exemption from resubmitting that environmental and health effects information and re-asserting a CBI claim, the reporter must be able to point to a previous claim that adequately covers the current claim. In any event of a reporter having previously submitted environmental or health effects information as CBI, whether pre- or post-Lautenberg Amendments, they must adequately substantiate their CBI claim. EPA encourages all reporters who have previously submitted environmental or health effects information as CBI to carefully review their previous submissions and determine whether the previous claims satisfy current CBI substantiation requirements, and to assert a new claim and substantiate if appropriate. More discussion on submitting CBI under this rule is in Unit III.G.

Additionally, EPA is finalizing the requirement to submit all existing information concerning health and environmental effects in the format of OECD-harmonized templates, where such templates exist for the type of data (to be codified at 40 CFR 705.15(f)). OECD templates are accessible to the public online at *https://oecd.org/ehs/templates/harmonised-templates.htm* (Ref. 16). This can be accomplished by using the freely available IUCLID6 software by exporting the dossier in the OECD Harmonized Template working context. At the time of this rule publication, EPA can accept any dossiers generated using any version of IUCLID6. Users should refer to EPA web pages (to be identified) for updates on which version of IUCLID files will be accepted.

A standardized format such as the OECD templates will improve the efficiency of review and organization of the submitted data. EPA believes that some of the data will already be available as an OECD template if the company had already submitted the studies under the European Union's Registration, Evaluation, Authorization and Restriction of Chemicals (REACH) regulation (Ref. 16). In addition to the required template format, those subject to this rulemaking must submit any associated full study reports or underlying data as support documents. The full study reports and support documents are necessary for EPA to understand the full context and evaluate the quality of the data, which is necessary for the Agency to review to determine whether such data may be used for any future Agency actions.

If an OECD-harmonized template is not available for a particular endpoint for which the manufacturer has relevant information, then the manufacturer must still submit the data. Such information may include, but is not limited to, raw monitoring data (regardless of having been aggregated or analyzed) of human or environmental exposure assessments and toxicity tests for either human health effects or ecological other environmental effects.

F. What steps is the Agency taking to reduce potentially ''duplicative'' reporting? Does information need to be reported on the basis that it has already been reported to the Agency?

TSCA section 8(a)(5)(A) requires EPA, to the extent feasible when carrying out TSCA section 8, to avoid requiring unnecessary or duplicative reporting. The Agency seeks to avoid collecting data on PFAS that would duplicate information already reported to the Agency, while ensuring EPA obtains all data required to be collected under TSCA section 8(a)(7) and that such data are submitted in a format that is conducive to the collection and review of a manufactured PFAS dataset. While developing this rule, EPA reviewed the data elements submitted under the CDR Rule to evaluate whether there may be some overlap with the information requested under this rule. Through internal review, and from input received

during the public comment periods and the SBAR Panel, the Agency has identified the following data elements that may have some overlap with CDR requirements:

- Physical state of the chemical or mixture;
- Production volume (domestically manufactured);
- Production volume (imported);
- Volume directly exported;
- Indicator for imported but never physically at site;
- Industrial processing and use type, sector(s), functional category(ies), and percent of production volume for each use;
- Consumer and/or commercial indicator, product category(ies), functional category(ies), percent of production volume for each use, indicator for use in products intended for children, and maximum concentration in the product; and
- Number of workers reasonably likely to be exposed for each combination of industrial processing or use operation, sector, and function, and the number of commercial workers reasonably likely to be exposed if the PFAS is contained in a commercial product.

However, EPA notes that even though there are some potentially overlapping data elements between this rule and CDR, any duplication of reporting requirements is likely to be narrower in scope. For instance, CDR is limited to chemical substances on the Inventory. In contrast, the reporting requirements in this rule extend beyond chemicals on the Inventory and may cover chemicals subject to LVEs, byproducts, and other chemicals that may not have been reported on or added to the Inventory. In addition, CDR has a reporting threshold of 25,000 pounds (or 2,500 pounds for chemicals subject to certain TSCA actions), along with several reporting exemptions, including for imported articles, certain byproducts, non-isolated intermediates, and small quantities of R&D substances, while this reporting rule does not incorporate any such thresholds or exemptions. Finally, while this rule requests the same data to be submitted for each year in which a PFAS has been manufactured since 2011, CDR requires different information to be submitted in different years: for instance, reporters submit the total annual domestically manufactured production volume and the total annual imported volume separately only for the principal reporting year (*e.g.,* 2019 for the 2020 reporting cycle), but only the combined total annual production volume is required reporting for the intervening years. Additionally, the CDR rule has been amended over the course of this reporting period, meaning certain data elements were not requested or submitted for all CDR cycles overlapping this rule's lookback period. Specifically, the CDR industrial processing and use codes and consumer/commercial processing and use codes did not align with the OECD-harmonized use codes until the 2020 reporting cycle. While CDR submitters may have provided certain processing and use information related to PFAS they manufactured during previous CDR cycles, any CDR responses that do not sufficiently respond to this data call by providing the required OECD codes would not be duplicative of the information being reported under this rule. Therefore, while some data elements of this rule may be considered duplicative of CDR requirements, differences between CDR and this rule's requirements (including reporting thresholds and reporting exemptions) may limit the scope of what is duplicative and duplicative information does not need to be re-reported for this rule. If the previous submission for the same data element under a different reporting rule was not accurate for purposes of this rule (*e.g.,* by not reporting volumes related to an activity exemption that does not apply to this rule, or by reporting industrial processing and use information that does not align with the OECD-harmonized use codes required under this rule), then the submitter must report the accurate information and cannot rely on their prior submission to satisfy this rule's requirements.

Beyond the CDR rule, some commenters and participants in the SBAR Panel suggested that other information requested under this rule may have been reported to EPA through a TSCA section 8(d) rule. Under TSCA section 8(d), EPA has the authority to request unpublished health and safety data studies, or lists of such studies, known to or reasonably ascertainable by manufacturers, processors, and distributors of certain chemical substances or mixtures. Commenters suggested that some ''existing environmental and health effects information'' on PFAS may have already been submitted to EPA through a TSCA section 8(d) rule and would be duplicative of information requested under this rule.

While EPA agrees that any previous submissions of unpublished studies under TSCA section 8(d) need not be resubmitted under this TSCA section 8(a)(7) rule, EPA does not anticipate that there will be much overlap between information requested under this rule and information that may have already been submitted through the reporting requirements related to the TSCA section 8(d) rule codified in 40 CFR part 716. First, only a few substances already listed in a section 8(d) rule would meet this rule's definition of PFAS; out of the many examples of PFAS, only oxirane, 2-(2,2,3,3,4,4,5,5,6,6,7,7,7-tridecafluoroheptyl)- (CASRN 38565–52–5), hexane, 1,1,1,2,2,3,3,4,4,5,5,6,6,6-tetradecafluoro- (CASRN 355–42–0), and 1-butanamine, 1,1,2,2,3,3,4,4,4-nonafluoro-N,N-bis(1,1,2,2,3,3,4,4,4-nonafluorobutyl)- (CASRN 311–89–7) are listed as PFAS, which can be found in 40 CFR 716. Secondly, the substances which are listed in 40 CFR part 716 have sunset dates, or reporting deadlines. The PFAS that have previously been listed in a section 8(d) rule have sunset dates between 1988 and 1995; therefore, potentially duplicative section 8(d) reporting stops decades short of the scope of reporting for this rule (40 CFR 716) (53 FR 38645, September 30, 1988 (FRL–3439–9)). Finally, the scope of ''unpublished health and safety studies'' requested under a TSCA section 8(d) rule may not be as inclusive as the scope of ''all existing information concerning the environmental and health effects'' requested for the substances under this TSCA section 8(a)(7) rule. This rule's scope of all existing information concerning environmental and health effects is intended to be broadly interpreted and is inclusive of any health and safety study, regardless of the date the information was collected or generated; see the discussion in Unit III.E.

Similarly, ''all existing information concerning the environmental and health effects'' of a PFAS may include previous submissions to EPA pursuant to TSCA section 8(e). TSCA section 8(e) requires manufacturers, processors, and distributors of chemicals to notify EPA immediately of information that reasonably supports the conclusion that their substances or mixtures present a substantial risk of injury to health or the environment. To the extent that a substantial risk notification under TSCA section 8(e) may be duplicative with this rule's requirements, the reporter need not resubmit such information, but will be required to indicate when they had previously provided that notification under TSCA section 8(e) so that EPA is able to locate that previous submission and satisfy the requirements of TSCA section 8(a)(7). Manufacturers who have previously submitted information to EPA under TSCA section 8(d) or TSCA section 8(e) that may be

considered ''existing information concerning the environmental and health effects'' of a PFAS for which they are reporting under this TSCA section 8(a)(7) rule need not resubmit the duplicative information. However, the manufacturer must indicate in the reporting form the year in which they had previously provided that information and under which rule (*e.g.,* TSCA section 8(d), section 8(e)). If EPA has previously collected information relevant to the implementation of TSCA section 8(a)(7) and is able to locate that information based on the reporter's submission, then EPA would be able to meet the information collection obligations under TSCA section 8(a)(7) without requiring potentially duplicative reporting.

EPA also considered other, non-TSCA reporting rules' potential overlap with this rule. These include the Toxics Release Inventory (TRI) and the Greenhouse Gas Reporting Program (GHGRP). Under the TRI, certain industrial and Federal facilities are required to report their annual releases and other waste management quantities and activities for TRI-listed toxic chemicals that are manufactured, processed, or otherwise used above the respective threshold. Information reported to TRI that is also requested under this rule includes:

- Total volume recycled on-site;
- Description of disposal process(es);
- Total volume released to land;
- Total volume released to water;
- Total volume released to air; and
- Total volume incinerated on-site.

However, in the same vein as the limitations on potentially duplicative reporting with CDR and TSCA section 8(d) rules, EPA does not anticipate much, if any, overlap in reporting between this rule and TRI. First, PFAS were not on the TRI chemical list until the FY 2020 NDAA automatically added 172 PFAS effective calendar year 2020, with additional PFAS added annually since 2020 (Ref. 17). Therefore, the only potentially overlapping reporting of PFAS releases and other waste management quantities would be since 2020, instead of the entire lookback period of this rule. Additional limitations in the potential overlap between this rule and TRI include the PFAS reporting threshold for TRI of 100 pounds manufactured, processed, or otherwise used and certain TRI reporting exemptions for quantities below de minimis concentrations and in articles. Without a reporting threshold or similar reporting exemptions applicable for this rule, there may be more PFAS releases and other waste management activities reportable for this rule than for TRI.

EPA also considered potential overlaps with GHGRP. The GHGRP requires annual reporting of greenhouse gas (GHG) data and other information from large GHG emissions sources (*i.e.,* those that emit at least 25,000 tons of CO_2-equivalent, any electricity generation site, aluminum, ammonia or cement production facility, and some municipal solid waste landfills), fuel and industrial gas suppliers, and carbon dioxide injection sites (Ref. 18) (40 CFR part 98). 111 compounds covered as GHGs and heat transfer fluids (HTF) would also be considered PFAS under this rule. Between this rule and the GHGRP, the following data elements may be duplicative for at least some GHGRP reporters:

- Production volume (imported);
- Volume directly exported; and
- Total volume incinerated on-site.

Besides the limited number of PFAS covered by GHGRP, other limitations on the potential overlap between this rule and GHGRP include the exemption of GHGRP reporting for quantities imported or exported below 25 kilograms. Additionally, not all coincidentally manufactured chemicals (such as byproducts) are covered by GHGRP, though they fall under the definition of ''manufacture for a commercial purpose'' under this rule (40 CFR 705.3). Overall, there is a significant difference between the reporting requirements in the GHGRP and this rule, though EPA is allowing reporters to abstain from re-reporting any of the information listed previously in this unit for a PFAS that was previously reported to GHGRP, unless the GHGRP submission did not account for all quantities that are covered by this rule.

EPA also notes the potential for duplicative reporting of environmental releases of certain byproducts within this rule. Pursuant to TSCA section 8(a)(2)(D), EPA is requiring PFAS manufacturers to provide a ''description of the byproducts resulting from the manufacture, processing, use, or disposal of each [PFAS].'' However, EPA notes there may be occasions where a byproduct that resulted from the manufacture, processing, use, or disposal of a reported PFAS also meets this rule's definition of PFAS. Because ''manufacture for commercial purposes'' includes the coincidental manufacture of byproducts, that byproduct would also need to be reported under this rule to the extent data are known or reasonably ascertainable. As a reportable PFAS, information on that byproduct's environmental releases would be requested twice, both as a byproduct of the originally manufactured PFAS and as a commercially manufactured PFAS itself. To mitigate potentially duplicative reporting concerns in such situations, manufacturers of byproducts that are also reportable PFAS under this rule need not re-report the environmental release information of that byproduct on the original PFAS's form.

To address potentially duplicative reporting, EPA is identifying specific types of information that need not be reported if the reporting entity indicates in the reporting tool that they have previously provided such information to EPA and provides information sufficient to allow the agency to locate that information. Pursuant to TSCA section 8(a)(5)(A), EPA is limiting the requirement for reporting ''duplicative'' information if a PFAS manufacturer has previously submitted the requested information to EPA for that same PFAS in that same year through CDR, TRI, GHGRP, or TSCA sections 8(d) and 8(e), or is also reporting a PFAS byproduct on its own reporting form. Only the aforementioned data elements from CDR, TRI, and GHGRP; studies submitted under TSCA section 8(d) or 8(e); and certain byproduct release information may be exempt from re-reporting under this rule as potentially duplicative information. In these cases, the manufacturer would be required to indicate to which program (and in which year) that information was submitted (*e.g.,* CDR, in 2016). Additionally, EPA notes that a manufacturer's previous submission for the same data element under a different reporting rule (*e.g.,* a manufacturer previously reported the production volume to CDR for a particular year) does not necessarily mean that the same quantity or information would be accurate for this rule's purposes. Because this rule does not provide for the same exemptions as the rules discussed in Unit III.F., the manufacturer must ensure that all quantities and other requested information for that PFAS are reported under this rule to the extent such information is known or reasonably ascertainable. In the previous example of a CDR reporter who had previously reported a PFAS's production volume, the reporter must ensure that all manufactured quantities covered under this rule (including those that are exempt from CDR, such as impurities or imported articles) are accounted for. If a previous submission for a data element does not account for all covered volumes or activities, then the submitter

may not rely on that prior submission to satisfy the reporting requirements of this rule.

EPA considered other previous information collection requests related to PFAS but did not determine those to be ''duplicative'' such that reporting may be exempt under TSCA section 8(a)(5)(A). For instance, EPA received many public comments asserting that information submitted through a PMN is duplicative of the information that would be collected through this rule. EPA disagrees. Information collected through a PMN (or an LVE) reflects information *before* manufacture of a substance commences.

EPA notes that the Agency has also required the submission of information on PFAS using a variety of enforcement authorities under different environmental statutes. However, most, if not all, of the information collected in the course of investigating potential non-compliance with, or liability under, TSCA or other statutes is different in numerous respects from information requested pursuant to this rule. EPA does not anticipate there to be duplicative reporting as the enforcement requests are generally narrower in scope. The enforcement requests generally focus on fewer years than this rule's reporting period, and those requests tend to focus on far fewer substances. Additionally, the requested data for enforcement authorities is both aggregated and reported in formats differently than this rule's requirements. While this rule requires data to be reported for each year over the reporting period in which the PFAS was manufactured, some enforcement requests have focused on just single years, or have requested quantities to be reported to reflect cumulative totals over multiple years. In that latter example, such a submission would not satisfy EPA's obligations under TSCA section 8(a)(7) requesting certain information ''*for each year* since January 1, 2011.'' In terms of information reporting formats, EPA notes that enforcement requests may often ask for responses in a narrative format, distinct from this rule's requests for information in quantities or within specific ranges. For these discrepancies, EPA does not believe that most information requested through previous enforcement request letters is duplicative of information requested under this rule.

The only information that may have been submitted in response to past enforcement letters that may be potentially duplicative of this rule relates to ''all existing information concerning environmental and health effects.'' Such information includes but is not limited to environmental monitoring, sampling, or worker exposure data. Thus, if a manufacturer has previously submitted certain information concerning environmental or health effects of a PFAS to EPA under an enforcement authority, that manufacturer does not need to resubmit that environmental or health effects information to EPA under this rule, provided that the manufacturer indicates to which program or office and in which year such information was submitted to EPA.

While the use of those enforcement authorities may be duplicative in some cases, the information is needed to ensure protection of public health and the environment in instances where the Agency feels it needs information from an entity to make that judgment call and determine if action is needed. Therefore, information duplication between previous enforcement requests and this rule is unlikely for many reasons, including various limitations on information gathered under the enforcement authorities and the fundamental differences in the type of information sought under this rule as compared with the information gathered under the other authorities. While information from PFAS manufacturers requested by EPA is, in all cases, needed to ensure the protection of public health and the environment, the information requested under the different authorities serves different purposes. EPA has determined that the information submitted in response to an enforcement letter is not duplicative of the information requested under this rule, except for certain information concerning environmental and health effects.

Finally, some reporters may also have submitted certain information concerning environmental or health effects of a PFAS pursuant to either a TSCA section 4 action or voluntarily, in conjunction with EPA's National PFAS Testing Strategy. To the extent a reporting entity has already provided information concerning environmental or health effects (such as chemical and physical properties, hazard testing, or exposure testing), that entity need not resubmit the information to this reporting rule. Instead, the reporter should indicate that they have already submitted such information to EPA and provide the program, the specific chemical identity, the date, and an associated case number, if available, of that submission.

G. What are the requirements for submitting CBI claims?

The 2016 amendments to TSCA included new procedural requirements for the submission and Agency management of CBI claims, including new substantiation requirements, generic name requirements, a certification requirement, and a requirement for Agency review of specified CBI claims within 90 days after receipt of the claim (15 U.S.C. 2613). In accordance with the 2016 TSCA amendments, the Agency recently proposed a rule addressing the procedures for submitting CBI claims to EPA under TSCA and the procedures for EPA's review of such claims (87 FR 29078, May 6, 2022 (FRL–8223–01–OCSPP)). PFAS manufacturers reporting under this rule may claim certain portions of the reporting form are CBI confidential business information, consistent with TSCA section 14, such as specific chemical identities that are not on the public Inventory, company identifier, and production volumes. Only confidentiality claims made through this rule's PFAS reporting tool will be considered properly asserted; any additional TSCA CBI claims made elsewhere will be considered improperly presented and will not be treated as having asserted a CBI claim under TSCA, and the information may be disclosed to the public without further notice. In addition to the requirement that CBI claims be submitted through the PFAS reporting tool, TSCA requires the reporter to certify that it has: (1) Taken reasonable measures to protect the confidentiality of the information; (2) Determined the information is not required to be disclosed or made public under Federal law; (3) A reasonable basis to believe that disclosure of the information is likely to cause substantial competitive harm; and (4) A reasonable basis to believe that the information is not readily discoverable through reverse engineering; and, (5) To certify that these statements and any information provided are true and correct. Consistent with the format of other TSCA reporting forms, the statements and certification would be combined into a single certification statement.

Information under this rule that may not be asserted as CBI includes:

- Specific chemical identity if the chemical is on the public (non-confidential) Inventory or reported as non-confidential in an LVE;
- All generic chemical names;
- For any PFAS that are on the public (non-confidential) Inventory, the chemical's CASRN;

- For PFAS that are on the confidential Inventory, the Inventory Accession Number cannot be claimed as CBI (but the underlying chemical identity can be claimed as CBI);
- LVE numbers;
- The following categories of use information: industrial processing and use type, sector, and functional categories, whether a chemical is in a consumer and/or commercial product, the consumer/commercial product categories and functional categories, and its presence in products for children; or
- Any blank or NKRA designation or response.

Any entity that claims a specific chemical identity as CBI must also submit a generic name pursuant to TSCA section 14(c)(1)(C). This includes reporting a PFAS by either an Accession number or LVE number (assuming that the specific chemical identity is not on the public Inventory), or reporting by a CAS name on a PFAS for which the CASRN, Accession number, and LVE number are not known to be assigned (*i.e.,* the CASRN and specific identifiers have not been created or generated). Entities must ensure that that any such generic name is consistent with EPA's Generic Name Guidance (Ref. 19). The generic name must also ''describe the chemical structure of the chemical substance as specifically as practicable while protecting those features of the chemical structure that are claimed as confidential; and the disclosure of which would be likely to cause substantial harm to the competitive position of the person.'' 15 U.S.C. 2613(c)(1)(C)(ii). Generic names must be sufficiently detailed to identify the reported chemical as a PFAS. Specifically, any generic name reported for a PFAS that does not contain ''fluor'' in the name would be rejected by EPA as insufficient under TSCA section 14(c)(1)(C). As the Agency described in the NODA published for this rule (Ref. 1), any generic name for a PFAS (including previously existing generic names from earlier TSCA section 5 submissions) that does not contain ''fluor'' in the name is inconsistent with this provision and will be rejected. Ultimately, if a generic name reported under the TSCA section 8(a)(7) rule lacks the structural unit ''fluor,'' the Agency will publicly identify the chemical substance as a PFAS.

TSCA section 14 further requires that substantiation be provided for each data element claimed as CBI. The substantiation must be provided at the time of submission. However, TSCA section 14(c)(2) exempts certain information from the substantiation requirements (*e.g.,* specific production volume). Under this rule, CBI claims for specific production or import volumes of the manufacturer need not be substantiated. Additionally, the specific chemical identity and molecular structure need not be substantiated when the substance has not been introduced into commerce (*e.g.,* an R&D substance manufactured in small quantities meeting the new chemical reporting exemption under section 5(h)(3)). No other TSCA section 14(c)(2) exemptions apply to information requested under this rule, so CBI claims must be substantiated for all other such information. Any information which is claimed as CBI will be disclosed by EPA only in accordance with the procedures and requirements of TSCA section 14 and 40 CFR parts 2 and 703. TSCA limits CBI protections for information in health and safety studies.

Generally, information from health and safety studies is not protected from disclosure, except to the extent such studies or information reveal information ''that discloses processes used in the manufacturing or processing of a chemical substance or mixture or, in the case of a mixture, the portion of the mixture comprised by any of the chemical substances in the mixture,'' 15 U.S.C. 2613(2)(B). Additional information, listed in the rule's definition of health and safety study, are not part of a health and safety study (*e.g.,* names of laboratory personnel). Submitters asserting a CBI claim for information under § 705.15(f) are required to submit a sanitized copy, removing only the information that is claimed as CBI.

EPA expects that article importers generally do not know the Accession number or other specific identifiers (*e.g.,* PMN or LVE number) for a confidential Inventory chemical that may be included in the article they are importing. As a result, article importers must report chemical identities to the extent that they are known to or reasonably ascertainable (generic name, trade name, or CASRN if it is a publicly known chemical substance) and use the article importer streamlined form. Public identifiers like generic names and public Inventory CASRNs may not be claimed as CBI and it is unnecessary for article importers to assert CBI claims for the specific identities of substances that are not reported by a specific identifier (*i.e.,* Accession number or LVE number). EPA would not be able to determine an underlying confidential chemical identity from this generic identifying information, so could not disclose that specific chemical identity, regardless of whether the submitter asserted a CBI claim. It would be purposeless for the submitter to assert a CBI claim for this information or for EPA to review such claims. In this TSCA section 8(a)(7) rule, and for these reasons, EPA believes that it is appropriate to differentiate article importers from other reporters with respect to chemical identity CBI claims.

However, all other entities (*i.e.,* other than article importers) who report a CAS name, CASRN, or specific identifier (*i.e.,* Accession number, LVE number) must assert and substantiate a CBI claim for the specific chemical identity if the reporter wants the chemical identity to receive confidential treatment. A person or entity (other than an article importer) who does not have knowledge of such an identifier (CAS name, CASRN, Accession number, or LVE number) must initiate a joint submission with its supplier or other entity who can provide this identifying information, if such an entity is known to or reasonably ascertainable by the manufacturer. In these cases, the secondary submitter would be responsible for providing the CAS name, CASRN, Accession number, or LVE number and for asserting and substantiating any CBI claims concerning the chemical identity (see *e.g.,* 40 CFR 711.15(b)(3); 711.30(c)). In light of the extended timeframe (11 years) covered by this reporting rule, it is possible that the submitter's supplier is unknown or no longer exists (*e.g.,* supplier has gone out of business without a successor entity). As applied to this reporting rule only, a submitter who lacks knowledge of the CAS name, CASRN or a specific identifier (*i.e.,* Accession number or LVE number) and who—after conducting due diligence and reviewing known or reasonably ascertainable existing information—cannot identify a supplier or any other entity who could provide this information in a joint submission, the submitter would indicate that secondary submitter information is not known or reasonably ascertainable and therefore does not need to initiate a joint submission.

Generally, reporting entities will not have an opportunity to add or modify substantiations once the reporting period concludes. Therefore, reporting entities should communicate with suppliers, or any other entities with CBI concerns (*e.g.,* non-disclosure agreements) and carefully consider the CBI implications of this rule. However, reporting entities may amend their submission to withdraw CBI claims at any time during the reporting period.

In response to comments received on CBI claims concerning the specific chemical identity, following the

conclusion of the reporting period for this rule, EPA will compile a list of reported substances it plans to move to the public Inventory because either no chemical identity CBI claim was asserted, or the claim was denied. Similar to past compilations, EPA will publish a list of Accession numbers associated with these substances on the EPA website for several months in advance of any update to the Inventory. Interested parties will have an opportunity to review the list for possible errors and contact EPA with any questions or concerns about specific candidates. In some cases, there may be assertions by a company that a mistake has been made (*e.g.,* the wrong chemical identity was reported by a third party) or that a waiver of a CBI claim was made by a company that may not know the specific chemical identity, in which case EPA will undertake appropriate factual investigations as necessary to confirm whether EPA should reconsider whether the chemical is no longer entitled to confidential Inventory protection. Where EPA determines that a chemical identity was identified as a candidate for disclosure because there was an error or because the sole basis for the proposed move to the public portion of the Inventory was a waiver of a CBI claim by an entity that did not know the specific chemical identity, it will not move the chemical identity to the public portion of the Inventory. This investigation would take place prior to the point that the specific chemical identity would be disclosed on the public Inventory.

H. What are the electronic reporting requirements?

EPA is requiring all information to be submitted electronically, similar to the requirements established in 2013 for submitting other information under TSCA (see 40 CFR 704.20(e)). Reporters must use EPA's Central Data Exchange (CDX), the Agency's electronic reporting portal, to submit all information under this rule. EPA developed the Chemical Information Submission System (CISS) for use in submitting data electronically to the Agency for TSCA sections 4, 5, 6, 8(a), 8(b), 8(d), and 8(e) and Title VI. CISS, a web-based reporting tool housed within the CDX environment, provides submitters with user-friendly applications to build and submit data packages to EPA within a secure, encrypted environment. CISS applications provide for the capture of both fielded data as well as the attachment of additional information using a wide variety of file types. Within CDX, CISS is available under the ''Submission for Chemical Safety and Pesticide Program (CSPP)'' CDX flow. Users who have previously submitted under TSCA through CDX, including submitting information under sections 4 and 5, or CDR, will already have the CSPP flow linked to their account. Users reporting to EPA using other CDX housed applications, including the Toxics Release Inventory TRI–MEweb, would be able to add the CSPP flow to their existing CDX accounts.

EPA is developing a rule-specific reporting tool within CISS, which reporters must use to submit the required information. This tool will be available in CISS prior to the start of the reporting period (see the discussion in Unit III.I on reporting deadlines). EPA believes that electronic reporting reduces the reporting burden for submitters by reducing the cost and time required to review, edit, and transmit data to the Agency. It also allows submitters to share a draft submission within their organization and more easily save a copy for their records or future use. Additionally, EPA believes that many of the anticipated reporters under this rule have experience with reporting electronically to EPA through CDX. For those reporters who do not have experience submitting information to EPA via CDX, EPA has provided guidance documents and support via a help desk to assist users with technical questions related to CDX. The resource and time requirements to review and process data by the Agency will also be reduced, and document storage and retrieval will require fewer resources.

I. What if an entity who knows the specific chemical identity will not disclose it to the PFAS manufacturer (including importer)?

In response to public comment, EPA is also enabling joint submissions for PFAS manufacturers (including importers) other than article importers who do not know the CASRN, Accession Number, and/or LVE number and whose suppliers will not disclose the identity to the PFAS reporter. Similar to the 2020 CDR cycle, this joint submission tool would allow manufacturers (including importers) to submit all importing, processing, use, and other information to the extent it is known or reasonably ascertainable and to send a request to the appropriate supplier or other entity to create a submission to supply the PFAS identity to EPA through the reporting tool. The joint submission process does not require the supplier or other entity to disclose the specific chemical identity to their customer, thus maintaining confidentiality between the two entities.

The joint submission tool would be relevant when a manufacturer (including importer) cannot provide the CAS name, CASRN, Accession number, or LVE number of a chemical substance it manufactures, generally because it is unknown to the manufacturer (including importer) and claimed in part or in its entirety as CBI by the supplier of the chemical substance or mixture.

In a joint submission, the primary submitter (*i.e.,* the PFAS manufacturer) may assert CBI claims over some of their supplier information, including the supplier identity and the chemical substance or mixture trade name (or other designation). Substantiation of the CBI claims for this information will not be required at the time of the primary submitter's submission. The secondary submitter of the joint submission must register with CDX if they have not previously and provide its company name and location, a technical contact, trade name, chemical identity, function, and, for PFAS in mixtures, the percentage of each PFAS in the mixture represented by the trade name. The secondary submitter is responsible for asserting all confidentiality claims for the data elements that it submits directly to EPA and for substantiating those claims not exempt under 40 CFR 705.30(a)(2). The specific chemical identity may be claimed as CBI by the secondary submitter following the provisions in 40 CFR 705.30. If the secondary submitter does not assert and substantiate a CBI claim for the identity of the chemical substance in its response to the Agency, then the chemical is not entitled to confidential treatment. Except for the percentage composition information, which is generally exempt from substantiation pursuant to TSCA section 14(c)(2)(D), all other reported data elements are subject to substantiation at the time the information is submitted.

Similar to the CDR joint submissions, any secondary submitter in this rule will be able to request the chemical information from their own suppliers as needed, should the importer's direct supplier not have the information. There may be instances where a foreign supplier purchases a mixture, under a trade name, from another company (tertiary company) and does not know the chemical components of the mixture. The foreign supplier can ask the tertiary company manufacturing the trade secret mixture or PFAS within the mixture to directly provide EPA with the correct chemical identity in the reporting tool. In this case, the tertiary company would register with CDX and use the Unique Identifier for Joint Submissions, sent to the tertiary

company by the secondary company (*i.e.,* the foreign supplier), to complete the reporting form.

Under this scenario, the foreign supplier does not have access to any of the information submitted to EPA by the tertiary company. Likewise, the tertiary company cannot see the information the foreign supplier or the primary company (*i.e.,* the U.S. manufacturer (including importer)) reports to EPA. This way, the confidentiality of information for all parties is protected. EPA believes this functionality addresses some concerns that have been voiced from stakeholders, including an importer's direct (or immediate) supplier may not have knowledge of the PFAS identity. By allowing a foreign supplier (secondary submitter) to request the required information from their own supplier (a tertiary submitter) as needed, EPA believes this will capture more information related to specific PFAS identities that may not be known to the importer due to confidentiality or trade secret claims, while not requiring suppliers to share any information they wish to protect from their customers.

Joint submissions are to be used only in cases when the PFAS reporter does not know the CAS name, CASRN, Accession number, or LVE number for the PFAS, but another entity (*e.g.,* a supplier or other manufacturer) does and will not disclose it to the reporter. If a reporter (including importer) or joint reporter (secondary or tertiary submitter) actually knows or can reasonably ascertain the CAS name, CASRN, Accession number, or LVE number of a PFAS, the reporter (including importer) must provide that information irrespective of others' confidentiality claims. If the reporter wishes to claim the specific chemical identity as confidential, the chemical substance must not be listed on the public portion of the Inventory, the submitter must check the CBI box in the reporting tool and provide the appropriate substantiation. Such a CBI claim only relates to the specific chemical identity as listed on the confidential portion of the Inventory (*i.e.,* CAS name and/or CASRN) and does not apply to the Accession number and generic name listed on the public portion of the Inventory.

Because article importers are not required to assert or substantiate CBI claims for the chemical identity for this rule, EPA is not requiring or enabling joint submissions for article importers when they do not know the CAS name, CASRN, Accession number, or LVE number of the PFAS. Additionally, in scenarios where a secondary submitter is not known or existent (*e.g.,* a supplier has gone out of business and does not have a successor entity), the primary submitter would indicate in the reporting tool that the secondary submitter is ''not known or reasonably ascertainable.'' In this case, however, the PFAS manufacturer would be required to provide as much identifying detail as they have regarding the PFAS identity (*e.g.,* trade name), but would be able to report to EPA without initiating a joint submission.

J. When are reports due?

EPA proposed a six-month information collection period following the effective date of the final rule, then a six-month reporting period. Thus, the proposed rule stipulated a reporting deadline one year following the effective date of the final rule. EPA received many public comments on the reporting timeframe, which are detailed in Unit IV.K.

In response to public comment, EPA has decided to finalize a one-year information collection period following the effective date of this rule, which will then be followed by a six-month reporting period. Further, EPA is granting an additional six months for reporting to small manufacturers (as defined at 40 CFR 704.3) whose reporting obligations under this rule are exclusively from article import. ''Small manufacturers'' as defined at 40 CFR 704.3 include manufacturers who meet one of two standards: (1) a manufacturer (including importer) whose total annual sales, when combined with those of its parent company, are less than $120 million, *and* the annual production volume of a chemical substance is less than 100,000 lbs; or (2) a manufacturer (including importer) whose total annual sales, when combined with those of its parent company, are less than $12 million. EPA acknowledges that the scope of reporting for this rule is broader than for CDR, and that there may be some reporting entities who have not submitted information to EPA under a TSCA section 8(a) reporting rule before (*e.g.,* some small manufacturers). Therefore, EPA agrees that additional time is warranted for PFAS manufacturers to familiarize themselves with the scope of the reporting rule and reporting standard, as well as begin to collect the required information and create a CDX account if necessary. The extended time period for information collection also benefits both EPA and the reporting community by providing the Agency with additional time to develop and test the CDX reporting application for this rule. Thus, reporting forms will be due 18 months following the effective date of this rule, except for small article importers (as defined at 40 CFR 704.3), whose reporting forms are due 24 months following the effective date of this rule.

K. What are the recordkeeping requirements?

EPA is finalizing the proposed recordkeeping requirements. Each person who is subject to the reporting requirements must retain records that document any information reported to EPA for five years, beginning on the last date of the information submission period. The five-year retention requirement is consistent with the CDR rule and corresponds with the statute of limitations for violations and is necessary to preserve records to support future regulatory activities that will be informed by this information collection. Further, EPA believes the burden of retaining these records, which are likely electronic, is minimal.

L. Which proposed requirements are not being finalized as proposed?

EPA is modifying the following items from the proposed rule: the definition of ''PFAS''; the reporting deadline; some of the data elements requested; enabling streamlined reporting options for article importers and manufacturers of R&D substances below 10 kilograms; enabling joint submissions; and [certain waste management/disposal facility exemptions].

As noted in Unit III.A.1, this rule defines ''PFAS'' as including at least one of these three structures:

- R-(CF_2)-CF(R′)R″, where both the CF_2 and CF moieties are saturated carbons;
- R–CF_2OCF_2-R′, where R and R′ can either be F, O, or saturated carbons; and
- $CF_3C(CF_3)$R′R″, where R′ and R″ can either be F or saturated carbons.

This definition is an expansion of the proposed definition of ''PFAS'', which was defined as R-(CF_2)-CF(R′)R″, where both the CF_2 and CF moieties are saturated carbons, and none of the R groups can be hydrogen. The proposed definition defined PFAS as a substance that includes the following structure: R-(CF_2)-C(F)(R′)R″, in which both the CF_2 and CF moieties are saturated carbons and none of the R groups (R, R′ or R″) can be hydrogen. The proposed definition, which existed previously in EPA's Office of Pollution Prevention and Toxics (OPPT), was developed to focus on chemical substances in the Inventory with properties similar to PFOA, PFOS, and GenX. EPA notes that the proposed definition of ''PFAS'' had previously been used by OPPT, although this definition has changed

over time. For instance, the polymer exemption for PMNs provided a different definition of ''perfluoroalkyl'' in its PFAS exception rule in 2010 (40 CFR 723.250) (Ref. 20). Over many years of research and data collection, EPA continues to learn more about these substances and may consider whether modifications to the definition are appropriate. See Unit IV.A.1 for a more detailed discussion of EPA's reasons for modifying this definition for this rule.

EPA is also modifying the reporting deadline from the proposed rule. As noted in Unit III. J, EPA believes additional time for rule familiarization and data collection is warranted given the lookback period of this rule and that there are entities that are potentially covered by this rule which have not been previously required to respond to other TSCA section 8 reporting rules, such as CDR. Given public comments and input during the SBAR Panel, EPA is providing a one-year period following the effective date of this rule for data collection, followed by a six-month reporting period during which the reporting application will be open. EPA is further granting an additional six months for reporting to small manufacturers (as defined at 40 CFR 704.3) who would report exclusively as article importers for the purpose of this rule. Thus, reporting forms are due 18 months following the effective date of this rule, except for small article importers, which are due 24 months from the effective date of this rule.

EPA is slightly modifying the data elements requested by PFAS manufacturers. Based on public comments, EPA is not including the following proposed data elements within this rule: the maximum quantity on-site at any time, including storage; the maximum first 12 months production volume, and the maximum yearly production volume in any 3 years. EPA received public comment that it is unlikely that manufacturers have information related to the storage quantities, and other comments stated that requesting the maximum production quantities in either the first 12 months or in any three years may be duplicative of other production volume data requested. Therefore, EPA is removing these three items from the scope of the final rule. For more discussion on the comments received on the scope of data elements, see the Response to Comments document (Ref. 21).

Pursuant to public comments, EPA is also modifying the request for the molecular structure of the PFAS in all reports: submitting molecular structure of the reported PFAS is optional for any Class 1 PFAS on the Inventory. Class 1 chemical substances are those chemical substances composed of molecules with particular atoms arranged in a definite, known structure. If a Class 1 substance is also on the Inventory, EPA knows its particular molecular structure. However, many commercially-manufactured chemicals are not Class 1 substances (*i.e.,* they are Class 2 substances comprised of specific molecular formula representations in variable structures, or they have unknown or indefinite molecular formulas and/or incomplete structural diagrams). Additionally, not all commercially-manufactured substances that are subject to TSCA may be on the Inventory due to various reporting exemptions. While EPA has the authority and obligation to request the molecular structure of any reported PFAS pursuant to TSCA section 8(a)(2)(A), EPA does already know the structure of Class 1 substances on the Inventory; thus, pursuant to TSCA section 8(a)(5)(A), EPA is limiting the scope of this reporting requirement in cases where the information would be duplicative of information EPA has obtained through TSCA reporting. Therefore, EPA is modifying the proposed rule by limiting the reporting requirement of molecular structures to those PFAS that are not Class 1 substances on the Inventory.

Finally, EPA is also modifying the proposed data elements for worker exposure duration. EPA proposed to request information on worker exposure for the manufacturing site, each industrial process and use, and each commercial use. For all three categories, EPA proposed to request ''maximum duration of exposure for any worker'' in both hours per day and days per year. However, following the publication of the proposed rule, EPA understands that the worker exposure duration information, as proposed, could lead to a manufacturer reporting unassociated variables; that is, the worker with the maximum duration of exposure in hours per day is not the same as the worker with the maximum duration of exposure in days per year. Without additional clarifying information on which worker(s) the reported durations reflect, such a request may not yield data useful for EPA's assessments. EPA is therefore modifying the proposed request for the worker exposure duration data by clarifying the workers for whom the maximum exposure durations or frequency must be reported. EPA is requesting worker exposure duration information (in hours per day and days per year) both for the worker with the greatest daily exposure duration (*i.e.,* the worker with the greatest exposure in hours per day) and for the worker with the greatest annual exposure frequency (*i.e.,* the worker exposed during the most days per year).

Additionally, EPA is modifying the scope of data elements requested for some article importers and manufacturers of R&D substances in quantities below 10 kilograms annually. Based on feedback through public comments and the SBAR Panel, EPA understands that some article importers and some manufacturers of R&D substances may not know or be able to ascertain all information being requested. Therefore, EPA is offering two streamlined reporting options for those manufacturers. (For more information on these reporting options, see additional discussions in Units III.D.2 and III.D.3.)

EPA is also modifying the proposed rule by enabling joint submissions. In the proposed rule, EPA did not propose joint submissions, but did specifically request comment on whether to enable them for this rule in cases where a supplier may not disclose the chemical identity to an importer who is covered by this reporting rule. Following public comments, EPA is finalizing this rule to include joint submissions for situations in which an importer does not know the CASRN or specific identifier (*i.e.,* Accession number or LVE number) (see Unit III.I.). EPA further discussed requiring submitters who lack knowledge of a chemical's specific chemical identity to initiate a joint submission in the NODA.

Finally, EPA is modifying the scope of reportable activities under this rule to clarify that importing municipal solid waste streams for the purpose of disposal or destruction is not a reportable activity under this rule. As explained in Unit III.B.3., EPA learned through public comments and the SBAR Panel that entities engaged in certain municipal solid waste management activities are in the unique position of not having any knowledge of the contents of the municipal solid waste they have imported. Therefore, extending reporting requirements to such sites would not result in any responsive information under TSCA section 8(a)(7), and EPA does not consider the import of municipal solid waste for the purpose of disposal or destruction to be a reportable activity.

IV. Summary of Comments and Other Public Input and EPA's Response

EPA received 109 unique public comments during the proposed rule's public comment period. Following

publication of the proposed rule, EPA received more data related to the proposed rule's burden and cost estimates. At the time of the proposed rule's publication, EPA did not have sufficient and reliable data to inform an estimate of the scope of article importers that may be affected by the proposed rule's requirements. However, after receiving comments through the docket related to the scope of article importers (including estimates provided by companies and industry trade associations), and through the discovery of additional information and data sources related to the scope of potentially affected article importers, EPA determined the proposed rule could no longer support a certification under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* that there would be no significant economic impact on a substantial number of small entities. Specifically, the number of small businesses who may be considered importers of PFAS-containing articles and therefore potentially affected by the proposed rule was estimated to be approximately 130,000. Thus, EPA convened an SBAR Panel under the RFA to hear directly from small entities on the anticipated impact of the proposed rule on their organizations, and to hear feedback regarding recommended paths forward to finalize a rulemaking that would minimize the burden of compliance on small entities while still achieving the objectives of TSCA section 8(a)(7). This Panel convened in April 2022, with a Panel Outreach meeting conducted on April 20, 2022. The Panel (which included EPA, Office of Management and Budget (OMB), and Small Business Administration (SBA) representatives) used feedback from the small entity representatives submitted during and after the Outreach meeting to develop its Panel Report (Ref. 22), which included recommendations for EPA to consider in its final rule.

Along with public comments on the overall cost estimates of the 2021 proposed rule, EPA received many public comments both in support of and against EPA's position to not exempt entities or activities that are often exempt under CDR, including small manufacturers and article importers, and the use of a structural definition for PFAS rather than a discrete list of substances.

Following this Panel, EPA published a NODA (Ref. 1) to solicit public comment on the rule's IRFA and other aspects of the proposed rule that may have been impacted by EPA actions or proposed actions since the public comment period had closed for the proposed rule in September 2021. EPA also published the SBAR Panel Report (Ref. 22) for public comment. The notice was published on November 25, 2022 (Ref.1), for a 33-day public comment period ending on December 27, 2022. EPA received 44 unique public comments during the public comment period following the publication of the NODA (Ref. 1). Comments largely focused on different regulatory alternatives presented in the Panel Report (including certain exemptions, or using a discrete list of covered PFAS) and on EPA's discussion of its approach to CBI claims of the chemical identity.

EPA considered all comments and other stakeholder input, including from the SBAR Panel, in the development of this final rule. This unit discusses many of the comments on the proposed rule received through both avenues and the Agency's responses; however, the more comprehensive response to comments related to this rule can be found in the Response to Comments document, which is available in the docket for this rulemaking (Ref. 21).

A. What is the proposed definition of covered substances?

1. Summary of Public Input

Many commenters provided feedback on the specific definition of PFAS in the proposed rule. These commenters either were unsupportive of EPA's definition and requested that the Agency narrow the proposed definition of PFAS or requested that EPA broaden their definition of PFAS, while generally supporting EPA's proposed structural definition.

Commenters who were generally unsupportive of EPA's proposed definition of PFAS noted that ''the proposed rule contains a definition of 'PFAS' not recognized by any other federal agency or international organization, and which EPA itself does not use consistently.'' One commenter mentioned that treating PFAS as a single group or class of chemicals is ''not scientifically sound or appropriate'' due to it being ''over- and under-inclusive.'' Another commenter stated that EPA's proposed definition of PFAS is overly expansive ''because it includes molecules that are not obviously PFAS'' such as ''highly fluorinated molecules that are not PFAS by any common understanding of PFAS.'' This commenter suggested that the definition of PFAS in the final rule ''hew much more closely to the types of PFAS molecules that motivated Section 7351 of the NDAA 2020.'' Commenters who suggested that EPA's proposed PFAS definition is overly broad, also suggested that an overly broad PFAS definition will ''almost certainly'' result in unnecessary reporting of ''PFAS molecules' that are ''likely unrelated to the underlying problems.''

Some commenters suggested that EPA use the OECD definition of PFAS, with a few commenters recommending that EPA define PFAS ''at least as broadly as the recent OECD definition.'' Supporters of adopting the OECD definition claimed that the OECD definition incorporates sound science based on input from the ''world's leading developed countries, including scientists from EPA'' and mentioned that it might make reporting compliance easier for PFAS manufacturers who have a global presence. Another commenter who supported use of the OECD definition mentioned that EPA's proposed definition excludes ''many PFAS of known concern, undercutting the benefits of the Agency's actions.''

A few commenters who claimed that EPA's proposed PFAS definition is overly narrow, mentioned that other regulatory agencies in some states have taken a ''class-based approach'' to PFAS by regulating them as a chemical class. Commenters specifically cited Vermont, Massachusetts, and California as examples of States that are regulating PFAS in this way, ''given that all PFAS, or their degradation, reaction, or metabolism products, display commonly hazardous traits.'' Some commenters pointed to additional States (Colorado, Maine, Washington) that have adopted or are considering adopting a broader definition of PFAS similar to the OECD definition.

2. EPA's Response

EPA appreciates that there are differences between the definition of PFAS used for this rule, for other actions in the Agency, and by non-EPA entities. While EPA's rule is not dictated by the definitions used by other regulatory bodies or international organizations, the Agency did consider adopting the different definitions suggested by the commenters, but ultimately determined those definitions would not satisfy EPA's obligations under TSCA section 8(a)(7). In the development of this proposed definition, EPA intended to include substances with a strong electron withdrawing nature as this greatly effects the chemistry of the substituted, adjacent and nearby atoms, meaning they would have a minimum of two fluorine atoms on at least one carbon (*e.g.,* -CF_2-). Additionally, EPA wanted the covered substances to be unlikely to degrade or metabolize, so an adjacent CF group was added to the requirement/

definition, with the stipulations that the substitutions could not be H and both carbons must be saturated (*e.g.,* -CF_2-CFR-). EPA also thought that branching might make a chemical less susceptible to degradation and metabolism, so EPA also removed the option for -CF_2-CF_2- when developing the proposed definition.

After reviewing public comments, EPA is modifying the proposed definition of PFAS. For the purposes of this section 8(a)(7) reporting rule, EPA is defining ''PFAS'' using a structural definition. PFAS is defined as including at least one of these three structures:

- R-(CF_2)-CF(R′)R″, where both the CF_2 and CF moieties are saturated carbons;
- R-CF_2OCF_2-R′, where R and R′ can either be F, O, or saturated carbons; and
- $CF_3C(CF_3)$R′R″, where R′ and R″ can either be F or saturated carbons.

For the purposes of this rule, EPA has defined PFAS to include chemical substances whose structures or substructures resemble, at least in part, chemicals widely known to be of concern to human health and/or the environment, *i.e.,* PFOA, PFOS, and GenX. The definition also captures substances that may metabolize or degrade to PFAS which may present similar properties to PFOA, PFOS, or GenX. This definition is focused on substances likely to be present in the environment, thereby focusing on substances with greater potential for exposures to people and/or the environment and by extension more potential to present risks.

EPA considered adopting OECD's definition for the purpose of this rule, but for the reasons provided in this unit, determined it is not appropriate to do so. First, EPA notes that ''alkyl'' means an alkane missing one hydrogen, and acyclic alkyl has the general formula of $C_nH_{2(n+1)}$, while a cycloalkyl has the general formula $C_nH_{2(n-1)}$. Rather than limiting the definition of PFAS to alkyl chains, the OECD definition covers, with certain exceptions, any chemical with one or more fluorinated alkyl groups (*i.e.,* -CF_2-, -CF_3). Many chemical substances covered by the OECD definition are unlike the structures of the PFAS of concern (*i.e.,* PFOA, PFOS, GenX), which have more fluorinated carbons and are more likely to be present in the environment. The substances with only single fluorinated alkyl groups and no additional fluorinated moieties do not share the same environmental and/or human health impacts (including bioaccumulation, persistence, or toxicity) as substances such as PFOA, PFOS, or GenX. Further, many substances with one terminal -CF_3 (*e.g.,* trifluoroacetic acid (TFA)) are well-studied. Using structures in the CompTox Chemicals Dashboard, EPA estimates that approximately 23,000 additional substances would be captured by the OECD definition, though approximately 17,000 of those would be covered only due to having one terminal -CF_3 and no additional fluorine. Thus, adopting the OECD definition of PFAS in this rule would mainly serve to significantly add reporting burden on many substances whose only fluorine atom is in a terminal -CF_3 and that do not share a fluorinated substructure that is likely to result in their persistence in the environment, nor to degrade to a substance that shares toxicological or physiochemical properties with PFOA, PFOS, or GenX. Therefore, EPA is using its authority under TSCA section 8(a)(5)(A) to focus reporting on structures that contain at least one fluorinated alkyl chain rather than isolated fluorinated alkyl groups. Information on structures that would meet the OECD definition due to an isolated fluorinated alkyl group is considered ''unnecessary'' for the purpose of this rule and is out of scope of reporting requirements under EPA's authority under TSCA section 8(a)(5)(A).

Further, OECD's general definition is ''based on molecular structure alone'' (Ref. 8). In its 2021 terminology document, OECD notes that the current definition ''serves as a starting and reference point to guide individual users to have a comprehensive understanding of the PFAS universe and to keep the big picture of the PFAS universe in mind. At the same time, individual users may define their own working scope of PFASs for specific activities according to their specific needs by combining the general definition of PFASs with additional considerations (*e.g.,* specific properties, use areas)'' (Ref. 8). Accordingly, EPA determined it is appropriate to define ''PFAS'' differently for this rule and to establish a definition which characterizes PFAS based on predefined traits. Substances which meet the OECD's definition of PFAS but that would not be considered PFAS under this rule do not share properties with substances of concern to EPA (*i.e.,* PFOA, PFOS, and GenX). As noted previously, EPA is defining PFAS for this rule to focus on reporting that is necessary under TSCA section 8(a)(7), while reducing unnecessary or duplicative reporting pursuant to EPA's obligations under TSCA section 8(a)(5)(A).

Additionally, while the OECD definition of PFAS is broader than other entities' definitions of PFAS, EPA is aware of some TSCA chemical substances which would meet this rule's definition of PFAS but not OECD's. In comparing the universe of PFAS that would be subject to EPA's proposed definition and those substances captured by OECD's definition, EPA determined that some substances with halogens (*e.g.,* iodine, chlorine, bromine) on the same carbon as the CF or CF_2 moiety would be in scope of EPA's proposed definition but not OECD's. Examples of substances which are considered PFAS under this rule's definition but not OECD's definition include 1-chloro-1,1,2,2-tetrafluoroethane (CASRN 354–25–6) or 1,2-dichloro-1,1,2,2-tetrafluoroethane (CASRN 76–14–2). Because all substances which were captured by the proposed definition are still captured in this final rule, EPA points out that adopting the OECD definition would still have excluded some substances that are captured by this rule's definition.

Many commenters also suggested that trifluoroacetyl fluoride (TFA; CASRN 354–34–7) should be included within the scope of this rule. Under this rule's definition of PFAS, TFA is not within scope. EPA believes TFA does not meet the threshold for reporting under TSCA section 8(a)(7), as it is a short-chain molecule (C_2) with only one terminal -CF_3, and no other fluorine atom, unlike substances such as PFOA, PFOS, and GenX. TFA is naturally occurring in some instances or is produced as an environmental degradant of many other substances, especially those with only one terminal carbon (-CF_3) (Refs. 23, 24, and 25). EPA understands that the manufacture of TFA would not always be considered ''manufactured for commercial purposes'' under TSCA, such as its production as an environmental degradant or its presence as a naturally-occurring substance, and therefore EPA would not receive any TSCA section 8(a)(7) reporting on those quantities. Additionally, as EPA has noted in responding to a request for testing on PFAS, TFA is ''a well-studied substance'' with ''relatively robust toxicity information available'' (Ref. 25). Therefore, EPA believes that reporting on TFA under a TSCA section 8(a) rule (*i.e.,* one in which the scope is limited to those substances manufactured for commercial purposes and does not include environmental degradants) is not warranted as such requirements would be ''unnecessary'' and

''duplicative'' under TSCA section 8(a)(5)(A).

EPA also disagrees with commenters who expressed that the scope of substances reportable under this rule should be a discrete list and not a structural definition. EPA points out that other TSCA requirements have relied on a structural definition when appropriate (*e.g.,* the LCPFAC SNUR defines covered substances using a structural definition (40 CFR 721.10536) (Ref. 7), and the polymer exemption rule for new chemical pre-manufacture notices (PMNs) defines covered PFAS polymers using structural definitions (40 CFR 723.250). As some commenters pointed out, reporting exemptions for both existing chemicals (*e.g.,* certain byproduct exemptions in the CDR rule) and new chemicals (*e.g.,* byproducts and impurities not listed on the Inventory) mean that EPA may be unaware of some substances which meet this definition of PFAS, and which would also meet the TSCA definition of ''chemical substance.'' Therefore, EPA has chosen to define the scope of covered substances for the purpose of this rule using a structural definition and not inadvertently limit the scope of reporting to a discrete list.

B. What is the inclusion for articles?

1. Summary of Public Input

Several commenters provided feedback on the inclusion of articles (whether imported or domestically produced) in the proposed reporting requirements.

Commenters who expressed support for the inclusion of articles in the proposed reporting requirements provided the following rationales:

- It is necessary that EPA include articles in the scope of reporting requirements to better understand where PFAS are used in products and the extent of human exposure. Additionally, EPA has recognized that PFAS in articles can be released during use and disposal, and therefore it is necessary for EPA to gather this information.
- Information on PFAS-containing articles is critical to states that are beginning to regulate PFAS-containing items.
- Even if there are data gaps related to the presence of PFAS in articles, EPA would benefit from knowing the existence of these gaps, and therefore, EPA should move forward with requiring reporting on articles.
- Congress has authorized inclusion of articles in the reporting requirements; reporting of ''known or reasonably ascertainable information'' is not an excessive burden. Commenters argued that excluding articles from the scope of the final rule would be inconsistent with Congressional intent.
- The definition of ''chemical substance'' under TSCA is not incompatible with the inclusion of articles. Further, in other sections of TSCA, Congress specified distinct requirements for chemical substances depending on their presence in articles, though it did not do so in TSCA section 8(a)(7).

Commenters who suggested that EPA exempt articles from the proposed reporting requirements provided the following rationales:

- The proposed requirements are at odds with regulatory practices; historically, EPA has not included articles in reporting requirements. Additionally, CDR does not include reporting on imported articles, and some commenters stated that EPA should be consistent with those requirements. Some commenters suggested that the reasons EPA has provided in the past for certain CDR exemptions, including imported articles, are relevant here (*i.e.,* the potential for exposure to chemicals contained in articles is ''limited'') and encouraged EPA to incorporate an imported article exemption under this rule. Several of these comments also mentioned previous EPA actions, such as the TSCA Fees Rule and the phenol, isopropylated phosphate (3:1) (PIP (3:1)) rule, in which EPA initially aimed to include articles but eventually changed course due to ''workability'' issues of including articles (Refs. 26 and 27).
- EPA did not provide sufficient justification in the proposed rule for requiring article reporting, and there is no mandate in the FY 2020 NDAA for inclusion of articles. Commenters claimed that EPA underestimated or failed to account for the burden this reporting will have on article importers, and EPA is unable to accurately estimate how many importers this proposed rule would affect.
- Under TSCA, the definition of ''chemical substance'' has not been interpreted to include articles which contain the chemical substance. Commenters argue that TSCA section 8 implementing regulations also distinguish ''articles'' from ''chemical substances.''
- Requiring reporting on articles would place undue burden on industry and for manufacturers or importers to obtain the information EPA seeks is very difficult given the absence of historical PFAS reporting requirements. Commenters claimed that there will be significant data gaps if EPA requires article information, and that EPA will not be able to obtain the information it seeks. Additionally, reporting on articles going back ten years is impractical.
- EPA has acknowledged that article manufacturers and importers likely will not have the information EPA seeks, and therefore, manufacturers and importers should be exempt. These commenters also cite their foreign suppliers' confidentiality or trade secret claims over their products and indicate that it is unlikely their suppliers will divulge the information necessary to comply with this rule.
- Supply chains are too broad and requiring articles reporting will result in duplicative information, especially for more complex articles or finished products.

Neutral comments suggested that if EPA is going to require reporting on articles, they should require reporting for domestic article manufacturers only and not article importers, and that even beyond this rule, EPA should fully consider the complexities associated with collecting data on articles under TSCA. One commenter stated that EPA should consider focusing its reporting requirements on articles with the greatest potential for human exposure. The commenter offered as an example the differences between articles containing PFAS on its surface due to the properties that PFAS would impart on the product (such as carpets or cookware) and articles containing PFAS within resins of multi-component parts. The commenter suggested that EPA exclude articles containing PFAS unless the PFAS was intentionally added to the article due to properties imparted on the article.

2. EPA's Response

EPA appreciates the broad interest in the general topic of requiring reporting on PFAS within articles (either imported articles or articles that are domestically produced). This topic was also discussed at length during the SBAR Panel, and EPA considered all public input on the proposed inclusion of PFAS-containing articles in this rule. EPA is finalizing the requirement to include PFAS-containing articles within the scope of this rule, to the extent that the manufacturer (including importer) of PFAS within articles knows or can reasonably ascertain the requested information. EPA disagrees with commenters who stated that the Agency does not have the authority to collect information on PFAS-containing articles given the language in the FY 2020 NDAA. While the FY 2020 NDAA did not explicitly direct EPA to collect data

on articles containing PFAS, the FY 2020 NDAA also did not explicitly prevent EPA from collecting information on PFAS-containing articles. Further, EPA notes that it is within the Agency's authority to collect information on chemical substances which are manufactured or imported through articles. Thus, the FY 2020 NDAA's direction to EPA to require data from PFAS manufacturers necessarily includes those PFAS manufactured (including imported) within articles. Although EPA has not typically included articles in some other TSCA section 8 reporting rules, the Agency both has the authority and has previously done so. Other TSCA rules, including other TSCA section 8 reporting rules (such as the Preliminary Assessment Information Reporting rule under TSCA section 8(a) (40 CFR part 712) and the TSCA section 8(d) Health and Safety Data Reporting rule (40 CFR part 716) include reporting on articles as needed for EPA to fulfill its responsibilities under TSCA. Additionally, EPA points out that the TSCA Fees and PIP 3:1 rules (Refs. 26 and 27) are authorized under separate sections of TSCA. This PFAS reporting rule was proposed and required under TSCA section 8(a), which authorizes EPA to require reporting and recordkeeping requirements of manufacturers and/or processors, to the extent such information is known to or reasonably ascertainable by the reporter. The requirements and compliance standards of the PIP 3:1 (use in article prohibition) (Ref. 27) and Fees (self-identification of manufacture) rules were different (Ref. 26).

EPA disagrees with the commenters that under TSCA, the definition of 'chemical substance' ''cannot be and has never been interpreted to include articles that contain the regulated chemical substance.'' TSCA section 3(2) does not define ''chemical substance'' to exclude articles. Generally speaking, articles are manufactured goods or finished products—and the chemicals in them are subject to TSCA. The law is clear that when a chemical substance is manufactured (including imported into the United States) or is distributed or processed in the United States—whether in bulk form or in an article—it can be subject to regulation under TSCA. As such, EPA can and has imposed regulatory requirements on chemical substances in articles under TSCA. Further, no TSCA section 8 regulations exclude articles from the definition of ''chemical substances.'' While implementing regulations for other TSCA section 8 rules may exempt reporting for activities related to a covered chemical substance in an article (*e.g.,* general reporting and recordkeeping provisions for TSCA section 8(a) information-gathering rules (40 CFR part 704) or the Chemical Data Reporting rule (40 CFR part 711)), there is no definitional distinction for a chemical substance depending on whether it is incorporated into an article; nothing says that an ''article'' is exclusive or distinct from a ''chemical substance.'' While the CDR rule has exempted the import of articles from reporting, the domestic manufacture of a chemical substance within an article is still subject to CDR. Further, EPA points out that the introductory paragraph of 40 CFR 704.5 for exemptions states this section is superseded by any TSCA section 8(a) rule that adds to, removes, or revises the exemptions described in this section. Thus, the commenters' reliance on precedent under 40 CFR part 704 fails to acknowledge that EPA has long allowed for different exemptions (or lack thereof) to apply under different TSCA section 8(a) rules as appropriate.

EPA also disagrees with commenters' statements that reporting on articles would place undue burden on industry. EPA points out that the reporting standard of TSCA section 8(a) rules is limited to information which is known to or reasonably ascertainable by the manufacturer. Thus, if requested information is beyond that scope of known or reasonably ascertainable, the reporting entity would not be required to submit anything beyond indicating that such information is not known or reasonably ascertainable to them. In other words, this reporting standard is not a testing requirement; rather it asks reporters to share with EPA the information they already have (or can reasonably determine) on their manufactured and imported PFAS.

Regarding comments on the lookback period for article importers, EPA points out that the lookback period proposed is consistent with Congress's direction to EPA in TSCA section 8(a)(7). EPA is not changing the proposed requirement to provide any known or reasonably ascertainable information for the period beginning in 2011.

Regarding comments stating that requiring reporting on articles may result in duplicative information for complex articles or products that are re-imported, EPA disagrees that the information reported will result in duplicative information, especially given the reporting standard applicable to this rule. EPA acknowledges that some supply chains of manufacturers reporting under this rule are complex. However, EPA believes that information known to or reasonably ascertainable by an article manufacturer at the first instance the PFAS is imported into the United States is likely different than the scope of information known to an article importer farther down the supply chain who may re-import that PFAS later, as the article is incorporated into more complex articles or products. For instance, the person who imports a PFAS within an article in the first instance may have different worker exposure information to report than a person who may later re-import that PFAS-containing article as part of a more complex product. In another example, information related to the known industrial or consumer uses of a PFAS within an article may be clearer to the person who re-imports a PFAS within a larger complex product than it is to the person who first manufactured the PFAS within the article. Thus, EPA does not believe that the information requested of PFAS article manufacturers would be duplicative, given the different steps of a supply chain and manufacturing processes, and is requiring all PFAS-containing article manufacturers to report the requested data to EPA to the extent it is known or reasonably ascertainable. EPA also believes that applying the reporting requirements each time a PFAS is imported into the United States is consistent with TSCA's definition of manufacturing under TSCA section 3(9) (which means ''to import into the customs territory of the United States (as defined in general note 2 of the Harmonized Tariff Schedules of the United States), produce, or manufacture'') and the directive under TSCA section 8(a)(7). EPA also believes that if a PFAS is imported, exported, then re-imported, limiting the scope of reporting to just one instance of importation into the United States may result in certain burden on manufacturers within the supply chain who need to further communicate with each other to determine whether a PFAS within an article has already been reported and who is responsible for reporting. Further, with respect to comments claiming that the inclusion of articles will necessarily result in significant data gaps, EPA respectfully points out that there is no current database with comparable information on PFAS in commerce, including within articles, over the reporting timeframe. EPA cannot make an assessment of potential PFAS data gaps without considering all reasonably available information. Additionally, as noted by other commenters, EPA would benefit

from better characterizing any data gaps after receipt of all reasonably known information.

EPA disagrees with commenters' suggestions to limit the scope of reporting on PFAS in articles by extending reporting requirements to only those articles ''with the greatest exposure potential.'' For the purpose of a TSCA section 8 information reporting rule, there is no requirement for EPA to determine which substances or types of articles may pose greater exposure potential, unlike some other sections of TSCA (*e.g.,* TSCA section 6 Significant New Use Rules). This TSCA section 8(a)(7) rule in particular aims to provide EPA with a greater understanding of the scope of existing information of PFAS within the supply chain and the quantities and uses of commercially manufactured PFAS, which may include PFAS manufactured or imported within a variety of articles or products.

Finally, EPA took appropriate and necessary steps to consult with the public and consider stakeholder input on the proposed rule, including reporting on PFAS-containing articles. These steps included convening an SBAR Panel and meeting with stakeholders to discuss the proposed rule and potential reporting obligations. EPA has considered all input for this rule, including the complexity of different supply chains with respect to collecting data on articles. While EPA was not able to estimate the burden on article importers given the data limitations at the time of the proposed rule's publication, the Agency has since been able to provide such estimates, including input from public commenters, peer-reviewed journals, other government datasets, and input from the SBAR Panel. EPA has now remedied this omission in the Economic Analysis.

C. What are the exclusion of processors from rule?

1. Summary of Public Input

EPA received comments both in support of and in opposition to the addition of processors to the proposed rule. Ten commenters stated that EPA should expand the rule beyond manufacturers (including importers) to cover all facilities processing PFAS. Two of these commenters expressed that processors are often in the best position to provide the information required under TSCA section 8(a). Several commenters emphasized the importance of collecting information on the full life cycle of PFAS, including from processing operations. Some commenters were concerned with a potential data gap of PFAS exposures if processors are omitted from the final rule. Another commenter highlighted the importance of tracking the PFAS solid waste stream to enhance understanding of health risks associated with PFAS and to inform other actions under environmental regulations such as the Safe Drinking Water Act (SDWA) and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Many commenters in support of adding processors also stated that EPA has the authority to require reporting from processors, citing both the FY 2020 NDAA and TSCA section 8(a)(1).

Four commenters indicated that the Congress did not intend for the proposed rule to include processors and that EPA should not require them to report. Two of these commenters referred to the FY 2020 NDAA section 7351 language stating that the Act does not identify manufacturers that process PFAS substances as entities that would be subject to the rule. Commenters in opposition to adding processors also claimed that EPA would be creating confusion and the potential for duplicative reporting. One commenter urged EPA to clarify in the final rule that reporting is limited to only the initial importers of PFAS-containing products and not any downstream processors or users. Commenters also said that such reporting would create unnecessary burden for both EPA and processors.

2. EPA's Response

EPA appreciates commenters' perspectives on extending reporting requirements to processors for this rule under TSCA section 8(a)(7). However, the Agency's reading of the text in TSCA section 8(a)(7) and the FY 2020 NDAA's legislative history conclude that the intended scope of this rule is to only require reporting from manufacturers (including importers), distinct from processors. EPA is clarifying that entities who solely process, distribute, and/or use PFAS, and do not manufacture (including import) PFAS for a commercial purpose, are not required to report under this rule.

As some commenters noted, the Agency would have the authority to promulgate such a rule for processors under TSCA section 8(a)(1). However, this rule is being promulgated under TSCA section 8(a)(7). EPA also notes that the exclusion of processors from the scope of this rule does not preclude any potential future rulemaking under TSCA section 8(a)(1), should the Agency determine such data are needed. EPA will review the data submitted by manufacturers under this rule and reserves the right to promulgate a rule under TSCA section 8(a)(1) to capture information from PFAS processors if appropriate. EPA disagrees with commenters who noted that including processors in the scope of this rule would lead to confusion and duplicative reporting. EPA points out that other TSCA section 8(a) rules have included processors, such as the nanoscale materials reporting rule (40 CFR 740.20).

D. What were the small business considerations?

1. Summary of Public Input

Many commenters opined on the inclusion of small businesses, including small manufacturers, under the proposed rule. Several commenters stated that EPA should exempt small businesses from reporting under the proposed rule. Some of these commenters said that small businesses are not likely to provide useful information and will be disproportionately affected by the rule (including potentially being forced out of business) because fewer resources are available to them. Others expressed that they thought EPA had not evaluated whether small businesses would actually contribute meaningful data to EPA as a result of the rule.

Four commenters disagreed with EPA's position that the FY 2020 NDAA authorizes data collection from all manufacturers, including small manufacturers. Two of these commenters felt that, by not providing relief for small manufacturers, EPA did not appropriately apply TSCA section 8(a)(5) requirements. Some commenters referred to TSCA section 8(a)(1), which they state excludes small manufacturers from reporting rules. Another commenter stated that EPA needs to consider the historical lack of TSCA section 8 reporting requirements on small manufacturers or article importers, including from CDR.

Other commenters said that EPA should collect the information required under the proposed rule from all businesses regardless of size. While one commenter acknowledged that the rule could be burdensome for small entities, they also said that the health risks associated with PFAS are significant and warrant the data collection from small businesses. Another commenter described EPA's definition of small manufacturer under TSCA section 8 as ''expansive'' and noted that the existing ''small manufacturer'' definition would

result in omitting reporting from significant PFAS manufacturing and importing activities such that it would undermine this data collection effort.

One commenter stated that EPA could help small businesses comply with the proposed rule in lieu of a small manufacturer exemption by extending other reporting exemptions to them, including R&D substances, non-isolated intermediates, impurities, byproducts, and articles, as well as a minimum reporting threshold.

2. EPA's Response

EPA disagrees with commenters' positions that a broad small business or a small manufacturer exemption is appropriate for this rule. EPA appreciates that small businesses, especially those which have not previously reported under CDR or other TSCA section 8(a) rules, may not have the same resources that are available to large companies. This feedback was also voiced through the rule's SBAR Panel, and EPA is greatly appreciative of the input related to small businesses' resources and ability to respond to the rule. To that end, EPA has modified the proposed rule to include options that provide some relief to all manufacturers, including small entities. Specifically, article importers and manufacturers of R&D substances in quantities below 10 kilograms per year will have the option to submit more streamlined reporting forms than the longer, standard form for all other PFAS manufacturers. Additionally, EPA is extending the deadline for reporting forms by at least six months from what was proposed, so that all entities, including small entities, have 18 months from the effective date of this rule to submit the requested information. For small manufacturers (as defined at 40 CFR 704.3) whose reporting obligations under this rule are exclusively from article imports, EPA is further extending the deadline for reporting forms by an additional six months. Thus, small article importers have 24 months from the effective date of this rule to submit the requested information.

In response to commenters who refer to TSCA section 8(a)(1) in their support of an exemption for small manufacturers, EPA respectfully points out that this is a rule authorized under TSCA section 8(a)(7), not under TSCA section 8(a)(1). While Congress explicitly carved out potential exemptions for small manufacturers and small processors for rules implemented under TSCA section 8(a)(1) for chemicals not subject to certain TSCA actions, Congress chose not to do so in the text of TSCA section 8(a)(7). EPA considered the provisions at TSCA section 8(a)(5) to limit reporting requirements for small manufacturers and determined that reporting from small manufacturers would be appropriate under TSCA section 8(a)(5)(A) through (C). The information requested under this rule is not unnecessary nor duplicative due, in part, to exemptions in other TSCA reporting rules. Additionally, a broad exemption for all entities deemed a ''small manufacturer'' would not enable EPA to fulfill the express requirements of the NDAA to require ''each person'' to report their PFAS manufacturing activities to the extent they know or can reasonably ascertain. Regarding the provision to minimize the cost of compliance on small manufacturers, EPA has identified regulatory alternatives to the proposed rule that reduce compliance costs without a complete exemption. Finally, based on public comments and input from the SBAR Panel, EPA believes that small manufacturers are likely to have information regarding commercially manufactured PFAS, which is relevant to the effective implementation of TSCA.

E. What is the concern regarding a lack of common TSCA reporting exemptions or reporting threshold?

1. Summary of Public Input

Many commenters opined on the proposed rule's lack of common TSCA reporting exemptions and a reporting threshold. Several commenters added that incorporating exemptions and/or a reporting threshold would make the proposed rule consistent with other TSCA rules such as CDR, Fees, PAIR, and PMN reporting (Refs. 20, 26, and 27). Commenters cited potential compliance challenges and reporting burden as the rationale for such exemptions, as they stated that the work involved in identifying, tracing, and reporting under the proposed rule is significantly increased without exemptions. Other commenters said that the lack of exemptions would significantly increase the number of substances for which reporting must occur as opposed to the 1,364 PFAS estimated in the proposed rule, as those only reflected those PFAS on the Inventory or subject to an LVE, yet those sources exempt several types of substances (*e.g.,* impurities, byproducts, R&D substances). Another commenter said that these types of substances are not likely to result in exposure to humans or the environment, and that EPA has not articulated what the benefit of the additional data would be.

On the other hand, several commenters supported implementation of the proposed rule without any exemptions. They said that Congress intended for each person who manufactures a PFAS to be subject to the rule, without exemptions, and that incorporating exemptions would not be consistent with EPA's past approach for PFAS. Some commenters also pointed out the differences between the objectives of CDR and this PFAS reporting rule, stating that CDR's intent is to obtain initial screening information on a broad universe of chemicals, while this rule's aim is to collect information specifically on PFAS.

2. EPA's Response

EPA appreciates the input from commenters on the impacts of not incorporating certain reporting exemptions or thresholds. EPA appreciates the support from commenters who supported promulgating the final rule without exemption and, after reviewing public input, has decided to finalize that aspect of the proposed rule.

EPA disagrees with commenters' requests to include many of the reporting exemptions found in other TSCA rules such as in PMN reporting and the Fees Rule (Refs. 20 and 26). EPA points out that, unlike the Fees Rule, the scope of this rule is information which is known to or reasonably ascertainable by the manufacturer (Ref. 26).

While this rule uses the same reporting standard as CDR and other TSCA section 8(a) rules, this rule is focused on improving EPA's knowledge of commercially manufactured PFAS and their uses, which includes chemicals of concern to human health and the environment. Therefore, EPA does not believe many of the same reporting exemptions used in other TSCA rules are warranted. As directed by the statute, EPA is requesting information on PFAS manufactured for a commercial purpose to the extent such information is known or reasonably ascertainable to the manufacturer. EPA also points out that, whether types of substances (such as non-isolated intermediates, impurities, or articles) are likely to result in human or environmental exposures is not a threshold that EPA needs to satisfy for requiring reporting on those substances under TSCA section 8(a)(7). EPA aims to better understand the scope of existing knowledge of the universe of historically manufactured PFAS and implementing certain exemptions may inadvertently lead to the omission of information known to or reasonably ascertainable to some manufacturers.

The information EPA receives through this rule will refine the Agency's understanding of certain exposure-related data of PFAS manufactured. If certain substances have not resulted in significant human and environmental exposures, then that would be reflected in the submitted information.

EPA appreciates the public input on the proposed rule's burden analysis, including additional information received during the proposed rule's comment period, the SBAR Panel, and the IRFA comment period. EPA has refined its economic analysis, including the estimated scope of covered substances and associated burden of determining whether reporting is required. Regarding commenters' claims that the estimated scope of covered substances may be significantly greater than estimated without certain exemptions, EPA points out that the exact challenge articulated by commenters justifies the lack of exemptions in this rule: the fact that stakeholders have questions surrounding the number of covered substances under this rule, including as impurities, intermediates, or R&D substances, reveals the lack of existing information of the universe of PFAS in commerce. EPA aims to better understand what manufacturers know or may reasonably ascertain regarding manufactured PFAS, and exempting substances that were not previously reported under other TSCA rules would hinder that effort.

F. What is the application of the reporting standard?

1. Summary of Public Input

EPA received many comments on the reporting standard proposed for this rule: information known to or reasonably ascertainable by the manufacturer. The majority of these commenters suggested that EPA revise their definition of ''reasonably ascertainable'' to assist businesses with compliance. Specifically, these commenters voiced concerns over the time spent to conduct compliance determination activities to satisfy the ''due diligence'' requirement of the reporting standard for many substances and products, and for which they do not anticipate information being readily available even after an extensive search. Commenters claimed that, for substances which have been historically exempt from other TSCA reporting requirements (especially imported articles), there is likely little if any information available, yet entities would still be required to perform due diligence and demonstrated they have examined each imported article.

However, other commenters largely supported EPA's proposed requirements. One commenter suggested that ''known and reasonably ascertainable'' should be broadly interpreted and that the proposed definition of ''known and reasonably ascertainable'' is consistent with definitions in TSCA recordkeeping regulations and should therefore be included, as is, in the final rule. Other commenters stated that the requirement for manufacturers to assess whether they know or can reasonably ascertain PFAS' presence in their articles is a modest cost that is outweighed by the benefits of the data to EPA and the public.

In addition, there were several comments requesting that EPA clarify or provide additional guidance on the reporting standard for this rule, including guidance tailored to article importers and what constitutes due diligence under this standard. Some suggestions included stipulating that the scope of a manufacturer's inquiry within their supply chain is limited to just immediate suppliers (*i.e.,* no need to inquire multiple levels of their supply chain), and that if a supplier refuses to share information with a manufacturer, then the manufacturer need not inquire further and would not face EPA enforcement action. Some commenters also requested further clarification of the proposed requirement to submit ''reasonable estimates'' for certain data elements where actual data are not available.

2. EPA's Response

EPA appreciates the input from commenters and the SBAR Panel related to the scope of information that may be known to or reasonably ascertainable by (KRA) PFAS manufacturers, including small article importers. EPA has incorporated the feedback into both the rule (*e.g.,* providing an option of streamlined reporting forms for article importers and manufacturers of small quantities of R&D substances who would not know the downstream processing, use, and disposal information) and this rule's accompanying guidance and instructions on applying the KRA standard.

Regarding manufacturers who have concerns over the due diligence expected under this rule, including those who believe they ultimately will not obtain any reportable information, EPA clarifies that there is no reporting or recordkeeping requirement if an entity has no relevant information. This rule does not itself require any company to maintain information upon which a decision not to report is based. Consistent with their own business practices, companies may elect to retain documentation of their conclusion that they were not subject to reporting requirements. While manufacturers and importers are expected to exercise ''due diligence'' in looking for reportable PFAS and information, that effort will look different for different entities.

EPA also acknowledges that it may not be within the scope of ''reasonably ascertainable'' to survey all articles and products, especially for article importers. In addition to the existing guidance on this reporting standard, EPA is providing guidance on this reporting standard with respect to article importers and other entities who may be exempt under other TSCA regulations (*e.g.,* manufacturers of small quantities of R&D substances).

Regarding the suggestions that the rule should limit the scope of a manufacturer's inquiry of its supplier(s) to only information which the supplier does not claim as CBI or trade secret, EPA is enabling a joint submission option within the future reporting tool. Similar to one of the joint submission options in the CDR tool, a PFAS manufacturer whose supplier does not volunteer requested information, including the specific chemical identity of a PFAS imported from the supplier, would have the option to complete the PFAS reporting form to the extent information is known or reasonably ascertainable. The manufacturer would then initiate an email to its supplier via the CDX-based tool and request the supplier provide the necessary information to EPA, using a secondary reporting form, without needing to divulge to the reporting entity the specific chemical identity of the PFAS or the composition of the product. The tool will create an electronic record of the U.S.-based importer's attempts to contact the supplier and request information. Further, if the immediate supplier does not know the information, they may continue to send an email via the reporting tool to their own suppliers, in an effort to secure the requested information.

G. What are the concerns regarding potential duplicative reporting?

1. Summary of Public Input

EPA received comments on potential duplicative reporting under the proposed rule and NODA public comment periods. The majority of commenters shared the sentiment that the proposed reporting requirements

would result in duplicative reporting that is contrary to TSCA section 8(a)(5)(A), which requires EPA to avoid, to the extent feasible, reporting which is unnecessary or duplicative. Most of these commenters shared the opinion that some information required to be reported under the proposed rule is extremely similar to, if not the same as, information required under the CDR rule. One commenter, however, shared a contrasting opinion that EPA should not exclude information previously reported under CDR requirements on the grounds that omitting that information would compromise EPA's ability to collect and aggregate PFAS data pursuant to TSCA section 8(a)(7).

The commenters who stated that the requirements in the proposed rule consist of duplicative reporting primarily cited reporting requirements under the CDR rule as justification for their position. Multiple commenters also cited studies submitted as unpublished health and safety studies under TSCA section 8(d) and the substantial risk notification requirements under TSCA section 8(e). One commenter claimed that EPA is likely already in possession of a considerable amount of PFAS information from studies submitted to EPA under new chemicals reporting (*i.e.,* PMN and LVE applications) and TSCA section 8(e) reporting. A few commenters also suggested that companies should not be required to collect and repeat data for past non-principal reporting years. Other commenters specified that EPA should limit reporting of information concerning environmental or health effects by excluding information that is publicly available, such as information published in scientific journals, as requiring reporting of this information would be unnecessary and duplicative.

Multiple commenters claimed that including articles in the required reporting would substantially increase duplicative reporting due to the number of entities an article may pass through, who would then all be required to report information on that chemical. Two commenters raised the issue of articles which are exported from and then reimported into the U.S. and asserted that the reporting of reimported articles would be considered duplicative reporting. To remedy this situation, a commenter suggested that EPA require reporting at the level of manufacturing the PFAS itself, and possibly the first supplier that incorporates a PFAS, but no further.

2. EPA's Response

EPA acknowledges that some of the data elements may overlap with the data required under the 2020 CDR cycle but disagrees that the scope of such overlap is significant. There are several differences between the CDR rule and this rule which limit the scope of any potential overlaps between the datasets. First, CDR includes several reporting exemptions and a reporting threshold based on production volume, which are not included in this rule: imported articles, certain byproducts, non-isolated intermediates, small quantities of R&D chemicals, small manufacturers, and a minimum production volume reporting threshold of 25,000 lbs/year (or 2,500 lbs/year for substances subject to certain TSCA actions). Therefore, PFAS reporters with activities that are exempt in CDR or who manufacture PFAS below the CDR threshold will not have reported such information to CDR before and would not be considered ''duplicative'' here. Further, CDR reporters may have excluded quantities that would be reportable under this rule, based on certain CDR exemptions, and therefore the information they previously submitted to CDR would not be considered duplicative and would not be responsive to this rule. Secondly, the PFAS that have been reported to CDR are a subset of the scope of PFAS for this rule. The scope of CDR chemical substances is limited to those on the Inventory and excludes polymers. The scope of this reporting rule includes any chemical substance meeting the rule's structural definition, which is not limited to those on the Inventory (*e.g.,* LVEs), and includes any fluoropolymers that meet the structural definition. Finally, the years for which certain required data elements may have been reported to CDR differ. Some of the information described earlier in this unit is reported differently for the principal reporting year compared to the other three years within the four-year CDR period. For instance, the production volumes for domestic manufacture and import are combined for any non-principal reporting year. Further, prior CDR cycles had different required information. Therefore, the extent of potentially ''duplicative'' reporting between CDR and this rule is limited, especially when considering each year for which reporting is required under this rule.

EPA is finalizing the proposal to not require resubmission of information that has been reported to CDR, unless that information did not reflect all activities or quantities for which reporting is required under this rule. EPA disagrees with the commenter who suggested that EPA should not exclude information previously reported under CDR. Such information could be duplicative and therefore EPA is limiting that reporting under TSCA section 8(a)(5)(A).

EPA also appreciates the commenters' input regarding information previously submitted via TSCA section 8(e) reporting. EPA agrees that substantial risk notification requirements submitted to EPA under TSCA section 8(e) could be considered ''information concerning the environmental or health effects'' of a PFAS. To that end, EPA is finalizing the rule to acknowledge that manufacturers who have previously submitted substantial risk notifications, other unpublished health and safety studies under TSCA section 8(d), or other relevant information concerning environmental or health effects need not resubmit the information. However, to enable EPA to easily collect those prior submissions, the manufacturers must indicate the rule or program to which they submitted that prior information concerning the environmental or health effects of that PFAS and the year in which it was submitted to EPA. EPA also reiterates that manufacturers need not submit health and environmental effects information that is not in their possession or control, but could be found from a publicly available source.

Finally, regarding the comments related to whether reporting certain imported articles in complex products may lead to duplicative reporting: EPA disagrees that the information reported will result in duplicative information, especially given the reporting standard applicable to this rule. EPA believes that information known to or reasonably ascertainable by an article manufacturer at the first instance the PFAS is imported into the United States is likely different than the scope of information known to an article importer farther down the supply chain who may re-import that PFAS later, as the article is incorporated into more complex articles or products. EPA also believes that applying the reporting requirements each time a PFAS is imported into the United States is consistent with TSCA's definition of manufacturing and directive under TSCA section 8(a)(7). If a PFAS is imported, exported, then re-imported, then limiting the scope of reporting to just one instance of importation into the United States may result in certain burdens on manufacturers within the supply chain who need to further communicate with each other to determine whether a PFAS within an article has already been reported and who is responsible for reporting.

H. What are the concerns regarding the lookback period?

1. Summary of Public Input

Several commenters stated that attempting to obtain or develop the required information over a ten-year lookback period is not feasible and would constitute a significant burden to reporters, and they felt that EPA should eliminate or shorten the lookback period. These commenters suggested either setting the lookback period to either 3 years, or 5 years to be consistent with the CDR recordkeeping requirement. Commenters stated that it would be difficult or impossible to collect the information required due to the complexities of their supply chains, the turnover rate of foreign suppliers especially for fad markets, the lack of historical reporting requirements for PFAS in products, and the concurrent supply chain disruptions rendered by the COVID–19 pandemic. Commenters also suggested that creating or recreating data from the lookback period will result in imprecise data. In addition to the suggestions to reduce the lookback period, some commenters suggested that EPA consider implementing a ''principal reporting year'' approach as used in CDR, in which only production volumes are reported for each year, while the more detailed data elements are reported for only the principal reporting year. Other suggestions included exempting articles or exempting companies that have since phased out PFAS by the reporting deadline.

2. EPA's Response

EPA disagrees with the commenters who have suggested altering the lookback period from 2011 to a more recent year. The language in TSCA section 8(a)(7) directs EPA to promulgate a reporting rule for ''each person who has manufactured a chemical substance that is a [PFAS] in any year since January 1, 2011, to submit to the Administrator a report that includes, *for each year since January 1, 2011,* the information described in subparagraphs (A) through (G) of paragraph (2).'' Congress's direction to EPA is clear: the lookback period for this reporting rule must begin on January 1, 2011. EPA understands the extent of information known to or reasonably ascertainable by a manufacturer may vary for several reasons. However, EPA's obligation under TSCA section 8(a)(7) and interest in identifying the scope of available and existing data on historically manufactured PFAS demand that PFAS manufacturers conduct their due diligence and submit requested information to the extent it is known or reasonably ascertainable.

I. What is the submission period duration and reporting deadline?

1. Summary of Public Input

EPA received significant input on the duration of the proposed submission period. Many commenters and input during the SBAR Panel claimed that the proposed rule's reporting deadline is unrealistic, and EPA should allow more time for reporting to accomplish the required data collection. Commenters provided a range of alternatives to consider for the reporting deadline, from 1.5 years from rule promulgation to 5 years from rule promulgation for article importers.

Several commenters provided detailed descriptions of the types of activities that would need to occur during the submission period as evidence of why they felt the proposed submission period to be inadequate. Some commenters raised EPA's experiences with the PIP (3:1) rule as justification for a longer time frame for extensive PFAS data reporting (Ref. 27). Other reasons provided by commenters regarding why additional time is needed include: time to familiarize themselves with the rule; unclear scope of requirements in the proposed rule; lack of systems in place with which to track the data leading to manual collection; and lack of ability to outsource the task to contractors due to the confidentiality concerns. In addition, one commenter noted that other jurisdictions have delayed the implementation of new rules in light of overwhelming burden, COVID, and supply chain disruptions.

EPA also received some comments urging the Agency to finalize this aspect of the proposed rule and not delay the deadline by which PFAS data are submitted. Commenters cited the pressing need for such data and the awareness within the regulated community of this rule.

2. EPA's Response

EPA appreciates the significant feedback the Agency received from the public, including through the SBAR Panel, on the duration of the reporting submission period. After considering input from the commenters and other stakeholders, EPA agrees that the proposed reporting time frame may not be sufficient for identifying, collecting, and reporting the scope of information requested by this rule. While EPA disagrees that the extent of activities necessarily requires investigations of the supply chain that would take up to five years to complete, it is modifying the proposal by adding six more months to the information collection period ahead of the reporting tool opening (for a total of one year from the effective date of this rule). This one-year information collection period will then be followed by a six-month reporting submission period. Thus, information will be due 18 months following the effective date of this rule for all PFAS manufacturers except certain small article importers. EPA has provided an additional six months for small manufacturers (as defined at 40 CFR 704.3) who would report exclusively article importers for the purposes of this rule. Therefore, small article importers have two years from the effective date of this final rule to report. Thus, information will be due 24 months following the effective date of this rule for small manufacturers (per 40 CFR 704.3) who are reporting exclusively as article importers. EPA believes this timeframe will be sufficient to allow reporters to familiarize themselves with the rule, identify PFAS they have produced or imported, identify any suppliers or other contacts, collect information, and submit the information to EPA. The additional time will enable reporters to thoroughly review their known or reasonably ascertainable information and provide EPA with the extent of the requested information under this reporting standard.

Additionally, as this is a TSCA section 8(a) reporting rule, EPA disagrees with commenters who request additional reporting time by comparing this rule to the PIP (3:1) rule or other non-section 8 reporting rules (Ref. 27). The reporting standard under TSCA section 8(a) does not apply to those rules, which may require additional compliance activities. However, EPA agrees with commenters who pointed out the distinctions between this rule and CDR as a basis for extending the reporting period: the CDR rule requires only a four-year lookback period, includes certain exemptions and reporting thresholds, different data elements, and is regularly occurring so that companies can anticipate reporting. Due, in part, to these differences with CDR, EPA is extending the information collection period ahead of the submission period, thereby providing reporters with 18 months to submit information for this rule (or 24 months for small article importers).

EPA disagrees with commenters who have suggested the reporting deadline should be sooner than what was proposed. EPA appreciates the commenters' interest in reviewing the submitted PFAS data as soon as

possible, but notes the scope of this rule and differences between this rule and CDR as factors in allowing the reporting community extra time to sufficiently review their known or reasonably ascertainable information and to submit the required data to EPA.

J. Can joint submissions be allowed?

1. Summary of Public Input

Some commenters requested that EPA allow joint submissions. They suggested it might ease the reporting burden and simplify the reporting process while still protecting CBI. However, other commenters stated that joint submissions can still be a substantial burden for companies already trying to complete their own reporting within a prescribed timeframe. Commenters urged EPA to carefully consider a workable solution to protecting CBI and reducing industry burden for compliance. In response to the NODA, one commenter asked EPA to eliminate the requirement for joint submissions in response to chemical identity CBI concerns.

2. EPA's Response

EPA agrees with the commenters' requests for joint submissions and is finalizing this requirement for reporters (other than article importers) whose suppliers do not wish to disclose chemical identity. EPA agrees that such an approach would help protect suppliers' CBI while not withholding necessary information from EPA related to PFAS identity. While this may increase burden on upstream companies, EPA believes this approach will both help downstream manufacturing and reporting entities, as well as protect CBI if the suppliers do not wish to disclose it to their customers, including reporting entities.

K. What are the economic analysis considerations?

1. Summary of Public Input

Many commenters addressed the impact of the proposed rule in general: on industry, EPA, and the general public. Several commenters provided input on the industry burden estimates provided in EPA's draft Economic Analysis for the proposed rule, with many stating that EPA underestimated the cost industry would incur to comply with the proposed rule and failed to include article importer costs. Commenters provided specific feedback on EPA's burden and cost estimates for certain activities including rule familiarization, CBI substantiation, article identification, determination of chemical identity, identification of byproducts, outreach to suppliers, data collection, CDX access and training, form completion and recordkeeping. Some of these commenters provided additional data or factors to consider when estimating burden or costs for these compliance activities, including providing results of their own industry surveys. Commenters also provided specific feedback on the proposed rule's burden on article importers and stated that EPA's draft burden assessment is significantly underestimated. Some commenters stated that article importers may face substantially more costs than domestic producers because they lack the knowledge needed for compliance yet would still incur costs under the reporting standard. Additionally, because article importers do not have experience with CDR, commenters believed their cost would be higher than EPA's draft estimates which used CDR to extrapolate burden estimates for this rule.

Some commenters also claimed that EPA's use of CDR burden to derive burden estimates under this rule was inappropriate due to the differences between the two rules. Commenters also provided feedback on the estimated number of substances subject to reporting in the draft Economic Analysis and claimed that the draft estimates were too low. Some commenters pointed out that, because the proposed rule does not have the same exemptions as CDR nor is limited to a discrete list of substances, the number of substances subject to reporting would be substantially higher than the estimates provided in the draft Economic Analysis.

EPA also received comments that the proposed rule significantly underestimated the universe of small entities that would be subject to the rule, both due to the lack of estimates related to article importers and to the extrapolation from CDR data. Some commenters described the unique difficulties or burdens small businesses face when complying with the proposed rule compared to larger businesses. Commenters stated that EPA cannot justify an RFA certification without further analysis of the small business impacts and requested that EPA convene an SBAR Panel under the RFA to obtain feedback from small businesses potentially affected by the rule.

Some commenters also stated that EPA's draft Economic Analysis underestimated burden on the Agency itself. Namely, the need to increase CDX capacity to handle the number of reporting forms and other administrative costs of reviewing the submitted data are not reflected in the draft Economic Analysis.

Finally, other commenters claimed that EPA had not accounted for the social and health costs associated with PFAS exposure in the burden analysis. Commenters added that the public and various government entities have incurred significant health, social, and financial costs due to inadequate information related to PFAS, and that even an underestimation of industry compliance costs for this rule are minimal compared to the externalized costs that the public and governments bear related to PFAS exposure and remediation.

2. EPA's Response

EPA appreciates the feedback on the draft Economic Analysis and agrees with commenters that an SBAR Panel was appropriate given the limitations of data related to the small entity universe at the time of the proposed rule's publication. Accordingly, EPA convened an SBAR Panel for this rule in April 2022 and completed it in August 2022. Using feedback from commenters, input during the SBAR Panel, and additional data made available to EPA since the proposed rule's publication, EPA has since accounted for the burden that the rule would impose on article importers and small entities. The burden estimates include the number of article importers who will be required to report as well as the number of entities that will have to assess their product lines to determine whether they must submit reports. EPA disagrees that the article importer compliance determination activities are too low. EPA recognizes that a range of activities may be involved depending on the level of experience of the importer. Actual costs may vary based on the number of articles imported, the complexity of the articles, the number of suppliers, and the frequency of supplier changes. EPA has increased the rule familiarization costs as well as included the burden of understanding the structural definition of PFAS. Readers are referred to EPA's updated Economic Analysis for details regarding the assumptions of calculating burden and costs for article importers and small entities.

With regards to the use of CDR data, EPA acknowledges that CDR data are subject to reporting thresholds and that the CDR universe does not reflect a perfect representation of the likely reporting universe of this rule. EPA recognizes the limitations of using CDR data in estimating the burden, including the number of PFAS for which companies may ultimately report. However, there is no comprehensive

database of PFAS manufactured in the U.S. that EPA could use to develop more precise estimates. The reporting requirements of this rule will serve to fill this knowledge gap. After considering input from the proposed rule's public comments, stakeholders in the SBAR Panel, and comments received on the IRFA, EPA is continuing to rely on the CDR data to extrapolate the estimated number of PFAS to be reported per firm. EPA acknowledges that the number may vary for some manufacturers but believes that using CDR for such estimates will help provide an industry average.

EPA has updated the Agency costs to account for the volume of reports that will be submitted. EPA will incur costs in administering the final rule associated with processing submitted reports, analyzing data from the reports, maintaining the information technology systems that support these activities, reviewing CBI claim substantiations, and information technology infrastructure.

Finally, with regard to the comments that EPA has not accounted for social and health costs associated with PFAS, EPA points out that this rule is a TSCA section 8(a) reporting and recordkeeping rule and does not impose any restrictions or other chemical management requirements. While the benefits of this rule include additional information related to potential PFAS exposure, which will help inform future regulatory and research activities, EPA cannot quantify those benefits at this time, though the Agency discusses them qualitatively in the Economic Analysis.

L. What are the CBI claim submission requirements?

1. Summary of Public Input

Several commenters submitted comments regarding reporting requirements in the proposed rule and EPA's intended approach to reviewing CBI claims as stated in the NODA. Their comments generally fell into two categories: (1) Urging EPA to protect CBI and simplify electronic reporting to allow joint submissions when needed, in addition to making substantiation procedures for CBI claims more simplified, and not allowing reporters without knowledge of a specific chemical identity to waive a CBI claim for that chemical identity; and (2) Urging EPA to require valid and well-explained rationale for any CBI exemptions, and generally asking EPA to disclose as much information to the public as possible. Some commenters also cited concerns with the proposed rule's CBI protections as being inadequate for R&D activities, including those in the defense or national security industries. Some commenters requested that the Agency allow a ''blanket substantiation'' for all CBI claims so that reporters would not be required to substantiate each individual CBI claim.

On the other hand, commenters who are supportive of limiting the amount of information claimed as CBI (especially regarding health and safety studies) cited the urgent need for states to address their own PFAS exposure and contamination issues and the benefit that this rule will confer on state agencies struggling with inadequate PFAS information. These commenters encouraged EPA to review claims and disclose as much information submitted under this rule as possible.

Commenters during the NODA comment period also addressed EPA's proposal to require that any PFAS generic name include ''fluor,'' at minimum, and EPA's proposal to determine that failure to stipulate that a chemical for which the identity is being claimed as CBI is fluorinated would be an insufficient claim. Some commenters were supportive of such requirements; other commenters discouraged EPA from implementing this requirement as it may create confusion. Finally, commenters diverged on EPA's intent to move any PFAS identity to the public TSCA Inventory without prior notice if it is not claimed as CBI. While some commenters supported this approach, others described potential complications of confidential chemical identity protection when multiple entities submit reports for the same substance, some of whom may not assert CBI for the identity, and requested that EPA notify all claimants of a potential change in CBI status for a chemical identity and allow appeal opportunities.

2. EPA's Response

EPA does not believe that an option for blanket CBI claims substantiation is appropriate for an information collection rule such as this one, in which several types of information are requested. TSCA section 14(c) requires substantiation specific to each claim. Because the type of information requested under this rule varies, a blanket substantiation is unlikely to address the specific reasons for each data element claimed as CBI. The more generic a substantiation gets, the less support it provides for any specific claim. In terms of information disclosure, EPA is committed to reviewing CBI claims and substantiations pursuant to TSCA section 14 and implementing regulations, and publicly disclosing data that are not approved as CBI to the extent possible.

As noted in the preamble of the proposed rule, TSCA limits confidentiality protections for health and safety studies, and information from health and safety studies (except to the extent such studies or information reveals ''information that discloses processes used in the manufacturing or processing of a chemical substance or mixture or, in the case of a mixture, the portion of the mixture comprised by any of the chemical substances in the mixture''). Submitters asserting a confidentiality claim for such information in health and safety studies are also required to submit a sanitized copy of the study, removing only that information which is claimed as CBI and that discloses the process or portion of mixture information described in TSCA section 14(b). However, certain other information within study reports may be claimed as CBI, such as the names of lab personnel or the company, or other information that is not related to health or environmental effects.

In response to requests for EPA to work directly with states on disclosing CBI submitted under this rule, EPA points out that TSCA section 14(d)(4) permits states, tribes, and political subdivisions of states to request access to CBI in writing. Under this authority, the entity seeking CBI access must show that it can continue to protect the information as confidential. If a state or tribe requests access and that is granted per statutory conditions, EPA would have an agreement in place laying out how the requestor was going to protect the information.

In response to comments on the CBI procedures described in the NODA, EPA is not requiring article importers to assert CBI for the chemical identity and will not make public any chemical identity based on article importer submissions alone (see discussion in Unit III.G). Further, EPA acknowledges some commenters' concerns that multiple manufacturers may report the same PFAS, but not all submitters may assert a CBI claim for the PFAS identity. EPA will publish a list of Accession numbers associated with chemical identities that it plans to move to the public portion of the Inventory because either no chemical identity CBI claim was asserted or the claim was denied. Publication of these Accession numbers will provide entities an opportunity to contact EPA with questions or concerns before specific chemical identities are moved to the public Inventory (see Unit III.G for more details on this process). Finally, EPA believes that requiring ''fluor'' in generic name submissions is

consistent with PMN reporting requirements which provide that a generic name ''should reveal the chemical identity of the substance to the maximum extent possible'' (40 CFR 720.85(a)(3)(i)(B)), and is finalizing this requirement as discussed in the NODA (Ref. 1).

V. References

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

1. EPA (2022). TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances; Notice of Data Availability and Request for Comment (87 FR 72439, November 25, 2022 (FRL–7902–04–OCSPP)).
2. EPA (2023). Economic Analysis for the Final TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances. September 2023.
3. EPA (2023). Research on Per- and Polyfluoroalkyl Substances (PFAS). Available at *https://www.epa.gov/chemical-research/research-and-polyfluoroalkyl-substances-pfas*.
4. Agency for Toxic Substances and Disease Registry (ATSDR) (2021). Toxicological Profile for Perfluoroalkyls. Available at *https://www.atsdr.cdc.gov/toxprofiles/tp200.pdf* [accessed February 10, 2023].
5. EPA (2021). PFAS Strategic Roadmap: EPA's Commitments to Action 2021–2024. October 2021. Available at *https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf*.
6. EPA. CompTox Chemicals Dashboard. Available at *https://comptox.epa.gov/dashboard/*.
7. EPA (2020) Long-Chain Perfluoroalkyl Carboxylate and Perfluoroalkyl Sulfonate Chemical Substances; Significant New Use Rule (85 FR 45109, June 27, 2020 (FRL–10010–44)).
8. OECD (2021). Reconciling Terminology of the Universe of Per- and Polyfluoroalkyl Substances: Recommendations and Practical Guidance. July 9, 2021. Series on Risk Management. No.61. Environment Directorate Chemicals and Biotechnology Committee. Available at *https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ENV/CBC/MONO(2021)25&docLanguage=En*.
9. Buck, Robert C., et al. (2021). Identification and Classification of Commercially Relevant Per- and Poly-Fluoroalkyl Substances (PFAS). May 14, 2021. Integrated Environmental Assessment and Management, vol. 17, no. 5. Available at *https://setac.onlinelibrary.wiley.com/doi/full/10.1002/ieam.4450*.
10. Gaines, Linda, et al. (2023). A Proposed Approach to Defining Per- and Polyfluoroalkyl Substances (PFAS) Based on Molecular Structure and Formula. Integrated Environmental Assessment and Management. Accepted Author Manuscript. *https://doi.org/10.1002/ieam.4735*.
11. United Nations Environment Programme (UNEP) (2022). Updated indicative list of substances covered by the listing of perfluorooctanoic acid (PFOA), its salts and PFOA-related compounds. March 4, 2022. Stockholm Convention on Persistent Organic Pollutants. Available at *https://chm.pops.int/Portals/0/download.aspx?d=UNEP-POPS-POPRC.17-INF-14-Rev.1.English.PDF*.
12. EPA (2020). Advancing Sustainable Materials Management: 2018 Facts and Figures Report. December 2020. *https://www.epa.gov/sites/default/files/2021-01/documents/2018_tables_and_figures_dec_2020_fnl_508.pdf*.
13. EPA (2023). International Agreements on Transboundary Shipments of Hazardous Waste. *https://www.epa.gov/hwgenerators/international-agreements-transboundary-shipments-hazardous-waste*.
14. EPA (2023). Small Entity Compliance Guidance for the TSCA PFAS Data Call. September 2023.
15. EPA (2023). Data Elements included in the TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances, Final Rule. September 2023.
16. OECD. OECD Harmonised Templates. Available at *https://www.oecd.org/ehs/templates/harmonised-templates.htm*.
17. EPA (2023). Addition of Certain PFAS to the TRI by the National Defense Authorization Act. Available at *https://www.epa.gov/toxics-release-inventory-tri-program/addition-certain-pfas-tri-national-defense-authorization-act*.
18. EPA (2023). Greenhouse Gas Reporting Program (GHGRP). Available at *https://www.epa.gov/ghgreporting*.
19. EPA (2018). Guidance for Creating Generic Names for Confidential Chemical Substance Identity Reporting under Toxic Substances Control Act. EPA 743B18001. June 2018.
20. EPA (2010) Premanufacture Notification Exemption for Polymers; Amendment of Polymer Exemption Rule to exclude Certain Perfluorinated Polymers (75 FR 4295, January 27, 2010 (FRL–8805–5)).
21. EPA (2023). Response to Public Comments: TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances. September 2023.
22. EPA (2022). TSCA Section 8(a)(7) Small Business Advocacy Review (SBAR) Panel Report. August 2022.
23. EPA (2022). Initial Regulatory Flexibility Analysis and Updated Economic Analysis for TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances. November 2022.
24. EPA (2021). EPA Response to Petition on Testing for Certain PFAS. December 2021. Available at *https://www.epa.gov/system/files/documents/2021-12/pfaspetitionresponse.pdf*.
25. Frank, Harmut, et al. (2002). Trifluoroacetate in ocean waters. 2002. Environmental Science & Technology, 36(1), 12–15. Available at *https://doi.org/10.1021/es0101532*.
26. EPA (2018). Fees for the Administration of the Toxic Substances Control Act (TSCA) (83 FR 52694, October 17, 2018 (FRL–9984–41)).
27. EPA (2022). Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h); Phenol, Isopropylated Phosphate (3:1); Further Compliance Date Extension (87 FR 12875, March 8, 2022 (FRL–6015.6–02–OCSPP)).
28. EPA (2023). Information Collection Request Supporting Statement entitled ''Final Rule ICR: Reporting and Recordkeeping Requirements for PFAS (RIN 2070–AK67).'' EPA Information Collection Request (ICR) No. 2682.02. September 2023.
29. EPA (2023). Final Regulatory Flexibility Analysis and Updated Economic Analysis for TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances. September 2023.
30. EPA. Unfunded Mandates Reform Act Statement. PFAS; Reporting and Recordkeeping Requirements under the Toxic Substances Control Act (TSCA); Final. May 2023.

VI. 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 Orders 12866: Regulatory Planning and Review and 14094: Modernizing Regulatory Review

This action is a ''significant regulatory action'' as defined under section 3(f)(1) of Executive Order 12866 (58 FR 51735, October 4, 1993), as amended by Executive Order 14094 (88 FR 21879, April 11, 2023). Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for Executive Order 12866 review. Documentation of any changes made in response to the Executive Order 12866 review is available in the docket. EPA prepared an analysis of the potential costs and benefits associated with this action. This analysis, entitled ''Economic Analysis for the Final TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances'' (Ref. 1), is also available in the docket and is briefly summarized in Unit 1.E.

B. Paperwork Reduction Act (PRA)

The information collection requirements in this rule will be

submitted for approval to OMB under the PRA, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document that EPA prepared has been assigned the EPA ICR No. 2682.02 (Ref. 28) and the OMB Control number 2070–0217. You can find a copy of the ICR in the docket for this action, and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them.

The reporting requirements identified in the rule will enable EPA to meet the statutory obligations required by TSCA section 8(a)(7) and collect data related to the identities, manufacture, use, exposure, and disposal of PFAS manufactured in the United States since 2011. These one-time reporting requirements will also help the Agency to collect existing information on the health and environmental effects of PFAS. EPA intends to use information collected under the rule to assist in chemical assessments under TSCA, and to inform any additional work necessary under environmental protection mandates beyond TSCA. Respondents may claim some of the information reported to EPA under the rule as CBI under TSCA section 14. TSCA section 14(c) requires a supporting statement and certification for confidentiality claims asserted after June 22, 2016.

Respondents/affected entities: PFAS manufacturers (including importers). See Unit I.A.

Respondent obligation to respond: Mandatory. TSCA section 8(a) and 40 CFR part 705.

Total estimated number of respondents: 131,410.

Frequency of response: One time.

Total estimated burden: 3,878,744 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $281 million (per year) and $266.7 million (per year) using a 3 percent and 7 percent discount rate, respectively, which includes no annualized capital or operation and maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

C. Regulatory Flexibility Act (RFA)

Pursuant to the RFA, 5 U.S.C. 601 *et seq.,* EPA prepared an IRFA for the proposed rule and convened an SBAR Panel under RFA sections 603 and 609(b) to obtain advice and recommendations from small entity representatives that potentially would be subject to the rule's requirements. Summaries of the IRFA and Panel recommendations are presented in the proposed rule's NODA (Ref. 1).

As required by RFA section 604, EPA prepared a final regulatory flexibility analysis (FRFA) for this action. The FRFA addresses the issues raised by public comments on the IRFA for the proposed rule. The complete FRFA is available for review in the docket (Ref. 29) and is summarized here.

• *Statement of need and rule objectives.* Section 7351 of the FY2020 NDAA amended TSCA by adding section 8(a)(7), which obligates EPA to promulgate a rule by January 1, 2023, that requires each person who has manufactured PFAS in any year since 2011 to report and maintain records, for each year, information described in TSCA section 8(a)(2)(A)–(G). This includes a broad range of information, such as information related to chemical identity and structure, production, use, exposure, disposal, and health and environmental effects. In addition, EPA believes that the collected data may help provide more information about PFAS manufacture, and to the extent that new information indicates the presence of negative externalities or data gaps, inform future agency actions and/or legislation governing the manufacture, processing, use, and disposal of PFAS.

EPA developed this final rule after considering findings from information provided in public comments on the proposed rule, findings from and comments on the SBAR Panel, and public comments on the IRFA. The final rule requires all manufacturers of PFAS in any year since 2011 to report certain information to EPA related to chemical identity, categories of use, volume manufactured, byproducts, environmental and health effects, worker exposure, and disposal (*i.e.,* the TSCA section 8(a)(2)(A)–(G) requirements). This rule also requires a five-year retention period for all relevant records following the submission period.

• *Significant comments on the IRFA.* In response to the IRFA and notice of data availability, EPA received 44 unique comments in the docket. EPA has provided a comprehensive summary of all comments received and EPA's responses in a supporting document that is included in the docket for this rulemaking (Ref. 21; see Part 2).

• *SBA Office of Advocacy comments and EPA response.* EPA received comments from SBA's Office of Advocacy on the proposed rule and the IRFA. SBA's comments and EPA's responses are in the Responses to Comments document for this rule (Ref. 21) and in the FRFA (Ref. 29). SBA comments that led to changes to the proposed rule, and EPA's responses to those comments, are also summarized in this unit.

Comments: EPA has improperly certified the rule under the RFA. EPA should convene a Small Business Regulatory Enforcement Fairness Act (SBREFA) Panel and consider burden-reducing compliance flexibilities for small businesses. Additionally, EPA underestimated the impact of compliance costs associated with the proposed reporting requirements.

Response: EPA initially certified the proposed rule under the RFA based on all information available to it at the time of proposal. However, after receiving additional information related to the scope of small entities (including article importers) potentially impacted by the proposed rule, EPA updated its estimated scope of the universe of small entities potentially affected (including article importers) and the small entity compliance costs. Thus, EPA convened an SBAR Panel in April 2022. The Panel concluded in August 2022, and EPA subsequently published the Panel Report, updated Economic Analysis, and IRFA for public comment in November 2022. Input received through the Panel and during the subsequent comment period for the IRFA were considered in the development of this final rule, including comments related to EPA's small entity analysis. As a result of public input, EPA identified certain regulatory alternatives to the proposed rule, which EPA is implementing in the final rule: streamlined reporting forms for article importers and for manufacturers of low quantities of R&D substances; extending the reporting deadline; providing additional guidance on the TSCA section 8(a) reporting standard for article importers. These modifications to the proposed rule reduce compliance costs without a complete exemption of small entities. EPA has not made a determination that a complete exemption of small entities is not legally viable in this rulemaking. EPA believes such an exemption would result in diminished collection of reasonably known or ascertainable information about PFAS manufacturing and import

since 2011 and therefore is exercising its discretion to not implement this alternative. EPA estimates that each manufacturer would incur $2,240 in costs to complete the streamlined R&D form and $41,850 in costs to complete the general reporting form. Thus, incurring a total of $44,089 in costs per firm for form completion, compared to $52,739 without the streamlined form. For the streamlined form for article importers, EPA estimates that each article importer will incur an average of approximately 91.7 burden hours and $7,531 in costs per firm. Without a streamlined reporting form, EPA estimates that each article importer would incur an average of approximately 168 burden hours and $13,818 in costs for form completion. Additionally, extending the reporting deadline may reduce the opportunity costs if firms are diverting resources from other business activities to report information under the rule. This may be particularly true for small entities. See Table 24 for more information on the costs associated with the finalized option and alternatives identified in the IRFA (Ref. 23).

• *Estimate of the number of small entities to which the final rule applies.* This final rule will impact PFAS manufacturers, including article importers, across a broad number of industries, including the following: utilities; construction; manufacturing; wholesale and retail trade; and some waste management. Entities who solely process, distribute, and/or use PFAS, and do not manufacture (including import) PFAS, are not covered. EPA estimates that approximately 97% of all firms potentially affected by this rule would meet the SBA standard of ''small business,'' for a total of 128,051 affected small entities. It is expected that all 128,051 firms will undertake structural definition familiarization, some rule familiarization activity, and compliance determination, including article importers that do not report under this rule. However, EPA does not assume that all potentially affected firms will ultimately have known or reasonably ascertainable information to report, so 13,021 small entities are estimated to report under this rule.

• *Reporting, recordkeeping, and other compliance requirements of the final rule.*

i. Compliance requirements. Pursuant to TSCA section 8(a)(7), EPA is finalizing this reporting and recordkeeping rule for entities who have manufactured a PFAS in any year since January 1, 2011. For each year since January 1, 2011, PFAS manufacturers (including importers) are required to report the following types of information for each PFAS to the extent it is known or reasonably ascertainable: chemical identity, production volume, categories of use, byproducts, worker exposure, disposal practices, and existing information concerning environmental or health effects. In instances where reporters have already submitted the requested information to EPA under certain reporting programs, they will not be required to re-report. The reporters will simply indicate they have already submitted such information to EPA. The reporting deadline is 18 months following the effective date of this rule, except for small manufacturers (defined at 40 CFR 704.3) whose reporting obligations exclusively arise from article imports; the latter's reporting deadline is 24 months following the effective date of this rule. The reporting deadline is then followed by a five-year recordkeeping period.

ii. Classes of small entities subject to the compliance requirements. The small entities that are potentially affected by this rule are manufacturers (including importers) who have manufactured (including imported) PFAS in any year since January 1, 2011. This includes entities who have imported articles containing PFAS in any year since January 1, 2011.

iii. Professional skills needed to comply. Understanding some of the reporting requirements may involve special skills or expertise, though hiring or contracting such skills specifically for this rule are not required to comply, given the TSCA section 8(a) reporting standard of ''known or reasonably ascertainable.'' For example, understanding the rule's structural definition of PFAS and other reporting requirements may involve special expertise of chemistry. EPA assumes that chemical manufacturing and importing firms and large article importers will have staff with the technical knowledge to understand a structural definition more easily than small article importers. Based on input from the Small Entity Representatives, EPA estimated the cost of small article importer firms contracting outside help to understand the chemical structural definition, despite it not being a necessary step for compliance. Small article importers that contract outside help (which is not required for this rule's compliance) would incur $1,212 in structural definition compliance costs, while small article importers that do not contract outside help would incur approximately $831. Additionally, environmental and health effects data may require some technical knowledge to report.

• *Steps taken to reduce economic impact to small entities.*

i. Small Business Advocacy Review Panel. As required by RFA section 609(b), EPA convened an SBAR Panel to obtain advice and recommendations from small entity representatives that potentially would be subject to the rule's requirements. A copy of the full SBAR Panel Report (Ref. 22) is available in the docket. The comments received on the proposed rule, the IRFA and EPA's responses to those comments are summarized in Unit IV and in further detail in the Response to Comments document in the docket (Ref. 21).

ii. Alternatives considered. EPA considered a wide variety of alternatives to the proposed rule. EPA considered the impact (both cost and in anticipated reporting) of providing exemptions for all small businesses, or a portion of small businesses (*e.g.,* small article importers, small manufacturers using the TSCA section 8 definition, or entities below various sales thresholds). EPA also evaluated the impact of exemptions for certain substances, including imported articles, byproducts, impurities, non-isolated intermediates, and R&D substances. EPA also evaluated the impact of implementing a production volume-based reporting threshold in this rule. For each of these alternatives, EPA found that it would reduce the amount of PFAS reporting of reasonably known or ascertainable information from PFAS manufacturers (including importers) under TSCA section 8(a)(7). The amount of reporting that certain alternatives would reduce varied, ranging from exempting approximately 91% of all potentially covered firms from reporting under a small manufacturer exemption for any firm with under $12 million in sales (which would have resulted in a final rule costing small businesses approximately $48.8 million under a 7 percent discount rate), to exempting 69% of firms (all article importers) under an exemption for just article importers with sales below $2 million (which would have resulted in a final rule costing small businesses approximately $229.5 million under a 7 percent discount rate). EPA also considered applying a production volume reporting threshold of both 2,500 lbs per year and 25,000 lbs per year, to align with CDR reporting thresholds. Because the amount of reporting and burden under a reporting threshold was difficult to estimate with existing data, EPA conducted sensitivity analyses for this alternative, based on the estimated number of PFAS article

importers who would be able to determine whether they are below the reporting threshold. On the low-end estimate for this alternative (*i.e.,* 5% of affected article importers import PFAS-containing articles above threshold), EPA estimates that total number of PFAS reports submitted would decrease by 49 percent, and total small business costs would be approximately $736.6 million under a 7 percent discount rate. On the high-end (*i.e.,* 9.5% of affected article importers import PFAS-containing articles above threshold), EPA estimates the total number of PFAS reports submitted to decrease by 5%, with total small business costs of $785.2 million under a 7 percent discount rate. Given the reduced reporting expected under alternatives including various exemptions and reporting thresholds, EPA determined that implementing such alternatives contradicted EPA's mandate under section 8(a)(7) to collect information from ''each person'' who had manufactured a PFAS. Further, while EPA recognizes there is a tradeoff between rule compliance costs and information collection, PFAS exposure presents significant human health and environmental concerns that it is critical for EPA to collect as much existing information on PFAS presence in commerce (including through disposal) as possible.

In addition to alternatives related to reporting exemptions and reporting thresholds, EPA considered limiting the scope of PFAS subject to this rule to a finite list, rather than a structural definition. This alternative simplifies rule familiarization for affected entities and removes the cost and burden of understanding the structural definition of PFAS. Additionally, it reduces compliance determination costs for affected firms. However, this also significantly limits the number of PFAS subject to the rule and excludes many PFAS that cannot be listed due to CBI claims but are active in U.S. commerce. If EPA limited the scope to a discrete list of PFAS on the TSCA Inventory and LVEs that could be specifically named under the final definition, 602 PFAS would be subject to the rule. This alternative would result in an estimated 50% decrease in reporting forms submitted, along with an estimated small business cost of approximately $626.4 million under a 7 percent discount rate.

However, EPA also considered alternatives to the proposed rule that the Agency is finalizing to reduce burden on small entities. EPA considered providing streamlined reporting form options for both imported articles and R&D substances manufactured in low quantities (*i.e.,* no more than 10 kg/year). Based on EPA's knowledge of manufacturers of those substances, and public input from commenters and small entity representatives, EPA believes such manufacturers have less information that is known or reasonably ascertainable to them. Therefore, the streamlined reporting form reduces the burden of reporting on the standard form while still enabling EPA to collect all known or reasonably ascertainable historical PFAS data. Additionally, EPA considered and is finalizing a longer compliance timeframe for all reporting entities. Providing an additional six months for a data collection period ahead of the reporting period will reduce the opportunity costs on affected firms, particularly small entities, without sacrificing any PFAS manufacturing data. In addition, EPA is granting small manufacturers (as defined at 40 CFR 704.3) who would report exclusively as article importers an additional six months to collect data. Therefore, those small entities would have 24 months from the effective date of this rule to submit information on their imported articles. EPA is finalizing such alternatives to meet the Agency's obligations under TSCA sections 8(a)(5)(A) through (C), as this rule is requesting information that is neither duplicative nor unnecessary and will not exclude manufacturers who are likely to have relevant information, while minimizing costs on small manufacturers to the extent feasible.

- *Small entity compliance guide.* EPA prepared a Small Entity Compliance Guide to help small entities comply with the rule. This guide is available in the docket for this rulemaking and will be available on EPA's website prior to the effective date of this final rule (Ref. 14).

D. Unfunded Mandates Reform Act (UMRA)

This action contains a Federal mandate under UMRA, 2 U.S.C. 1531–1538, that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or for private sector in any one year. Accordingly, the EPA has prepared a written statement (Ref. 30) as required under UMRA section 202 that is include in the docket for this action and is briefly summarized here.

1. *Authorizing legislation.* This rule is issued under the authority of TSCA section 8(a)(7) (15 U.S.C. 2607(a)(7)).

2. *Benefit-cost analysis.* EPA has prepared an Economic Analysis (Ref. 2) and a Final Regulatory Flexibility Analysis (Ref. 29) to evaluate, among other things, the benefits and costs of this rule as well as various regulatory options. The rule is calculated to result in a total one-time cost to the private sector of approximately $843 million using a 3 percent discount rate and $800 million using a 7 percent discount rate. When adjusted for inflation, the $100 million UMRA threshold is equivalent to approximately $184 million. Thus, the cost of the rule to the private sector in the aggregate exceeds the inflation-adjusted UMRA threshold.

Because this is an information-collecting rule, EPA is not able to quantitatively measure the associated benefits. However, the rule may supply information on PFAS to which Federal agencies (and the public) do not currently have access. By enhancing the data supplied to risk-screening and risk-management programs, EPA expects to more effectively and expeditiously evaluate and manage any potential unreasonable risk posed by PFAS. The more EPA can base its decisions on actual data rather than on assumptions, the better EPA is able to tailor its risk management decisions to the level of actual risk, whether higher or lower than it would be if based on assumptions alone. Ultimately, enhancing the risk evaluation process will have positive consequences for human health and the environment and may enable a more efficient allocation of EPA's and society's resources. Additionally, this rule fulfills EPA's obligations under TSCA section 8(a)(7).

3. *Impacts on State, local, and Tribal governments.* This rule does not contain a significant Federal intergovernmental mandate because it neither imposes enforceable duties on State, local, or Tribal governments nor reduces an authorized amount of Federal financial assistance provided to State, local, or Tribal governments. This rule contains no regulatory requirements that might significantly or uniquely affect small governments. The rule would require reporting from certain persons who manufactured (including imported) PFAS for commercial purposes, including in articles. Governments do not typically engage in these activities, so State, local, and Tribal government entities are not expected to be subject to the rule's requirements. This action is not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The requirements of this action would primarily affect manufacturers (including importers) of PFAS.

E. Executive Order 13132: Federalism

This action does not have federalism implications, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999) because it will not have substantial direct effects on 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 (65 FR 67249, November 9, 2000) because it will not have substantial direct effects on Tribal governments, on the relationship between the Federal Government and the Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. It does not have substantial direct effects on Tribal government because EPA does not anticipate that PFAS was manufactured (including imported) for commercial purposes by Tribes so this rulemaking is not expected to impose substantial direct compliance costs on Tribal governments.

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying 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 Executive Order 13045. This action is not subject to Executive Order 13045, because it does not concern an environmental health or safety risk. Since this action does not concern human health, EPA's Policy on Children's Health also does not apply.

Although this action does not concern an environmental health or safety risk, this one-time data collection will aid in collecting all existing and reasonably ascertainable information related to the manufacturing (including importing) of PFAS since 2011. This rule will be of use in identifying current data gaps surrounding the knowledge of commercially manufactured PFAS. Understanding the extent of existing data gaps related to manufactured PFAS will also help inform and tailor future EPA actions to address PFAS as needed. This regulatory action establishes one-time reporting requirements for PFAS that will result in information on the quantity of PFAS to which children may be exposed. EPA believes that the information obtained as a result of this one-time data collection could also be used by the public, government agencies and others to identify potential problems, set priorities, and take appropriate steps to reduce any potential human health or environmental risks.

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

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. Further, we have concluded that this action is not likely to have any adverse effect on the supply, distribution or use of energy.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards. As such, NTTAA section 12(d), 15 U.S.C. 272.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All

The EPA believes that it is not practicable to assess whether the human health or environmental conditions that exist prior to this action result in disproportionate and adverse effects on communities with environmental justice concerns. The purpose of this action is to require reporting activity. EPA was unable to perform an environmental justice analysis because it lacks data on every exposure source.

However, this regulatory action makes changes to the reporting requirements for PFAS that will result in more information being collected and provided to better evaluate exposures and the risks posed by such exposures as explained in Unit II.A., certain PFAS exposure may be a hazard to human health. This action establishes one-time reporting requirements for companies to submit to EPA certain known or reasonably ascertainable information on manufactured PFAS by those entities as discussed in detailed in Unit III.D. The determination of potential risk to human health and/or the environment depends upon many factors, including the toxicity of the chemical, the fate of the chemical in the environment, and the amount and duration of human or other exposure to the chemical. This action does not directly address human health or environmental risks. However, the action will increase the level of information available to assess environmental protection for all affected populations without having any disproportionate and adverse human health or environmental effects on any population, including any community with environmental justice concerns. The information obtained as a result of this action may be used to collect all existing and reasonably ascertainable information related to PFAS-containing articles will be of use in identifying current data gaps surrounding the knowledge of commercially manufactured PFAS, and reporting of PFAS within imported articles will enable EPA to meet its obligations under the FY 2020 NDAA. Understanding the extent of existing data gaps related to manufactured PFAS will also help inform and tailor future EPA actions to address PFAS as needed. EPA also believes that the information obtained as a result of this action potentially could be used by the public (including communities with environmental justice concerns) with access to data which they may use to seek lower exposures and consequently reductions in chemical risks for themselves and their children. Technical assistance may be provided to communities with environmental justice concerns and efforts will be made to ensure meaningful access for individuals with limited English proficiency and individuals with disabilities. This information can also be used by government agencies and others to identify potential problems, set priorities, and take appropriate steps to reduce any potential risks to human health and the environment. Therefore, informational benefits, of the action, including behavioral changes such as consumers avoiding specific products, may have positive impact on the human health and environmental impacts on all communities, including communities with environmental justice concerns.

K. Congressional Review Act (CRA)

This action is subject to the CRA, 5 U.S.C. 801 *et seq.,* and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 705

Chemicals, Environmental protection, Hazardous materials, Reporting and recordkeeping requirements.

Dated: September 28, 2023.

Michal Freedhoff,

Assistant Administrator Office of Chemical Safety and Pollution Prevention.

Therefore, for the reasons set forth in the preamble, 40 CFR chapter I, subchapter R, is amended by adding part 705 to read as follows:

PART 705—REPORTING AND RECORDKEEPING REQUIREMENTS FOR CERTAIN PER- AND POLYFLUOROALKYL SUBSTANCES

Sec.

Authority: 15 U.S.C. 2607(a)(7).

§ 705.1 Scope, compliance, and enforcement.

(a) This part specifies reporting and recordkeeping procedures for manufacturers (including importers) of per- and polyfluoroalkyl substances (hereafter referred to as PFAS) under section 8(a)(7) of the Toxic Substances Control Act (TSCA).

(b) TSCA section 15(3) makes it unlawful for any person to fail or refuse to submit information required under this part. In addition, TSCA section 15(3) makes it unlawful for any person to fail to keep, and permit access to, records required by this part. TSCA section 16 provides that any person who violates a provision of TSCA section 15 is liable to the United States for a civil penalty and may be criminally prosecuted. Pursuant to TSCA section 17, the Federal Government may seek judicial relief to compel submission of TSCA section 8(a) information and to otherwise restrain any violation of TSCA section 15. TSCA section 11 allows for inspections to assure compliance, and the Environmental Protection Agency's (EPA) Administrator may by subpoena require the attendance and testimony of witnesses and the production of reports, papers, documents, answers to questions, and other information that the Administrator deems necessary.

(c) Each person who reports under this part must maintain records that document information reported under this part and, in accordance with TSCA, permit access to, and the copying of, such records by EPA officials.

§ 705.3 Definitions.

The definitions in this section and the definitions in TSCA section 3 apply to this part. In addition, the definitions in 40 CFR 704.3 also apply to this part, except the definition for *small quantities solely for research and development.*

Article means a manufactured item which:

(1) Is formed to a specific shape or design during manufacture;

(2) Has end use function(s) depending in whole or in part upon its shape or design during end use; and

(3) Has either no change of chemical composition during its end use or only those changes of composition which have no commercial purpose separate from that of the article, and that result from a chemical reaction that occurs upon end use of other chemical substances, mixtures, or articles; except that fluids and particles are not considered articles regardless of shape or design.

Central Data Exchange or *CDX* means EPA's centralized electronic submission receiving system.

Chemical Information Submission System or *CISS* means EPA's electronic, web-based reporting tool for the completion and submission of data, reports, and other information, or its successors.

Commercial use means the use of a chemical substance or a mixture containing a chemical substance (including as part of an article) in a commercial enterprise providing saleable goods or services.

Consumer use means the use of a chemical substance or a mixture containing a chemical substance (including as part of an article) when sold to or made available to consumers for their use.

Environmental or health effects information means any information of any effect of a chemical substance or mixture containing a chemical substance on health or the environment or on both. This includes all health and safety studies.

(1) Not only is information that arises as a result of a formal, disciplined study included, but other information relating to the effects of a chemical substance or mixture containing a chemical substance on health or the environment is also included. Any information that bears on the effects of a chemical substance on health or the environment would be included.

(2) Examples are:

(i) Long- and short-term tests of mutagenicity, carcinogenicity, or teratogenicity; data on behavioral disorders; dermatoxicity; pharmacological effects; mammalian absorption, distribution, metabolism, and excretion; cumulative, additive, and synergistic effects; and acute, subchronic, and chronic effects.

(ii) Tests for ecological or other environmental effects on invertebrates, fish, or other animals, and plants, including acute toxicity tests, chronic toxicity tests, critical life-stage tests, behavioral tests, algal growth tests, seed germination tests, plant growth or damage tests, microbial function tests, bioconcentration or bioaccumulation tests, and model ecosystem (microcosm) studies.

(iii) Assessments of human and environmental exposure, including workplace exposure, and impacts of a particular chemical substance or mixture containing a chemical substance on the environment, including surveys, tests, and studies of: Biological, photochemical, and chemical degradation; structure/activity relationships; air, water, and soil transport; biomagnification and bioconcentration; and chemical and physical properties, *e.g.,* boiling point, vapor pressure, evaporation rates from soil and water, octanol/water partition coefficient, and water solubility.

(iv) Monitoring data, including but not limited to when they have been aggregated and analyzed to measure the exposure of humans or the environment to a chemical substance or mixture containing a chemical substance.

Health and safety studies means any study of any effect of a chemical substance or mixture on health or the environment or on both, including underlying information and epidemiological studies, studies of occupational exposure to a chemical substance or mixture, toxicological, clinical, and ecological studies of a chemicals substance or mixture containing a chemical substance, and any test performed under TSCA. The following information is not part of a health and safety study:

(1) The name, address, or other identifying information for the submitting company, including identification of the laboratory that conducted the study in cases where the laboratory is part of or closely affiliated with the submitting company;

(2) Internal product codes (*i.e.,* code names for the test substance used internally by the submitting company or to identify the test substance to the test laboratory);

(3) Names and contact details for testing laboratory personnel and names and other private information for health and safety study participants or persons involved in chemical incidents such as would typically be withheld under 5 U.S.C. 552(b)(6) or under other privacy laws; and

(4) Information pertaining to test substance product development, advertising, or marketing plans, or to cost and other financial data.

Highest-level U.S. parent company means the highest-level company of the site's ownership hierarchy as of the start of the submission period during which data are being reported according to the following instructions. The highest-level U.S. parent company is located within the United States. The following rules govern how to identify the highest-level U.S. parent company:

(1) If the site is entirely owned by a single U.S. company that is not owned by another company, that single company is the U.S. parent company.

(2) If the site is entirely owned by a single U.S. company that is, itself, owned by another U.S.-based company (*e.g.,* it is a division or subsidiary of a higher-level company), the highest-level domestic company in the ownership hierarchy is the U.S. parent company.

(3) If the site is owned by more than one company (*e.g.,* company A owns 40 percent, company B owns 35 percent, and company C owns 25 percent), the company with the largest ownership interest in the site is the U.S. parent company. If a higher-level company in the ownership hierarchy owns more than one ownership company, then determine the entity with the largest ownership by considering the lower-level ownerships in combination (*e.g.,* corporation X owns companies B and C, for a total ownership of 60 percent for the site).

(4) If the site is owned by a 50:50 joint venture or a cooperative, the joint venture or cooperative is its own parent company. If the site is owned by a U.S. joint venture or cooperative, the highest level of the joint venture or cooperative is the U.S. parent company.

(5) If the site is federally owned, the highest-level Federal agency or department is the U.S. parent company.

(6) If the site is owned by a non-Federal public entity, that entity (such as a municipality, State, or tribe) is the U.S. parent company.

Industrial function means the intended physical or chemical characteristic for which a chemical substance or mixture is consumed as a reactant; incorporated into a formulation, mixture, reaction product or article; repackaged; or used.

Industrial use means use at a site at which one or more chemical substances or mixtures are manufactured (including imported) or processed.

Intended for use by children means the chemical substance or mixture is used in or on a product that is specifically intended for use by children aged 14 or younger. A chemical substance or mixture containing a chemical substance is intended for use by children when the submitter answers ''yes'' to at least one of the following questions for the product into which the submitter's chemical substance or mixture containing a chemical substance is incorporated:

(1) Is the product commonly recognized (*i.e.,* by a reasonable person) as being intended for children aged 14 or younger?

(2) Does the manufacturer of the product state through product labeling or other written materials that the product is intended for or will be used by children aged 14 or younger?

(3) Is the advertising, promotion, or marketing of the product aimed at children aged 14 or younger?

Known to or reasonably ascertainable by means all information in a person's possession or control, plus all information that a reasonable person similarly situated might be expected to possess, control, or know.

Manufacture means to import into the customs territory of the United States (as defined in general note 2 of the Harmonized Tariff Schedule of the United States (19 U.S.C. 1202)), produce, or manufacture for commercial purposes.

Manufacture for commercial purposes means:

(1) To import, produce, or manufacture with the purpose of obtaining an immediate or eventual commercial advantage for the manufacturer, and includes among other things, such ''manufacture'' of any amount of a chemical substance or mixture containing a chemical substance:

(i) For commercial distribution, including for test marketing; and/or

(ii) For use by the manufacturer, including use for product research and development, or as an intermediate.

(2) Manufacture for commercial purposes also applies to substances that are produced coincidentally during the manufacture, processing, use, or disposal of another substance or mixture containing a chemical substance, including both byproducts that are separated from that other substance or mixture containing a chemical substance and impurities that remain in that substance or mixture containing a chemical substance. Such byproducts and impurities may, or may not, in themselves have commercial value. They are nonetheless produced for the purpose of obtaining a commercial advantage since they are part of the manufacture of a chemical product for a commercial purpose.

Per- and polyfluoroalkyl substances or *PFAS* means, for the purpose of this part, any chemical substance or mixture containing a chemical substance that structurally contains at least one of the following three sub-structures:

(1) R-(CF_2)-CF(R′)R″, where both the CF_2 and CF moieties are saturated carbons.

(2) R-CF_2OCF_2-R′, where R and R′ can either be F, O, or saturated carbons.

(3) $CF_3C(CF_3)$R′R″, where R′ and R″ can either be F or saturated carbons.

Possession or control means in possession or control of the submitter, or of any subsidiary, partnership in which the submitter is a general partner, parent company, or any company or partnership which the parent company owns or controls, if the subsidiary, parent company, or other company or partnership is associated with the submitter in the research, development, test marketing, or commercial marketing of the chemical substance in question. (A parent company owns or controls another company if the parent owns or controls 50 percent or more of the other company's voting stock. A parent company owns or controls any partnership in which it is a general partner.) Information is included within this definition if it is:

(1) In files maintained by submitter's employees who are:

(i) Associated with research, development, test marketing, or commercial marketing of the chemical substance in question; and/or

(ii) Reasonably likely to have such data.

(2) Maintained in the files of other agents of the submitter who are associated with research, development, test marketing, or commercial marketing of the chemical substance in question in the course of their employment as such agents.

Research and development (R&D) means activities intended solely as scientific experimentation, research, or analysis. R&D focuses on the analysis of the chemical or physical characteristics, the performance, or the production characteristics of a chemical substance, a mixture containing the substance, or

an article. R&D encompasses a wide range of activities which may occur in a laboratory, pilot plant, commercial plant outside the research facility, or at other sites appropriate for R&D. General distribution of chemical substances to consumers does not constitute R&D.

Site-limited means a chemical substance is manufactured and processed only within a site and is not distributed as a chemical substance or as part of a mixture or article containing a chemical substance outside the site. Imported chemical substances are never site-limited.

Worker means someone at a site of manufacture, import, or processing who performs work activities near sources of a chemical substance or mixture or directly handles the chemical substance or mixture during the performance of work activities.

§ 705.5 Substances for which reports must be submitted.

The requirements of this part apply to all chemical substances and mixtures containing a chemical substance (including articles) that are a PFAS, consistent with the definition of PFAS at § 705.3.

§ 705.10 Persons who must report.

Persons who have manufactured for commercial purposes a chemical substance identified in § 705.5 at any period from January 1, 2011, through the end of the last calendar year prior to November 13, 2023, except as described in § 705.12, is subject to the requirements of this part.

§ 705.12 Activities for which reporting is not required.

Reporting under this part is not required for the import of municipal solid waste streams for the purpose of disposal or destruction of the waste. Additionally, reporting is not required for a Federal agency which imports PFAS when it is not for any immediate or eventual commercial advantage.

§ 705.15 What information to report.

For the one-time submission, persons identified in § 705.10 must report to EPA, for each site of each of the chemical substances identified in § 705.5, the following information to the extent known to or reasonably ascertainable by them, except as allowed under § 705.18. In the event that actual data is not known to or reasonably ascertainable by the submitter, then reasonable estimates may be submitted:

(a) *Company and plant site information.* The following currently correct company and plant site information must be reported for each site at which a reportable chemical substance is manufactured (see 40 CFR 711.3 for the ''site'' for importers):

(1) The highest-level U.S. parent company name, address, and Dun and Bradstreet D–U–N–S® (D&B) number, if one exists.

(2) The name of a person who will serve as Authorized Official for the submitter company, and who will be able to sign the certification statement as described in § 705.30(d), the Authorized Official's full mailing address, telephone number, and email address.

(3) The name of a person who will serve as technical contact for the submitter company, and who will be able to answer questions about the information submitted by the company to EPA, the contact person's full mailing address, telephone number, and email address.

(4) The name, full street address, and six-digit North American Industry Classification System (NAICS) code(s) of the site. A submitter under this part must include the appropriate D&B number for each plant site reported, and the county or parish (or other jurisdictional indicator) in which the plant site is located. A submitter under this part must obtain a D&B number for the site reported if none exists. A submitter under this part must also provide other site identification numbers, including the Facility Registry Service (FRS) identification number, if they exist.

(b) *Chemical-specific information.* The following chemical-specific information must be reported for each chemical substance that is a PFAS manufactured for each year since January 1, 2011, except as allowed under § 705.18. This includes each chemical substance that is a PFAS and incorporated into mixtures:

(1) The common or trade name, the chemical identity, and, except for chemical substances that are Class 1 substances on the TSCA Inventory, the representative molecular structure of each PFAS for which such a report is required.

(i) The specific, currently correct Chemical Abstracts (CA) Index name as used to list the chemical substance on the TSCA Inventory and the correct corresponding Chemical Abstracts Service Registry Number (CASRN) for each reportable PFAS at each site. Submitters who wish to report chemical substances listed on the confidential portion of the TSCA Inventory will need to report the chemical substance using a TSCA Accession Number. If a submitter has a low-volume exemption (LVE) case number for the chemical substance, that number may also be used if a CASRN is not known to or reasonably ascertainable by the submitter.

(ii) In addition to reporting the number itself, submitters must specify the type of number they are reporting by selecting from among the codes in table 1 to this paragraph (b)(1)(ii).

TABLE 1 TO PARAGRAPH (b)(1)(ii)—CODES TO SPECIFY TYPE OF CHEMICAL IDENTIFYING NUMBER

Code	Number type
A	TSCA Accession Number.
C	Chemical Abstracts Service Registry Number (CASRN).
L	Low-volume exemption (LVE) case number.

(iii) If the CASRN or specific identifier (*i.e.,* Accession Number or LVE number) of the PFAS is not known to or reasonably ascertainable (NKRA) to the submitter (*e.g.,* if the chemical identity is claimed as confidential business information by the submitter's supplier, or if the submitter knows they have a PFAS but are unable to ascertain its specific identifier and/or specific chemical identity), the submitter may provide a generic name or description of the PFAS and also initiate a joint submission if the secondary submitter is known. The submitter may only initiate a joint submission if the CASRN or the specific identifier (*i.e.,* Accession Number or LVE number) is not known or reasonably ascertainable, and a secondary submitter (who would provide such information) is known. The manufacturer (including importer) must use the reporting tool described under § 705.35 to ask the supplier or other entity to provide the chemical identity directly to EPA in a joint submission. Such request must include instructions for submitting chemical identity information electronically, using e-CDRweb and CDX (see 40 CFR 711.35), and for clearly referencing the manufacturer's (including importer) submission. Contact information for the supplier or other entity, a trade name or other designation for the chemical substance, and a copy of the request to the supplier or other entity must be included with the manufacturer's (including importer) submission. If, after conducting due diligence and reviewing known or reasonably ascertainable information, a secondary submitter to complete the joint submission is not known, the reporter may indicate that the secondary submitter is NKRA. However, the PFAS manufacturer would be required to

provide as much identifying detail as they have regarding the PFAS identity, and would be able to report to EPA without initiating a joint submission even if they do not know the underlying identity of the chemical substance.

(2) The physical form(s) of the PFAS as it is sent off-site from each site. If the PFAS is site-limited, you must report the physical form(s) of the PFAS at the time it is reacted on-site to produce a different chemical substance. For each PFAS at each site, the submitter must report as many physical forms as applicable from among the physical forms listed in this unit:

(i) Dry powder.
(ii) Pellets or large crystals.
(iii) Water- or solvent-wet solid.
(iv) Other solid.
(v) Gas or vapor.
(vi) Liquid.

(c) *Categories of use.* For each year since January 1, 2011, report the following information on categories of use of each chemical substance that is a PFAS manufactured for commercial purposes.

(1) *Industrial processing and use information.* A designation indicating the type of industrial processing or use operation(s) at each site that receives a PFAS from the submitter site directly or indirectly (whether the recipient site(s) are controlled by the submitter site or not). For each PFAS, report the letters which correspond to the appropriate processing or use operation(s) listed in table 2 to this paragraph (c)(1). A particular designation may need to be reported more than once, to the extent that a submitter reports more than one sector that applies to a given designation under this paragraph (c)(1).

TABLE 2 TO PARAGRAPH (c)(1)—CODES FOR REPORTING TYPE OF INDUSTRIAL PROCESSING OR USE OPERATION

Designation	Operation
PC	Processing as a reactant.
PF	Processing—incorporation into formulation, mixture, or reaction product.
PA	Processing—incorporation into article.
PK	Processing—repackaging.
U	Use—non-incorporative activities.

(2) *Corresponding sector code.* A code indicating the sector(s) that best describes the industrial activities associated with each industrial processing or use operation reported under this section. For each chemical substance, report the code that corresponds to the appropriate sector(s) listed in table 3 to this paragraph (c)(2). A particular sector code may need to be reported more than once, to the extent that a submitter reports more than one function code that applies to a given sector code under this paragraph (c)(2).

TABLE 3 TO PARAGRAPH (c)(2)—CODES FOR REPORTING INDUSTRIAL SECTORS

Code	Sector description
IS1	Agriculture, forestry, fishing, and hunting.
IS2	Oil and gas drilling, extraction, and support activities.
IS3	Mining (except oil and gas) and support activities.
IS4	Utilities.
IS5	Construction.
IS6	Food, beverage, and tobacco product manufacturing.
IS7	Textiles, apparel, and leather manufacturing.
IS8	Wood product manufacturing.
IS9	Paper manufacturing.
IS10	Printing and related support activities.
IS11	Petroleum refineries.
IS12	Asphalt paving, roofing, and coating materials manufacturing.
IS13	Petroleum lubricating oil and grease manufacturing.
IS14	All other petroleum and coal products manufacturing.
IS15	Petrochemical manufacturing.
IS16	Industrial gas manufacturing.
IS17	Synthetic dye and pigment manufacturing.
IS18	Carbon black manufacturing.
IS19	All other basic inorganic chemical manufacturing.
IS20	Cyclic crude and intermediate manufacturing.
IS21	All other basic organic chemical manufacturing.
IS22	Plastics material and resin manufacturing.
IS23	Synthetic rubber manufacturing.
IS24	Organic fiber manufacturing.
IS25	Pesticide, fertilizer, and other agricultural chemical manufacturing.
IS26	Pharmaceutical and medicine manufacturing.
IS27	Paint and coating manufacturing.
IS28	Adhesive manufacturing.
IS29	Soap, cleaning compound, and toilet preparation manufacturing.
IS30	Printing ink manufacturing.
IS31	Explosives manufacturing.
IS32	Custom compounding of purchased resins.
IS33	Photographic film, paper, plate, and chemical manufacturing.
IS34	All other chemical product and preparation manufacturing.
IS35	Plastics product manufacturing.
IS36	Rubber product manufacturing.
IS37	Non-metallic mineral product manufacturing (includes cement, clay, concrete, glass, gypsum, lime, and other non-metallic mineral product manufacturing).
IS38	Primary metal manufacturing.
IS39	Fabricated metal product manufacturing.
IS40	Machinery manufacturing.
IS41	Computer and electronic product manufacturing.
IS42	Electrical equipment, appliance, and component manufacturing.
IS43	Transportation equipment manufacturing.
IS44	Furniture and related product manufacturing.
IS45	Miscellaneous manufacturing.
IS46	Wholesale and retail trade.
IS47	Services.
IS48	Other (requires additional information).

(3) *Corresponding function category.* For each sector reported under paragraph (c)(2) of this section, the applicable code(s) from table 4 to this paragraph (c)(3) must be selected to designate the function category(ies) that best represents the specific manner in which the PFAS is used.

TABLE 4 TO PARAGRAPH (c)(3)—CODES FOR REPORTING FUNCTION CATEGORIES

Code	Category
F001	Abrasives.
F002	Etching agent.
F003	Adhesion/cohesion promoter.
F004	Binder.
F005	Flux agent.
F006	Sealant (barrier).
F007	Absorbent.
F008	Adsorbent.
F009	Dehydrating agent (desiccant).
F010	Drier.
F011	Humectant.
F012	Soil amendments (fertilizers).
F013	Anti-adhesive/cohesive.
F014	Dusting agent.
F015	Bleaching agent.
F016	Brightener.
F017	Anti-scaling agent.
F018	Corrosion inhibitor.
F019	Dye.
F020	Fixing agent (mordant).
F021	Hardener.
F022	Filler.
F023	Anti-static agent.
F024	Softener and conditioner.
F025	Swelling agent.
F026	Tanning agents not otherwise specified.
F027	Waterproofing agent.
F028	Wrinkle resisting agent.
F029	Flame retardant.
F030	Fuel agents.
F031	Fuel.
F032	Heat transferring agent.
F033	Hydraulic fluids.
F034	Insulators.
F035	Refrigerants.

TABLE 4 TO PARAGRAPH (c)(3)—CODES FOR REPORTING FUNCTION CATEGORIES—Continued

Code	Category
F036 ..	Anti-freeze agent.
F037 ..	Intermediate.
F038 ..	Monomers.
F039 ..	Ion exchange agent.
F040 ..	Anti-slip agent.
F041 ..	Lubricating agent.
F042 ..	Deodorizer.
F043 ..	Fragrance.
F044 ..	Oxidizing agent.
F045 ..	Reducing agent.
F046 ..	Photosensitive agent.
F047 ..	Photosensitizers.
F048 ..	Semiconductor and photovoltaic agent.
F049 ..	UV stabilizer.
F050 ..	Opacifer.
F051 ..	Pigment.
F052 ..	Plasticizer.
F053 ..	Plating agent.
F054 ..	Catalyst.
F055 ..	Chain transfer agent.
F056 ..	Chemical reaction regulator.
F057 ..	Crystal growth modifiers (nucleating agents).
F058 ..	Polymerization promoter.
F059 ..	Terminator/Blocker.
F060 ..	Processing aids, specific to petroleum production.
F061 ..	Antioxidant.
F062 ..	Chelating agent.
F063 ..	Defoamer.
F064 ..	pH regulating agent.
F065 ..	Processing aids not otherwise specified.
F066 ..	Energy Releasers (explosives, motive propellant).
F067 ..	Foamant.
F068 ..	Propellants, non-motive (blowing agents).
F069 ..	Cloud-point depressant.
F070 ..	Flocculating agent.
F071 ..	Flotation agent.
F072 ..	Solids separation (precipitating) agent, not otherwise specified.
F073 ..	Cleaning agent.
F074 ..	Diluent.
F075 ..	Solvent.
F076 ..	Surfactant (surface active agent).
F077 ..	Emulsifier.
F078 ..	Thickening agent.
F079 ..	Viscosity modifiers.
F080 ..	Laboratory chemicals.
F081 ..	Dispersing agent.
F082 ..	Freeze-thaw additive.
F083 ..	Surface modifier.
F084 ..	Wetting agent (non-aqueous).
F085 ..	Aerating and deaerating agents.
F086 ..	Explosion inhibitor.
F087 ..	Fire extinguishing agent.
F088 ..	Flavoring and nutrient.
F089 ..	Anti-redeposition agent.
F090 ..	Anti-stain agent.
F091 ..	Anti-streaking agent.
F092 ..	Conductive agent.
F093 ..	Incandescent agent.
F094 ..	Magnetic element.
F095 ..	Anti-condensation agent.
F096 ..	Coalescing agent.
F097 ..	Film former.
F098 ..	Demulsifier.

TABLE 4 TO PARAGRAPH (c)(3)—CODES FOR REPORTING FUNCTION CATEGORIES—Continued

Code	Category
F099 ..	Stabilizing agent.
F100 ..	Alloys.
F101 ..	Density modifier.
F102 ..	Elasticizer.
F103 ..	Flow promoter.
F104 ..	Sizing agent.
F105 ..	Solubility enhancer.
F106 ..	Vapor pressure modifiers.
F107 ..	Embalming agent.
F108 ..	Heat stabilizer.
F109 ..	Preservative.
F110 ..	Anti-caking agent.
F111 ..	Deflocculant.
F112 ..	Dust suppressant.
F113 ..	Impregnation agent.
F114 ..	Leaching agent.
F115 ..	Tracer.
F116 ..	X-ray absorber.
F999 ..	Other.

(4) *Consumer and commercial use information.* Using the applicable codes listed in table 5 to this paragraph (c)(4), submitters must designate the consumer and commercial product category(ies) that best describe the consumer and commercial products in which each PFAS is used (whether the recipient site(s) are controlled by the submitter site or not). If more than 10 codes apply to a PFAS, submitters need only report the 10 codes for PFAS that cumulatively represent the largest percentage of the submitter's production volume for that chemical, measured by weight. If none of the listed consumer and commercial product categories accurately describes the consumer and commercial products in which each PFAS is used, the category ''Other'' may be used, and must include a description of the use.

TABLE 5 TO PARAGRAPH (c)(4)—CODES FOR REPORTING CONSUMER AND COMMERCIAL PRODUCT CATEGORIES

Code	Category
Chemical Substances in Furnishing, Cleaning, Treatment Care Products	
CC101	Construction and building materials covering large surface areas including stone, plaster, cement, glass and ceramic articles; fabrics, textiles, and apparel.
CC102	Furniture & furnishings including plastic articles (soft); leather articles.
CC103	Furniture & furnishings including stone, plaster, cement, glass and ceramic articles; metal articles; or rubber articles.
CC104	Leather conditioner.

TABLE 5 TO PARAGRAPH (c)(4)—CODES FOR REPORTING CONSUMER AND COMMERCIAL PRODUCT CATEGORIES—Continued

Code	Category
CC105	Leather tanning, dye, finishing, impregnation and care products.
CC106	Textile (fabric) dyes.
CC107	Textile finishing and impregnating/surface treatment products.
CC108	All-purpose foam spray cleaner.
CC109	All-purpose liquid cleaner/polish.
CC110	All-purpose liquid spray cleaner.
CC111	All-purpose waxes and polishes.
CC112	Appliance cleaners.
CC113	Drain and toilet cleaners (liquid).
CC114	Powder cleaners (floors).
CC115	Powder cleaners (porcelain).
CC116	Dishwashing detergent (liquid/gel).
CC117	Dishwashing detergent (unit dose/granule).
CC118	Dishwashing detergent liquid (hand-wash).
CC119	Dry cleaning and associated products.
CC120	Fabric enhancers.
CC121	Laundry detergent (unit-dose/granule).
CC122	Laundry detergent (liquid).
CC123	Stain removers.
CC124	Ion exchangers.
CC125	Liquid water treatment products.
CC126	Solid/Powder water treatment products.
CC127	Liquid body soap.
CC128	Liquid hand soap.
CC129	Solid bar soap.
CC130	Air fresheners for motor vehicles.
CC131	Continuous action air fresheners.
CC132	Instant action air fresheners.
CC133	Anti-static spray.
CC134	Apparel finishing, and impregnating/surface treatment products.
CC135	Insect repellent treatment.
CC136	Pre-market waxes, stains, and polishes applied to footwear.
CC137	Post-market waxes, and polishes applied to footwear (shoe polish).
CC138	Waterproofing and water-resistant sprays.
Chemical Substances in Construction, Paint, Electrical, and Metal Products	
CC201	Fillers and putties.
CC202	Hot-melt adhesives.
CC203	One-component caulks.
CC204	Solder.
CC205	Single-component glues and adhesives.
CC206	Two-component caulks.
CC207	Two-component glues and adhesives.
CC208	Adhesive/Caulk removers.
CC209	Aerosol spray paints.
CC210	Lacquers, stains, varnishes and floor finishes.
CC211	Paint strippers/removers.
CC212	Powder coatings.
CC213	Radiation curable coatings.
CC214	Solvent-based paint.
CC215	Thinners.
CC216	Water-based paint.

TABLE 5 TO PARAGRAPH (c)(4)—CODES FOR REPORTING CONSUMER AND COMMERCIAL PRODUCT CATEGORIES—Continued

Code	Category
CC217	Construction and building materials covering large surface areas, including wood articles.
CC218	Construction and building materials covering large surface areas, including paper articles; metal articles; stone, plaster, cement, glass and ceramic articles.
CC219	Machinery, mechanical appliances, electrical/electronic articles.
CC220	Other machinery, mechanical appliances, electronic/electronic articles.
CC221	Construction and building materials covering large surface areas, including metal articles.
CC222	Electrical batteries and accumulators.
Chemical Substances in Packaging, Paper, Plastic, Toys, Hobby Products	
CC990	Non-TSCA use.
CC301	Packaging (excluding food packaging), including paper articles.
CC302	Other articles with routine direct contact during normal use, including paper articles.
CC303	Packaging (excluding food packaging), including rubber articles; plastic articles (hard); plastic articles (soft).
CC304	Other articles with routine direct contact during normal use including rubber articles; plastic articles (hard).
CC305	Toys intended for children's use (and child dedicated articles), including fabrics, textiles, and apparel; or plastic articles (hard).
CC306	Adhesives applied at elevated temperatures.
CC307	Cement/concrete.
CC308	Crafting glue.
CC309	Crafting paint (applied to body).
CC310	Crafting paint (applied to craft).
CC311	Fixatives and finishing spray coatings.
CC312	Modelling clay.
CC313	Correction fluid/tape.
CC314	Inks in writing equipment (liquid).
CC315	Inks used for stamps.
CC316	Toner/Printer cartridge.
CC317	Liquid photographic processing solutions.
Chemical Substances in Automotive, Fuel, Agriculture, Outdoor Use Products	
CC401	Exterior car washes and soaps.
CC402	Exterior car waxes, polishes, and coatings.
CC403	Interior car care.
CC404	Touch up auto paint.
CC405	Degreasers.
CC406	Liquid lubricants and greases.
CC407	Paste lubricants and greases.
CC408	Spray lubricants and greases.

TABLE 5 TO PARAGRAPH (c)(4)—CODES FOR REPORTING CONSUMER AND COMMERCIAL PRODUCT CATEGORIES—Continued

Code	Category
CC409	Anti-freeze liquids.
CC410	De-icing liquids.
CC411	De-icing solids.
CC412	Lock de-icers/releasers.
CC413	Cooking and heating fuels.
CC414	Fuel additives.
CC415	Vehicular or appliance fuels.
CC416	Explosive materials.
CC417	Agricultural non-pesticidal products.
CC418	Lawn and garden care products.
Chemical Substances in Products Not Described by Other Codes	
CC980	Other (specify).
CC990	Non-TSCA use.

(5) *Applicable codes for each commercial and consumer products.* For each consumer and commercial product category reported under paragraph (c)(4) of this section, the applicable code(s) described in table 4 to paragraph (c)(3) of this section must be selected to designate the function category(ies) that best represents the specific manner in which the PFAS is used.

(6) *Commercial and consumer products.* Submitters must indicate, for each consumer and commercial product category reported under paragraph (c)(4) of this section, whether the use is a consumer or a commercial use, or both.

(7) *Consumer product category.* Submitters must determine, within each consumer and commercial product category reported under paragraph (c)(4) of this section, whether any amount of each reportable chemical substance manufactured (including imported) by the submitter is present in (for example, a plasticizer chemical substance used to make pacifiers) or on (for example, as a component in the paint on a toy) any consumer products intended for use by children age 14 or younger, regardless of the concentration of the chemical substance remaining in or on the product. Submitters must select from the following options: The chemical substance is used in or on any consumer products intended for use by children; the chemical substance is not used in or on any consumer products intended for use by children; or information as to whether the chemical substance is used in or on any consumer products intended for use by children is not known to or reasonably ascertainable by the submitter.

(8) *Concentrations of PFAS.* For each year where the PFAS is used in consumer or commercial products, the estimated typical maximum concentration, measured by weight, of the chemical substance in each consumer and commercial product category reported under paragraph (c)(4) of this section. For each PFAS in each commercial and consumer product category reported under paragraph (c)(4) of this section, submitters must select from among the ranges of concentrations listed in table 6 to this paragraph (c)(8) and report the corresponding code (*i.e.,* M1 through M5):

TABLE 6 TO PARAGRAPH (c)(8)—CODES FOR REPORTING MAXIMUM CONCENTRATION OF CHEMICAL SUBSTANCE

Code	Concentration range (% weight)
M1	Less than 1% by weight.
M2	At least 1 but less than 30% by weight.
M3	At least 30 but less than 60% by weight.
M4	At least 60 but less than 90% by weight.
M5	At least 90% by weight.

(d) *Manufactured amounts.* For each year since January 1, 2011, the total amounts manufactured of each PFAS, including the amounts manufactured in each calendar year for each category of use as described in paragraph (c) of this section.

(1) *Total volume.* For each year the PFAS was manufactured, the total annual volume (in pounds) of each PFAS domestically manufactured or imported at each site. The total annual domestically manufactured volume (not including imported volume) and the total annual imported volume must be separately reported. These amounts must be reported to two significant figures of accuracy.

(2) *Site designation.* A designation indicating, for each PFAS at each site, whether the imported PFAS is physically present at the reporting site.

(3) *Volume imported.* The volume directly exported of each PFAS domestically manufactured or imported at each site. These amounts must be reported to two significant figures of accuracy.

(4) *Production volume.* The estimated percentage, rounded off to the closest 10 percent, of total production volume of the reportable chemical substance associated with each combination of industrial processing or use operation, sector, and function category as reported in paragraph (c) of this section. Where a particular combination of industrial processing or use operation, sector, and function category accounts for less than

5 percent of the submitter's site's total production volume of a reportable chemical substance, the percentage must not be rounded off to 0 percent. Instead, in such a case, submitters must report the percentage, rounded off to the closest 1 percent, of the submitter's site's total production volume of the reportable chemical substance associated with the particular combination of industrial processing or use operation, sector, and function category.

(5) *Site production volume.* The estimated percentage, rounded off to the closest 10 percent, of the submitter's site's total production volume of the PFAS associated with each consumer and commercial product category as reported in paragraph (c)(4) of this section. Where a particular consumer and commercial product category accounts for less than 5 percent of the total production volume of a reportable chemical substance, the percentage must not be rounded off to 0 percent. Instead, in such a case, submitters must report the percentage, rounded off to the closest 1 percent, of the submitter's site's total production volume of the reportable chemical substance associated with the particular consumer and commercial product category.

(6) *Site-limited.* An indication of whether the PFAS was site-limited.

(7) *Volume recycled.* The total volume (in pounds) of each PFAS recycled on-site.

(e) *Byproduct reporting.* A description of the byproducts resulting from the manufacture, processing, use, or disposal of each PFAS.

(1) *Byproduct identification.* For each byproduct produced from the manufacture, processing, use, or disposal of a PFAS, the submitter will identify the byproduct by its specific, currently correct CA Index name as used to list the chemical substance on the TSCA Inventory and the correct corresponding CASRN. A submitter under this part may use a known EPA-designated TSCA Accession Number for a chemical substance in lieu of a CASRN when a CASRN is not known to or reasonably ascertainable by the submitter. Submitters who wish to report chemical substances listed on the confidential portion of the TSCA Inventory will need to report the chemical substance using a TSCA Accession Number.

(i) In addition to reporting the number itself, submitters must specify the type of number they are reporting by selecting from among the codes in table 1 to paragraph (b)(1)(ii) of this section.

(ii) If the specific chemical identity of the byproduct is unknown to the submitter, the submitter may provide a description of the chemical substance.

(iii) An indication of which specific PFAS activity(ies) (*i.e.,* manufacture, process, use, or disposal) manufactured the byproduct.

(2) *Releases.* An indication of whether the byproduct is released to the environment, and if so, the environmental medium to which it is released (*i.e.,* air, water, land).

(3) *Volume.* For each year, the byproduct volume (in pounds) released to the environment.

(f) *Environmental and health effects.* All existing information concerning the environmental and health effects of such substance or mixture containing a chemical substance in the manufacturer's possession or control. The scope of this information shall not be limited to studies conducted or published since 2011.

(1) *Organization for Economic Cooperation and Development (OECD) Harmonized Templates.* For each published study report, the submitter shall complete an OECD Harmonized Templates for Reporting Chemical Test Summaries and submit the accompanying study reports and supporting information. This can be accomplished by using the freely available IUCLID software.

(2) *Human health data—preliminary studies.* Submitters shall also provide any additional human health data not in study reports, including but not limited to any preliminary studies, informal test results in workers, or inhalation studies.

(3) *Analytical tests.* Submitters shall also provide the names of any analytical or test methods used to detect or otherwise test for the PFAS.

(g) *Worker exposure data.* The number of individuals exposed to PFAS in their places of employment and the duration of such exposure.

(1) *Employment activities.* A narrative description of worker activities involving the PFAS at the manufacturing site, such as bag dumping, sampling, cleaning, or unloading drums.

(2) *Number of workers.* For each worker activity in this paragraph, indicate the number of workers reasonably likely to be exposed. The submitter must select from among the worker ranges listed in table 7 to this paragraph (g)(2) and report the corresponding code (*i.e.,* W1 though W8).

TABLE 7 TO PARAGRAPH (g)(2)—CODES FOR REPORTING NUMBER OF WORKERS REASONABLY LIKELY TO BE EXPOSED

Code	Range
W1	Fewer than 10 workers.
W2	At least 10 but fewer than 25 workers.
W3	At least 25 but fewer than 50 workers.
W4	At least 50 but fewer than 100 workers.
W5	At least 100 but fewer than 500 workers.
W6	At least 500 but fewer than 1,000 workers.
W7	At least 1,000 but fewer than 10,000 workers.
W8	At least 10,000 workers.

(3) *Exposure scenarios.* For each worker activity in this paragraph (g), the maximum duration of exposure for any worker at the manufacturing site, for each of the following scenarios:

(i) The daily exposure duration (in hours per day) in the case of the worker with greatest annual exposure frequency (*i.e.,* the worker exposed the most days per year); and

(ii) The annual exposure frequency (in days per year) in the case of the worker with greatest daily exposure duration (*i.e.,* the worker exposed for the most hours per day during the year).

(4) *Exposure by category.* For each combination of industrial processing or use operation, sector, and function category identified in paragraph (c) of this section, the submitter must estimate the number of workers reasonably likely to be exposed to each PFAS. For each combination associated with each chemical substance, the submitter must select from among the worker ranges listed in table 7 to paragraph (g)(2) of this section and report the corresponding code (*i.e.,* W1 though W8).

(5) *Duration of exposure industrial use.* For each PFAS, the maximum duration of exposure for any worker for each combination of industrial processing or use operation, sector, and function category, for each of the following scenarios:

(i) The daily exposure duration (in hours per day) in the case of the worker with the greatest annual exposure frequency (*i.e.,* the worker exposed the most days per year); and

(ii) The annual exposure frequency (in days per year) in the case of the worker with the greatest daily exposure duration (*i.e.,* the worker exposed for the most hours per day during the year).

(6) *Commercial workers.* Where the PFAS is used in a commercial product,

the submitter must estimate the number of commercial workers reasonably likely to be exposed to each reportable chemical substance. For each commercial use associated with each substance, the submitter must select from among the worker ranges listed in table 7 to paragraph (g)(2) of this section and report the corresponding code (*i.e.,* W1 though W8).

(7) *Duration of exposure commercial use.* For each PFAS, the maximum duration of exposure for any worker for each commercial use, for each of the following scenarios:

(i) The daily exposure duration (in hours per day) in the case of the worker with greatest annual exposure frequency (*i.e.,* the worker exposed the most days per year); and

(ii) The annual exposure frequency (in days per year) in the case of the worker with greatest daily exposure duration (*i.e.,* the worker exposed for the most hours per day during the year).

(h) *Disposal data.* During the years in which the PFAS was manufactured, the manners or methods of its disposal, and any changes to the disposal methods or processes.

(1) *Categories of disposal methods.* Description of disposal processes or methods, using the appropriate codes in table 8 to this paragraph (h)(1), and additional descriptions as needed.

TABLE 8 TO PARAGRAPH (h)(1)—CODES FOR REPORTING DISPOSAL METHODS

Code	Disposal method
D1	On-site land disposal: Resource Conservation and Recovery Act (RCRA) Class C landfill (hazardous).
D2	On-site land disposal: other landfill.
D3	Other on-site land disposal.
D4	On-site underground injection (UIC).
D5	Off-site land disposal: RCRA Class C landfill (hazardous).
D6	Off-site land disposal: other landfill.
D7	On-site incineration.
D8	Off-site incineration.
D9	Publicly owned treatment works (POTW).
D10 ...	Other off-site waste transfer.
D11 ...	Release to surface water.
D12 ...	Release to air (stack emissions).
D13 ...	Release to air (fugitive emissions).
D99 ...	Other.

(2) *Disposal processes.* Describe any changes to the disposal process(es) or method(s) indicated in paragraph (h)(1) of this section for any PFAS manufactured since 2011.

(3) *Disposal volume.* Indicate total volume of the PFAS that was released to each environmental medium in each year since 2011: land, water, and air.

(4) *Incineration volume.* Indicate total volume of the PFAS that was incinerated on-site in each year since 2011. If incineration occurred, indicate the temperature (in degrees Celsius) at which the PFAS was incinerated. If incineration occurred at multiple temperatures, indicate the minimum temperature (in degrees Celsius) at which the PFAS was incinerated.

§ 705.18 Article importer and R&D substance reporting options.

For the one-time submission, certain manufacturers have the option to use a streamlined reporting form if they do not know nor can reasonably ascertain information requested under § 705.15, beyond what is listed in this part. Paragraph (a) of this section lists the information which a manufacturer who has imported a PFAS within an article must report to the extent they know or can reasonably ascertain. Paragraph (b) of this section lists the information that manufacturers of PFAS that are solely R&D substances manufactured in volumes no greater than 10 kilograms per year must report to the extent they know or can reasonably ascertain.

(a) *Article reporting.* Any importer of an article which contains a chemical substance that is a PFAS and who meets the reporting requirements described in § 705.10 has the option to submit information to EPA using a streamlined reporting form for that PFAS in the imported article, for each year since January 1, 2011, in which the PFAS was imported in an article. Information must be submitted to the extent the submitter knows or can reasonably ascertain. In the event that actual data is not known to or reasonably ascertainable by the submitter, then reasonable estimates may be submitted. The information requested on the streamlined reporting form for article importers includes:

(1) *Company and plant site information.* All company and plant site information requested under § 705.15(a) shall be reported.

(2) *Chemical-specific information.* The following chemical-specific information must be reported for each chemical substance that is a PFAS imported in an article, for each year since January 1, 2011, in which that PFAS was imported within an article.

(i) The common or trade name, the chemical identity, and, except for chemical substances that are Class 1 substances on the TSCA Inventory (Inventory), the representative molecular structure of each PFAS for which such a report is required. Submitters who wish to report chemical substances listed on the confidential portion of the Inventory will need to report the chemical substance using a TSCA Accession Number. If a submitter has a low-volume exemption (LVE) case number for the chemical substance, that number may also be used if a CASRN is not known to or reasonably ascertainable by the submitter. In addition to reporting the number itself, submitters must specify the type of number they are reporting by selecting from among the codes in table 1 to § 705.15(b)(1)(ii).

(ii) If the specific chemical identity of the PFAS imported in an article is not known to or reasonably ascertainable to the submitter (*e.g.,* if the chemical identity is claimed as confidential business information by the submitter's supplier, or if the submitter knows they have a PFAS but is unable to ascertain its specific chemical identity), the submitter may provide a generic name or description of the PFAS.

(3) *Categories of use.* For each year since January 1, 2011, report the following information on categories of use of each PFAS imported in an article.

(i) *Industrial processing and use information.* A designation indicating the type of industrial processing or use operation(s) at each site that receives a PFAS from the submitter site directly or indirectly (whether the recipient site(s) are controlled by the submitter site or not). For each PFAS that was imported in an article, report the letters which correspond to the appropriate processing or use operation(s) listed in table 2 to § 705.15(c)(1). A particular designation may need to be reported more than once, to the extent that a submitter reports more than one sector that applies to a given designation under this paragraph (a)(3)(i).

(ii) *Industrial activities sector.* A code indicating the sector(s) that best describe the industrial activities associated with each industrial processing or use operation reported under this section. For each PFAS that was imported in an article, report the code that corresponds to the appropriate sector(s) listed in table 3 to § 705.15(c)(2). A particular sector code may need to be reported more than once, to the extent that a submitter reports more than one function code that applies to a given sector code under this paragraph (a)(3)(ii).

(iii) *Sector specific function categories.* For each sector reported under paragraph (a)(3)(ii) of this section, the applicable code(s) from table 4 to § 705.15(c)(3) must be selected to designate the function category(ies) that best represents the specific manner in which the PFAS in the imported article is used.

(iv) *Consumer and commercial use information.* Using the applicable codes listed in table 5 to § 705.15(c)(4), submitters must designate the consumer and commercial product category(ies) that best describe the consumer and commercial products in which each PFAS that is in an imported article is used (whether the recipient site(s) are controlled by the submitter site or not). If more than 10 codes apply to a PFAS in an imported article, submitters need only report the 10 codes for PFAS that cumulatively represent the largest percentage of the submitter's production volume for that chemical, measured by weight. If none of the listed consumer and commercial product categories accurately describe the consumer and commercial products in which each PFAS is used, the category ''Other'' may be used, and must include a description of the use.

(v) *Product specific function categories.* For each consumer and commercial product category reported under paragraph (a)(3)(iv) of this section, the applicable code(s) described in table 4 to § 705.15(c)(3) must be selected to designate the function category(ies) that best represents the specific manner in which the PFAS in an imported article is used.

(vi) *Consumer or commercial use designation.* Submitters must indicate, for each consumer and commercial product category reported under paragraph (a)(3)(v) of this section, whether the use is a consumer or a commercial use, or both.

(vii) *In or on consumer products intended for children.* Submitters must determine, within each consumer and commercial product category reported under paragraph (a)(3)(v) of this section, whether any amount of each reportable chemical substance manufactured (including imported) by the submitter is present in (for example, a plasticizer chemical substance used to make pacifiers) or on (for example, as a component in the paint on a toy) any consumer products intended for use by children age 14 or younger, regardless of the concentration of the chemical substance remaining in or on the product. Submitters must select from the following options: The chemical substance is used in or on any consumer products intended for use by children; the chemical substance is not used in or on any consumer products intended for use by children; or information as to whether the chemical substance is used in or on any consumer products intended for use by children is not known to or reasonably ascertainable by the submitter.

(viii) *Estimated maximum concentration.* For each year where the PFAS in an imported article is used in consumer or commercial products, the submitter must report the estimated typical maximum concentration, measured by weight, of the chemical substance in each consumer and commercial product category reported under paragraph (a)(3)(v) of this section. For each PFAS in an imported article in each commercial and consumer product category reported under paragraph (a)(3)(v) of this section, submitters must select from among the ranges of concentrations listed in table 1 to this paragraph (a)(3)(viii) and report the corresponding code (*i.e.,* AM1 through AM5):

TABLE 1 TO PARAGRAPH (a)(3)(viii)—CODES FOR REPORTING MAXIMUM CONCENTRATION OF PFAS IN AN IMPORTED ARTICLE

Code	Concentration range (% weight)
AM1 ...	Less than 0.1% by weight.
AM2 ...	At least 0.1% but less than 1% by weight.
AM3 ...	At least 1% but less than 10% by weight.
AM4 ...	At least 10% but less than 30% by weight.
AM5 ...	At least 30% by weight.

(4) *Imported article production volume.* For each calendar year since January 1, 2011, in which the PFAS was imported in an article, the production volume of the imported article. The imported production volume must be reported to two significant figures of accuracy. The submitter must also provide the unit of measurement of the imported production volume by selecting among the table 2 to this paragraph (a)(4). The submitter must also designate, for each PFAS imported in an article, whether the imported PFAS was ever physically present at the reporting site.

TABLE 2 TO PARAGRAPH (a)(4)—CODES TO SPECIFY UNIT OF MEASUREMENT FOR THE IMPORTED ARTICLE PRODUCTION VOLUME

Code	Unit of measurement
LB	Pounds.
TN	Tons.
QT	Quantity of imported article.
O	Other (must specify).

(5) *Additional article data.* The submitter has the option to provide any additional information to EPA that is requested under § 705.15 on the PFAS imported in an article, including supplemental attachments.

(b) *Research and development (R&D).* Any manufacturer of a PFAS R&D substance that was manufactured in volumes no greater than 10 kilograms per year and who meets the reporting requirements described in § 705.10 has the option to submit information to EPA using a streamlined reporting form for each such PFAS, for each year since January 1, 2011, in which the PFAS was manufactured for R&D purposes in volumes no greater than 10 kilograms per year. Information must be submitted to the extent the submitter knows or can reasonably ascertain. In the event that actual data is not known to or reasonably ascertainable by the submitter, then reasonable estimates may be submitted. The information requested on the streamlined reporting form for R&D manufacturers includes:

(1) *Company and plant site information.* All company and plant site information requested under § 705.15(a) shall be reported.

(2) *Chemical-specific information.* The following chemical-specific information must be reported for each R&D chemical substance that is a PFAS and each mixture containing a chemical substance that is a PFAS and meets the requirements for the reporting option under this paragraph (b)(2). The information must be reported for each year since January 1, 2011, in which that PFAS was manufactured for R&D purposes in quantities no greater than 10 kilograms per year.

(i) The common or trade name, the chemical identity, and, except for chemical substances that are Class 1 substances on the TSCA Inventory, the representative molecular structure of each PFAS for which such a report is required. Submitters who wish to report chemical substances listed on the confidential portion of the TSCA Inventory will need to report the chemical substance using a TSCA Accession Number. If a submitter has a low-volume exemption (LVE) case number for the chemical substance, that number may also be used if a CASRN is not known to or reasonably ascertainable by the submitter. In addition to reporting the number itself, submitters must specify the type of number they are reporting by selecting from among the codes in table 1 to § 705.15(b)(1)(ii).

(ii) If the specific chemical identity of the PFAS is not known to or reasonably ascertainable to the submitter (*e.g.,* if the chemical identity is claimed as confidential business information by the submitter's supplier, or if the submitter knows they have a PFAS but are unable

to ascertain its specific chemical identity), the submitter may provide a generic name or description of the PFAS.

(3) *Production volume.* The submitter must report for each year since January 1, 2011, in which the PFAS was manufactured, the total annual volume (in pounds) of each PFAS domestically manufactured or imported at each site. The total annual domestically manufactured volume (not including imported volume) and the total annual imported volume must be separately reported. These amounts must be reported to two significant figures of accuracy.

(i) A designation indicating, for each PFAS at each site, whether any imported PFAS is ever physically present at the reporting site.

(ii) [Reserved]

(4) *Additional R&D data.* The submitter has the option to provide any additional information to EPA that is requested under § 705.15 on the PFAS, including supplemental attachments.

§ 705.20 When to report.

All information reported to EPA in response to the requirements of this part must be submitted during the applicable submission period. For all reporters submitting information pursuant to §§ 705.15 and 705.18(b) (research and development), the submission period shall begin one year following November 13, 2023, and last for six months: November 12, 2024, through May 8, 2025. For any reporter who is reporting under this part exclusively pursuant to § 705.18(a) (article importers), and is also considered a small manufacturer under the definition at 40 CFR 704.3, the submission period shall begin one year following November 13, 2023, and last for 12 months: November 12, 2024, through November 10, 2025.

§ 705.22 Duplicative reporting.

Any person covered in this part may notify EPA through the electronic reporting system in § 705.35 that certain information has already been submitted to EPA, and any such person does not need to re-submit the information. The notification must include the statutory and regulatory provision under which the information was submitted and in which year it was submitted. This ability is limited to the type of information listed in this section. If the previous submission did not account for all information required to be submitted pursuant to this part (*e.g.,* due to exemptions inapplicable to this part), then the person may not rely on that prior submission to satisfy the reporting requirements of this part.

(a) *Chemical Data Reporting rule.* If a person identified in § 705.10 has already reported certain information in § 705.15 to EPA pursuant to the Chemical Data Reporting rule at 40 CFR part 711, then duplicative reporting of that information is not required of the years for which the information has already been reported. Such information that may potentially be duplicative under this part is limited to:

(1) *Chemical description.* Physical state of the chemical or mixture containing a chemical substance, pursuant to 40 CFR 711.15(b)(3)(C)(ix).

(2) *Sector description.* Industrial processing and use type, sector(s), functional category(ies), and percent of production volume for each use, pursuant to 40 CFR 711.15(b)(4)(i)(A) through (D).

(3) *Product category.* Consumer and/or commercial indicator, product category(ies), functional category(ies), percent of production volume for each use, indicator for use in products intended for children, and maximum concentration in the product, pursuant to 40 CFR 711.15(b)(4)(ii)(A) through (F).

(4) *Workers.* Number of workers reasonably likely to be exposed for each combination of industrial processing or use operation, sector, and function, pursuant to 40 CFR 711.15(b)(4)(i)(F), and the number of commercial workers reasonably likely to be exposed when the substance is used in a commercial product, pursuant to 40 CFR 711.15(b)(4)(ii)(G).

(5) *Volume.* Production volume, both domestically manufactured and imported, an indicator for the imported chemical never physically at site, and the volume directly exported, pursuant to 40 CFR 711.15(b)(3)(iii) through (v).

(b) *Greenhouse Gas Reporting rule.* If a person identified in § 705.10 has already reported certain information in § 705.15 to EPA pursuant to the Greenhouse Gas Reporting rule at 40 CFR part 98, then duplicative reporting of that information is not required of the years for which the information has already been reported. Such information that may potentially be duplicative under this part is limited to:

(1) *Imported.* Production volume (imported), pursuant to 40 CFR 98.416(c)(1) and (2).

(2) *Exported.* Volume directly exported, pursuant to 40 CFR 98.416(d)(1).

(3) *Incinerated.* Total volume incinerated on-site, pursuant to 40 CFR part 98.

(c) *Toxics Release Inventory reporting rule.* If a person identified in § 705.10 has already reported certain information in § 705.15 to EPA pursuant to the Toxics Release Inventory reporting rule at 40 CFR part 372, then duplicative reporting of that information is not required of the years for which the information has already been reported. Such information that may potentially be duplicative under this part is limited to:

(1) *Recycled.* Total volume recycled on-site, pursuant to 40 CFR 372.85(b)(16).

(2) *Disposal.* Description of disposal process(es), pursuant to 40 CFR 372.85(b)(14) and (15).

(3) *Release to land.* Total volume released to land, pursuant to 40 CFR 372.85(b)(14)(i)(D) and (E).

(4) *Release to water.* Total volume released to water, pursuant to 40 CFR 372.85(b)(14)(i)(C).

(5) *Release to air.* Total volume released to air, pursuant to 40 CFR 372.85(b)(14)(i)(A) and (B).

(6) *Incinerated.* Total volume incinerated on-site, pursuant to 40 CFR 372.85(b)(16).

(d) *TSCA sections 8(d) and 8(e) reporting.* If a person identified in § 705.10 has already reported certain information in § 705.15(f) to EPA, then duplicative reporting of that information is not required of the years for which the information has already been reported. Such information that may potentially be duplicative under this part is limited to health and safety studies submitted pursuant to TSCA section 8(d), notification of substantial risks pursuant to TSCA section 8(e), or other information concerning environmental and health effects of the PFAS.

(e) *Byproduct reporting.* If a person identified in § 705.10 must report byproducts information pursuant to § 705.15(e), and those byproducts are also PFAS that are reported independently pursuant to this part, then duplicative reporting of the environmental releases as byproducts is not required. Such information that may potentially be duplicative is limited to:

(1) *Incineration.* An indication of whether the byproduct is released to the environment, and if so, the environmental medium to which it is released (*i.e.,* air, water, land), pursuant to § 705.15(e)(2).

(2) *Byproduct volume.* For each year, the byproduct volume (in pounds) released to the environment, pursuant to § 705.15(e)(3).

(f) *Environmental and health effects information.* If a person identified in § 705.10 has already reported the

information in § 705.15(f) to EPA, then duplicative reporting of that information is not required, except to the extent required by to § 705.30. The notification required by this paragraph (f) must also include the EPA office (*e.g.,* EPA region or Headquarters Office) and case number or other identifier for the prior submission.

(g) *Reporting timeframe.* Any person covered in this part must report all information to EPA in § 705.15 for each year since January 1, 2011, in which that person manufactured a chemical substance that is a PFAS or a mixture containing a PFAS. If a person has already reported any of the data elements identified in paragraph (a) of this section, but not for all years since 2011, then that person must submit the required information for the intervening years. If a person has already reported any of the data elements identified in paragraph (a), (b), or (c) of this section, and the previous submissions did not account for all activities that are reportable under this part due to exemptions or thresholds that do not apply to this part, then that information is not considered duplicative reporting, and the person must submit information for that data element responsive to this part.

§ 705.25 Recordkeeping requirements.

Each person who is subject to the reporting requirements of this part must retain records that document any information reported to EPA. Relevant records must be retained for a period of 5 years beginning on the last day of the submission period.

§ 705.30 Confidentiality claims.

(a) *Making confidentiality claims*—(1) *Generally.* Any person submitting information under this part may assert a confidentiality claim for that information, except for information described in paragraph (a)(2) of this section. All such confidentiality claims must be asserted at the time the information is submitted. Instructions for asserting confidentiality claims are provided in the document identified in § 705.35. Information claimed as confidential business information in accordance with this section will be treated and disclosed in accordance with the procedures in 40 CFR part 703 and TSCA section 14.

(2) *Exceptions.* Confidentiality claims cannot be asserted for the following:

(i) Specific chemical identity if the chemical is on the public (non-confidential) TSCA Inventory or reported as non-confidential in an LVE;

(ii) For processing and use data elements required by §§ 705.15(c)(1) through (7) and 705.18(a)(3)(i) through (vii);

(iii) When a response is left blank or designated as ''not known or reasonably ascertainable;''

(iv) For specific chemical identity by submitters of article importer forms described in § 705.18(a);

(v) For all generic chemical names;

(vi) For any PFAS that are on the public (non-confidential) TSCA Inventory, the chemical's CASRN;

(vii) For the Inventory Accession Numbers for PFAS that are on the confidential TSCA Inventory; or,

(viii) For LVE numbers.

(3) *All existing information concerning environmental and health effects.* (i) Any person submitting a health and safety study, or information from a healthy and safety study, under this part may only assert a confidentiality claim for information that discloses processes used in the manufacturing or processing of a chemical substance or mixture or, in the case of a mixture, the release of data disclosing the portion of the mixture comprised by any of the chemical substances in the mixture.

(ii) If any information submitted under § 705.15(f) is claimed as confidential business information, a person who submits the information must provide EPA, at the time of submission, a sanitized copy for public release, removing only that information that is claimed as confidential business information.

(iii) Any person who has previously submitted information under § 705.15(f) and claimed it as confidential business information is required to reassert and re-substantiate the confidential business information claim if they seek to maintain the claim of confidential business information. Such persons are required to submit s a revised sanitized copy.

(b) *Substantiation of confidentiality claims.* (1) Unless exempted, all confidentiality claims require substantiation at the time of submission and must be signed and dated by an authorized official.

(2) Confidentiality claims for the following data elements are exempt from the substantiation requirement in paragraph (b)(1) of this section:

(i) *Volume.* Production volume information required pursuant to §§ 705.15(d)(1), (5), and (6) and 705.18(a)(4) and (b)(3)(i).

(ii) *Primary submitter.* Joint submission information from the primary submitter, consisting of trade name and supplier identification required pursuant to § 705.15(b)(1)(i) and (ii).

(iii) *Secondary submitter.* Joint submission information from the secondary submitter, consisting of the percentage of formulation required pursuant to § 705.15(b)(1)(i) and (ii).

(c) *Marking information claimed as confidential business information in confidentiality substantiation documentation.* If any of the information contained in the answers to the questions listed in paragraph (e) of this section is asserted to contain information that itself is considered to be confidential, you must clearly identify the information that is claimed confidential.

(d) *Certification statement for claims.* An authorized official representing a person asserting a claim of confidentiality must certify that the submission complies with the requirements of this part by signing and dating the following certification statement:

> ''I certify that all claims for confidentiality asserted with this submission are true and correct, and all information submitted herein to substantiate such claims is true and correct. Any knowing and willful misrepresentation is subject to criminal penalty pursuant to 18 U.S.C. 1001. I further certify that: (1) I have taken reasonable measures to protect the confidentiality of the information; (2) I have determined that the information is not required to be disclosed or otherwise made available to the public under any other Federal law; (3) I have a reasonable basis to conclude that disclosure of the information is likely to cause substantial harm to the competitive position of my company; and (4) I have a reasonable basis to believe that the information is not readily discoverable through reverse engineering.''

(e) *Substantiation requirements for all types of confidentiality claims.* For each data element that is claimed as confidential business information, you must submit with your report detailed written answers to the following questions:

(1) *Substantial harm due to release.* Please specifically explain what harm to the competitive position of your business would be likely to result from the release of the information claimed as confidential business information. How would that harm be *substantial?* Why is the substantial harm to your competitive position *likely* (*i.e.,* probable) to be caused by release of the information rather than just *possible*? If you claimed multiple types of information to be confidential (*e.g.,* site information, exposure information, environmental release information, etc.), explain how disclosure of each type of information would be likely to cause substantial harm to the competitive position of your business. (40 CFR 703.5(b)(3))

(2) *Precautions to protect confidentiality.* Has your business taken precautions to protect the confidentiality of the disclosed information? If yes, please explain and identify the specific measures, including but not limited to internal controls, that your business has taken to protect the information claimed as confidential business information. If the same or similar information was previously reported to EPA as non-confidential (such as in an earlier version of this submission), please explain the circumstances of that prior submission and reasons for believing the information is nonetheless still confidential.

(3) *Disclosure under Federal law or publicly available information.* (i) Is any of the information claimed as confidential business information required to be publicly disclosed under any other Federal law? If yes, please explain.

(ii) Does any of the information claimed as confidential business information otherwise appear in any public documents, including (but not limited to) safety data sheets; advertising or promotional material; professional or trade publications; state, local, or Federal agency files; or any other media or publications available to the general public? If yes, please explain why the information should be treated as confidential. If this chemical is patented and the patent reveals the information you are claiming to be confidential business information, please explain your reasons for believing the information is nonetheless still confidential.

(4) *Duration of claims.* Is the claim of confidentiality intended to last less than 10 years (see TSCA section 14(e)(1)(B))? If yes, please indicate the number of years (between 1–10 years) or the specific date after which the claim is withdrawn.

(5) *Previously disclosed information.* Has EPA, another Federal agency, or court made any confidentiality determination regarding information associated with this chemical substance? If yes, please provide the circumstances associated with the prior determination, whether the information was found to be entitled to confidential treatment, the entity that made the decision, and the date of the determination.

(f) *Additional requirements for specific chemical identity.* A person may assert a claim of confidentiality for the specific chemical identity of a chemical substance as described in §§ 705.15(b)(1)(i) and 705.18(b)(2)(i) only if the identity of that chemical substance is treated as confidential in the Master Inventory File (or as a confidential LVE) as of the time the report is submitted for that chemical substance, if that substance is currently on the Inventory or is an LVE. Any person who asserts a claim of confidentiality for the specific chemical identity under this paragraph must provide a generic chemical name. To assert a claim of confidentiality for the identity of a reportable chemical substance, you must submit with the report detailed written answers to the questions from paragraph (b) of this section and to the following questions.

(1) *Chemical substance in U.S. commerce.* Is this chemical substance publicly known (including by your competitors) to be in U.S. commerce? If yes, please explain why the specific chemical identity should still be afforded confidential status (*e.g.,* the chemical substance is publicly known only as being distributed in commerce for research and development purposes, but no other information about the current commercial distribution of the chemical substance in the United States is publicly available) (40 CFR 703.5(b)(4)). If no, please complete the certification statement:

> ''I certify that on the date referenced, I searched the internet for the chemical substance identity (*i.e.,* by both chemical substance name and CASRN). I did not find a reference to this chemical substance and have no knowledge of public information that would indicate that the chemical is being manufactured or imported by anyone for a commercial purpose in the United States. [provide date].''

(2) *Leave manufacturing site.* Does this particular chemical substance leave the site of manufacture (including import) in any form, *e.g.,* as a product, effluent, emission? If yes, please explain what measures have been taken to guard against the discovery of its identity.

(3) *Chemical identity.* If the chemical substance leaves the site in a form that is available to the public or your competitors, can the chemical identity be readily discovered by analysis of the substance (*e.g.,* product, effluent, emission), in light of existing technologies and any costs, difficulties, or limitations associated with such technologies? Please explain why or why not.

(4) *Chemical name.* Would disclosure of the specific chemical name release confidential process information? If yes, please explain.

(g) *Joint submissions.* If a primary submitter asks a secondary submitter to provide information directly to EPA in a joint submission under §§ 705.15(b)(1)(i) and 705.18(b)(2)(i), only the primary submitter may assert a confidentiality claim for the data elements that it directly submits to EPA. The primary submitter must substantiate those claims that are not exempt under paragraph (b)(2) of this section. The secondary submitter is responsible for asserting all confidentiality claims for the data elements that it submits directly to EPA and for substantiating those claims that are not exempt under paragraph (b)(3) of this section.

(h) *No claim of confidentiality.* Except for the chemical identity on article importer forms submitted under § 705.18(a), information not claimed as confidential business information in accordance with the requirements of this section may be made public (*e.g.,* by publication of specific chemical name and CASRN on the public portion of the TSCA Inventory). EPA will provide advance public notice of specific chemical identities to be added to the public portion of the TSCA Inventory.

§ 705.35 Electronic reporting.

You must use CDX to complete and submit the reporting form required under this part. Submissions may only be made as set forth in this section. Submissions must be sent electronically to EPA via CDX. The information submitted and all attachments (unless the attachment appears in scientific literature) must be in English. All information must be true and correct. Access the PFAS 8(a)(7) reporting tool and instructions, as follows:

(a) *By website.* Access the PFAS 8(a)(7) reporting tool via the CDX homepage at *https://cdx.epa.gov/* and follow the appropriate links.

(b) *By phone or email.* Contact the EPA TSCA Hotline at (202) 554–1404 or *TSCA-Hotline@epa.gov.*

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Part IV

The President

Memorandum of September 21, 2023—Delegation of Authority Under Section 614(a)(1) and Section 506(a)(1) of the Foreign Assistance Act of 1961

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Title 3—

The President

Memorandum of September 21, 2023

Delegation of Authority Under Section 614(a)(1) and Section 506(a)(1) of the Foreign Assistance Act of 1961

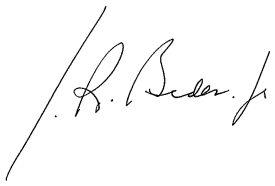
Memorandum for the Secretary of State

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 621 of the Foreign Assistance Act of 1961 (FAA), I hereby delegate to the Secretary of State:

(1) the authority under section 614(a)(1) of the FAA to determine whether it is important to the security interests of the United States to furnish approximately $128 million in assistance to Ukraine without regard to any provision of law within the purview of section 614(a)(1) of the FAA; and

(2) the authority under section 506(a)(1) of the FAA to direct the drawdown of approximately $128 million in defense articles and services of the Department of Defense, and military education and training, to provide assistance to Ukraine and to make the determinations required under such section to direct such a drawdown.

You are authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, September 21, 2023

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